



**Mwaura v Republic (Anti-Corruption and Economic Crimes Appeal E008 of 2022)
[2023] KEHC 18772 (KLR) (Anti-Corruption and Economic Crimes) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E008 OF 2022**

PN GICHOHL, J

MAY 31, 2023

BETWEEN

JOHN MUIRU MWAURA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being appeal from judgment of the CM Anti- Corruption Court Case
No. 20 of 2018 by Hon. V.Wakumile SPM delivered on 30th March, 2022)*

JUDGMENT

1. The background of this appeal is that John Muiru Mwaura (Appellant) was the 1st accused charged alongside Daniel Kimori Nyantika (2nd Accused), Charles Onyambu Birundu (3rd Accused), Samuel Otara Arama (4th Accused) and Kennedy Begi Onkoba (5th Accused) in the Chief Magistrates Court Anti- Corruption Case No. 20 of 2018. The accused persons faced various charges out of the Nineteen (19) counts therein and in a chronological order. For clarity the charges are reproduced as they appeared in the charge sheet.
2. Count 1 : Abuse of office contrary to section 46 as read with section 48 (1) of the Anti- Corruption and Economic Crimes Act, 2003 Particulars of the offence 1st accused Mr. John Muiru Mwaura:

On or about 8th of May 2012 at Nakuru Land Office , in Nakuru Town , Nakuru County in the Republic of Kenya, being the Land Registrar Nakuru Land Registry , used your office to improperly confer benefit to a Mr. Peter Alfred Hans to wit plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar by transferring the said plot to a Mr. Peter Alfred Hans without the knowledge or consent of the legitimate owner of the said plot and without verifying the land transfer instruments as required by law.



3. Count II -Abuse of office contrary to section 46 as read with section 48 (1) of the Anti- Corruption and Economic Crimes Act, 2003 Particulars of the offence 2nd accused Daniel Kimori Nyantika:

On or about 12th of July 2013 at Nakuru Land Office , in Nakuru Town , Nakuru County in the Republic of Kenya, being the Land Registrar Nakuru Land Registry , used your office to improperly confer benefit to a Mr. Yusuf Mustafa Ratemo to wit plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar by transferring the said plot and issuing a certificate of lease to Mr. Yusuf Mustafa Ratemo without verifying the land transfer instruments as required by law.

4. Count III -Abuse of office contrary to section 46 as read with section 48 (1) of the Anti- Corruption and Economics Crimes Act, 2003 Particulars of the offence 3rd accused Charles Onyambu Birundu.

On or about 7th of August 2015 at Nakuru Land office, in Nakuru Town , Nakuru County in the Republic of Kenya, being the Land Registrar Nakuru Land Registry , used your office to improperly confer benefit to Mr. Samuel Otara Arama to wit plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar by transferring the said plot and issuing a certificate of lease to Mr. Samuel Otara Arama without verifying the land transfer instruments as required by law.

5. Count IV -Conspiracy to defraud contrary to section 317 of the Penal Code.

Particulars of the offence

Mr. John Muiru Mwaura 2. Daniel Kimori Nyantika 3. Charles Onyambu Birundu 4. Mr. Samuel Otara Arama 5. Kennedy Begi Onkoba:

On diverse dates between 3rd August 2015 and 11th August 2015 at unknown place in Nakuru County conspired to defraud Mr. Ahmed Muhammad Nisar by means of dispossessing him off plot Nakuru Municipality Block 6/95 within Nakuru County fraudulently and deceitfully pretended that you were then carrying on a genuine business of land transfer of plot Nakuru Municipality Block 6/95 within Nakuru County and that you had capacity to transfer to Samuel Otara Arama by means of entries inserted by you in the Nakuru lands office white card register records.

6. Count V - Fraudulently making an entry contrary to section 103 (1) (c) (ii) of the [Land Registration Act](#) No. 3 of 2012 Particulars of the offence 1st accused John Muiru Mwaura :

On or about 8th day of May 2012 at Nakuru Lands Office in Nakuru Town ,Nakuru County in the Republic of Kenya, being the Land Registrar Nakuru Land Registry ,with intent to defraud , fraudulently made an entry into the white card register purporting to register a transfer of lease of plot Nakuru Municipality Block 6/95, the property of Mr. Ahmed Muhammad Nisar to one Mr. Peter Alfred Hans.

7. Count VI- Knowingly permitting an entry in which in any material particular is to his knowledge false , to be made in the register or record contrary to section 361 of the Penal Code.

Particulars of the offence 1st Accused John Muiru Mwaura:

On or about 8th day of May 2012 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban



development as a Land Registrar, knowingly permitted entries in the lands office registry white card record material particulars which to your knowledge were false to wit, entries nos. 12 and 13 of the white card purporting to transfer lease of plot Nakuru Municipality Block 6/95 to a Mr. Peter Alfred Hans on 8th May 2012.

8. Count VII - Fraudulently adds to any document or instrument relating to land contrary to section 103 (1) (d) of the [Land Registration Act](#) No. 3 of 2012.

Particulars of the offence : 1st accused John Muiro Mwaura:

On or about 8th day of May 2012 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, fraudulently added entries nos. 12 and 13 of 8th May 2012 in the white card record purporting to transfer lease of plot Nakuru Municipality Block 6/95 to a Mr. Peter Alfred Hans on 8th May 2012.

9. Count VIII - Fraudulently making an entry contrary to section 103(1) (c) (ii) of the [Land Registration Act](#) No. 3 of 2012.

Particulars of the offence 2nd accused Daniel Kimori Nyantika:

On or about 12th July 2013 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, fraudulently procured entries nos. 14 and 15 dated 12th July 2013 , in the white card register record by entering and signing the said entries purporting to transfer the lease of plot Nakuru Municipality Block 6/95 to Mr. Yusuf Mustafah Ratemo.

10. Count IX - Fraudulently procuring the issuance of a certificate of ownership contrary to section 103(1) (c) (i) of the [Land Registration Act](#) No. 3 of 2012.

Particulars of the offence 2nd accused Daniel Kimori Nyantika:

On or about 12th July 2013 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, fraudulently procured the issuance of a certificate of lease to Mr. Yusuf Mustafah Ratemo by making entries nos. 14 and 15 dated 12th July 2013, in the white card register record and purporting to transfer the lease of plot Nakuru Municipality Block 6/95 to the said person.

11. Count X- Obtaining registration of land by false pretences contrary to section 320 of the Penal Code.

Particulars of the offence 3rd accused Charles Onyambu Birundu:

On the 7th of August 2015 at Nakuru Land Registry in Nakuru Town of Nakuru County wilfully procured for Samuel Otara Arama a land registration of certificate of lease of plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar, by falsely pretending that you had transferred it from Yusuf Mustafah Ratemo.



12. Count XI- Fraudulently making an entry contrary to section 103(1) (c) (ii) of the [Land Registration Act](#) No. 3 of 2012.

Particulars of the offence 3rd accused Charles Onyambu Birundu:

On or about 7th of August 2015 at Nakuru Lands offices in Nakuru Town within Nakuru County being a Land Registrar at the Nakuru Land Registry, with intent to defraud, fraudulently made an entry into the white card purporting to register a transfer of lease of plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nisar to one Samuel Otara.

13. Count XII- Fraudulently procuring the issuance of a certificate of ownership contrary to section 103(1) (c) (i) of the [Land Registration Act](#) No. 3 of 2012.

Particulars of the offence 3rd accused Charles Onyambu Birundu:

On or about 7th of August 2015 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban development as a Land Registrar, fraudulently procured the issuance of a certificate of lease of plot Nakuru Municipality Block 6/95 to Samuel Otara Arama by signing the certificate of lease dated 7th August 2015 and purporting to transfer to the said person the lease of the said plot the said person without following due process.

14. Count XIII - Fraudulently procuring the making of an entry contrary section 103(1) (c) (ii) of the [Land Registration Act](#) No. 3 of 2012.

Particulars of the offence 3rd accused Charles Onyambu Birundu:

On or about 11th of August 2015 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a person employed by a public body to wit, the Ministry of Lands , Housing and Urban Development as a Land Registrar, fraudulently procured entries nos. 16 and 17 of 11th August 2015 in the white card Register record by entering and signing the said entries purporting to transfer the lease of plot Nakuru Municipality Block 6/95 to Samuel Otara Arama.

15. Count XIV- Making a document without authority contrary to section 357 (a) of the Penal Code.

Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On diverse dates between 3rd August 2015 and 11th day of August 2015 at unknown place in in Nakuru Town, within Nakuru County, with intent to defraud, without lawful authority made a land sale agreement in respect of plot Nakuru Municipality Block 6/95, the property of Mr. Ahmed Muhammad Nisar, purporting to have been signed by Mr Yusuf Mustafah Ratemo.

16. Count XV- Knowingly uttering a document with intent to deceive contrary to section 357 (b) of the Penal Code



Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On 9th day of February 2016 or thereabouts, at Shiv Plaza , EACC Offices, in in Nakuru Town, within Nakuru County, in the Republic of Kenya, with intent to deceive, knowingly uttered a land sale agreement to the Ethics and Ant- Corruption Commission (EACC) investigators n, namely Mr. Agosta Mecca and Ms Vera Nyambok purporting the same to have been signed by signed by Mr Yusuf Mustafah Ratemo, a purported vendor of plot Nakuru Municipality Block 6/95.

17. Count XVI- Wilfully obtaining registration of land by false pretences contrary to section 320 of the Penal Code.

Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On or about 7th of August 2015 at the offices of the Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a State Officer to wit a Member of Parliament of Nakuru West Constituency , wilfully procured the issuance of certificate of lease and registration of transfer of lease of plot Nakuru Municipality Block 6/95 to yourself by false pretences, purporting to have purchased the said plot from Mr Yusuf Mustafah Ratemo on 3rd August 2015.

18. Count XVII- Fraudulently procuring the issuance of a certificate of ownership contrary to section 103(1) (c) (i) of the [Land Registration Act](#) No. 3 of 2012.

Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On diverse dates between 7th of August 2015 and 11th August 2015 at the offices of Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, fraudulently procured the registration and issuance of a certificate of lease of plot Nakuru Municipality Block 6/95 to yourself by false pretences, purporting to have purchased the said plot from Mr Yusuf Mustafah Ratemo .

19. Count XVIII - Knowingly misleading an investigator acting under the Anti- Corruption and Economic Crimes Act, No. 3 of 2003 contrary to section 66 (1) (b) as read with section 66 (2) of the Anti- Corruption and Economic Crimes Act, No. 3 of 2003.

Particulars of the offence 4th accused Mr. Samuel Otara Arama:

On 9th day of February 2016 at EACC Offices at Nakuru, within Nakuru County, knowingly misled Ethics and Ant- Corruption Commission (EACC) investigators , namely Mr. Agosta Mecca and Ms Vera Nyambok in respect of an investigation into allegation of abuse of office by you as the MP Nakuru West Constituency , in the acquisition of plot Nakuru Municipality Block 6/95 that the said investigators were undertaking under the Ant- Corruption and Economic Crimes Act No. 3 of 2003 by recording a statement that you had legitimately bought the said plot for Ksh. 60 million and by providing the investigators with a purported sale agreement signed by Mr, Yusuf Mustafah Ratemo , facts you knew to be false and misleading.

20. Count XIX - Knowingly misleading an investigator acting under the Anti- Corruption and Economic Crimes Act, No. 3 of 2003 contrary to section 66 (1) (b) as read with section 66 (2) of the Anti- Corruption and Economic Crimes Act, No. 3 of 2003.



Particulars of the offence 5th Accused Kennedy Begi Onkoba :

On the 27th day of April 2017 at EACC at Nakuru, within Nakuru County, knowingly misled Ethics and Ant- Corruption Commission (EACC) investigators , namely Mr. Agosta Mecca and Ms Vera Nyambok in respect of an investigation into allegation of abuse of office by you Hon. Samuel Otara Arama , the MP Nakuru West Constituency, in the acquisition of plot Nakuru Municipality Block 6/95 that the said investigators were undertaking under the Ant- Corruption and Economic Crimes Act No. 3 of 2003 by recording a statement and stating Mr. Yusuf Mustafah Ratemo and Hon. Samuel Otara Arama visited your office and entered into a sale agreement in your presence, a fact you knew to be false and misleading.

21. Each of the accused persons was duly represented and pleaded not guilty of the charges he was facing . The case went for hearing and at the close of the defence case Hon. V. Wakumile SPM delivered his judgment on 30th March 2022 and concluded:-

“ That is to say, that each accused person is convicted U/S 215 CPC as follows:A1 is convicted on counts; i, iv, vi, viiA2 is convicted on counts; ii, iv, vii, ixA3 is convicted on counts; iii, iv, x, xi, xii, xiiiA4 is convicted on counts; iv, xiv, xv, xvi, xvii, xiiiA5 is convicted on counts; iv, xix

22. After hearing accused persons in mitigation on 30th June 2022, the learned magistrate held; “Each convict is hereby sentenced to pay a fine of Ksh. 260,000 on each count as charged. In default to serve six months imprisonment.”

23. The Appellant herein John Muiru Mwaura was dissatisfied and aggrieved by the conviction and sentence by Hon. V. Wakumile SPM. He therefore filed a Notice of Appeal dated 6th July 2022, his Record of Appeal dated 10th January 2023 and a Supplementary Record of Appeal dated 11th January 2023.

24. He raised the following six grounds of appeal :-

1. That the learned magistrate erred in law and fact by convicting the and sentencing the Appellant to six months jail term and or in the alternative to a fine of Ksh. 1,040,000/-
2. That the court erred in law and fact for fining the Appellant an excess of Ksh. 780,000/= for three (3) extra charges and or counts which the Appellant had been discharged by the previous magistrate in a no case to answer proceedings.
3. That the presiding magistrate erred in law and facts by not recognising that the Appellant had been discharged of all charged counts on 22nd November 2019 save Count I of an alleged offence of abuse of office but the magistrate went ahead to convict and sentence the Appellant for all the counts on 30th June 2022 as per the consolidated charge sheet herein.
4. That the learned magistrate’s imposition payment of Ksh. 1,040,000/= on the Appellant was unfair, irregular , unprocedural , unconstitutional and the same should be reviewed , stayed and a sum of Ksh. 780,000/= only be refunded to the Appellant.
5. That for interest of justice, the Appellant should be fined for one count and be discharged and the balance of Ksh. 780,000/-only refunded.
6. That the Judgment is unlawful , irregular, oppressive, and an abuse of the principle of rights to fair trials so far as three extra counts that the Appellant was convicted are oppressive.



Submissions

25. Directions were given as to filing and exchange of submissions. In their brief submissions dated 10th January 2023 and filed by G.Kimani & Co. Advocates for the Appellant, counsel submits that having been discharged of all charges contained in the charge sheet except for the Count 1 for the offence of abuse of office, the court put the Appellant on defence on only that one count.
26. While raising the doctrine of double jeopardy, counsel submits that at the start of the hearing (defence), the charges were read in court and or repeated and therefore the charges were unlawfully loaded against the Appellant. That instead of the Appellant defending himself on one charge, he was prosecuted and convicted and sentence on three counts.
27. Counsel submits that the correct fine is Ksh. 260,000/= only and urges the court to allow the appeal and quash the extra three counts the Appellant was convicted on and review the fine to be Ksh. 260,000/= and refund the Ksh. 780,000/= to the Appellant as he had deposited a sum of Ksh. 1,040,000/= as fine.
28. When the matter came for mention to confirm filing of submissions, Ms Ndobi for DPP intimated to court that she had not filed any. She was conceding the appeal on the ground of double jeopardy.

Determination

29. This being a first Appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions bearing in mind that the Court did not have the opportunity to see and hear the witnesses testify - see *Okeno v. Republic* [1972] E.A 32. However, the court bears in mind that the Appellant is basically challenging the conviction on three extra counts he had earlier been acquitted on saying that he had been put on his defence on only one count. He is therefore asking for dismissal of the three excessive counts and the penalty thereof and retention of one count of abuse of office penalty /conviction.
30. A perusal of the court record reveals that the matter was heard by Hon. F. Kombo SPM and at the close of the prosecution case, the honourable magistrate delivered his ruling on 22nd November 2019 in the presence of the parties as follows;

“In the end make orders as follows,

I Acquit under Section 2010 CPC;

- i. The 3rd, 4th and 5th Accused of all Counts herein (Counts 3, 4,10, 11, 12, , and 13 in respect to the 3rd accused) (Counts 4, 14, 15, 16, 17,and 18 in respect of the 4th Accused) (Counts 4 and 19 in respect of the 5th accused)
- ii. The 1st Accused in Counts 1,4 and 5.
- iii. The 2nd Accused in Count 4 and 8.

I call the 1st accused to his defence in Count 6 only.

I call the 2nd Accused to his defence in Counts 2, and 9.

R/A 14 Days”

31. On the same day, and upon delivery of the ruling, the trial Magistrate complied with Section 211 of the Criminal Procedure Code which was explained to the 1st and 2nd accused. Mr. Ondieki Advocate



for the 2nd accused was holding brief for Kimani for the 1st Accused , Mongeri for the 3rd accused and Mr. Nyaundi for the 4th Accused. He intimated to court that the 1st and 2nd Accused persons opted to give sworn evidence but neither of them was to call witnesses. Upon an application by the defence, the court ordered release of securities deposited by the 3rd, 4th and 5th Accused persons.

32. The court also ordered that Certified Copies of the Ruling and the proceedings be supplied to the parties. It is also apparent that the State preferred three separate appeals to High Court against the ruling delivered on 22nd November 2019 thus causing the hearing of the defence case to be put on hold.

33. According to the Court record, the appeals were ACEC Appeal No. 34 of 2019 which was against the Charles Onyambu Birundu (3rd Accused) , Appeal No. 35 of 2019 which was against Kennedy Begi Onkoba (5th accused) and Appeal No. 36 of 2019 which was against Samuel Otara Arama (4th accused).

34. The ACEC Appeal No 34 of 2019 was consolidated with ACEC Appeals No 35 and 36 of 2019 being;

Republic.....Appellant

Versus

Charles Onyambu Birundu.....1st Respondent

Kennedy Begi Onkora2nd Respondent

Samuel Otara Arama3rd Respondent

35. By a judgment delivered on 20th May 2021, Wakiaga J made the following orders:-

“I therefore find and hold that the appeal herein has merit as the trial court fell into error on both law and fact in arriving at his decision herein. I allow the appeal, set aside the trial court ruling acquitting the Respondents herein and substituting with an order putting the Respondents herein on defence under provisions of Section 211 (1) of the Criminal Procedure Code.

In view of the finding herein, I hereby order that the Lower Court file EACC No. 20/2021 Nairobi be placed before the Chief Magistrate Anti- Corruption Court, who shall assign the same to another magistrate rather than Felix Kombo for further trial and determination, in view of the content of the judgment herein and his decision thereon now overturned.” [Emphasis mine]

36. Flowing from the above, the parties appeared before Hon. Ogoti CM and agreed that the matter be handled by a different Magistrate. The matter was taken over Hon. V. Wakumile SPM and in light of directions issued in High Court ACEC Appeal No. 34, 35 and 36 of 2019, each of the five (5) accused persons was placed on his defence and Section 211 complied with. Hon. V. Wakumile SPM heard and concluded the case and delivered his judgment on 30th March 2022 now the subject of this appeal.

37. On page 35 of that judgment, the learned magistrate stated:

“Having considered both cases , the final submissions , along with the cited authorities the court is now bound to determine whether the prosecution has proved the charges beyond reasonable doubt as required by law. I have noted from the submissions , that parties herein seemed to have proceeded on the assumption that the earlier ruling touching on A1 and A2 which was made under section 210 stood , yet I made it clear that I had placed each accused on his defence as charged, I was unable to comprehend how the misconception came about.”



38. This finding is erroneous as the learned magistrate seemed to have misconstrued the High Court judgment in respect of ACEC Appeal No. 34, 35 and 36 of 2019. The Appellant herein was not a party to any of the three appeals before the honourable Judge. I do not understand the judgment by Wakiaga J to mean that the court overturned the entire ruling dated 22nd November 2019 which ruling involved all the accused persons. Had he intended that to be, then he would have stated so though the record shows that as the Respondent therein had no issue with the other accused persons. In any event, the State did not file any appeal against the Appellant herein.
39. The Appellant, having only been charged with Count I, IV, V, VI, and VII, he was acquitted by Hon. F. Kombo on Count I- Abuse of office contrary to section 46 as read with section 48 (1) of the Anti-Corruption and Economics Crimes Act, 2003; Count IV- Conspiracy to defraud contrary to section 317 of the Penal Code and Count V- Fraudulently making an entry contrary to section 103(1) (c) (ii) of the Land Registration Act No. 3 of 2012.
40. He was categorically placed on his defence only in Count VI- which is the offence of Knowingly permitting an entry in which in any material particular is to his knowledge false, to be made in the register or record contrary to section 361 of the Penal Code. There was no mention of Count VII in that acquittal. It is therefore not factual that the Appellant was acquitted by Hon. F. Kombo of all counts except Count I being abuse of office charge as stated by his counsel.
41. Having known that he had been placed on his defence on Count VI only, the Appellant did not defend himself on I, IV and VII. In the circumstances the two questions that arise now are;
1. What is the effect of the Ruling by Hon. F.Kombo where he specifically placed the Appellant on his defence on Count VI only but was silent on Count VII for which the Appellant was convicted too in the judgment dated 30th March 2022?
 2. What happens to Count VI for which the Appellant was placed on his defence but which he does not refer to in the submissions in this appeal?
42. To my mind, it is imperative for the court to find out what Hon. Kombo had said about Count VI and VII in the body of the ruling under section 210. At page 10 of the Ruling, the learned trial magistrate had this to say:
- “Before examining the evidence, I must express concern with the manner in which many of the charges in this matter are drawn. Despite generally having strong repetitive element where the same allegations of fraud run through several counts, some such as counts 5 and 6 cannot co-exist as main counts because prove of one would doom the other and should have been preferred in the alternative.”
43. At page 25 and 26 of the Ruling, the learned trial magistrate stated:
- ” I now address counts 1, 4, 5, and 7 and 8 which in my view must fail...As relates to count 1, the investigators conceded that the one Peter Alfred Hans whose particulars are shown in Pros. Exh. 19 was never found. Proof of charge of conferring benefit on a person must entail proof of existence of beneficiary. In my view, there can be no benefit without a beneficiary . For that reason, I find count 1 is unfounded against the 1st Accused and dismiss it.
- Count 5 is improperly drawn and does not disclose the intended by Section 103 (1) (c) (ii) . In the manner it is drawn, the key element of procurement is totally absent and the charge is fatally defective in substance. The same is dismissed for this reason.



Count 7 is an allegation against the 1st Accused that he ‘added’ entries 12 and 13 in Pros. Exh. 19 relating to Peter Alfred Hans. There is no evidence that these entries were ‘additions’ to any existing entries in Pros. Exh. 19, and if that was the case, there is no evidence of the entries that existed in the record before the alleged addition.

In these circumstances, I find this Count cannot stand against the 1st Accused and dismiss it.”

44. From that finding then, it is clear that the learned magistrate was clear in his mind when he placed the 1st Accused on his defence on Count VI only. He had already dismissed Count 1, IV and V. He dismissed Count VII in the body of the ruling. In his judgment, Hon. Wakulmile convicted 1st Accused in Counts I, IV, VI and VII yet he had been acquitted on Counts I, IV and VII by Hon. F. Kombo who had the opportunity to see and hear prosecution witnesses during the prosecution case.

45. To that extent, there was no basis therefore, for the learned magistrate Hon. Wakulmile, to place the Appellant on his defence on all counts as he did and subsequently convict him of Count I, IV and VII for which he had been acquitted of under Section 2010 of the Criminal Procedure Code. Doing so is a violation of the principle against double jeopardy (autrefois acquit or convict) and a violation of Article 50 (2)(o) of *the Constitution* which provides that;

“Every accused person has the right to a fair trial, which includes the right—

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.”

46. A look at the 1st accused’s sworn statement in defence shows that the Appellant acknowledged before court that the trial magistrate had established a prima facie case against him on Count VI only. That explains the reason why he did not defend himself on Count VII.

47. The Appellant denied the charge (Count VI) and explained that registration clerks /officers make all entries in the white card. He explained that in absence of duty rosters, movement registers to show how documents moved from one point to another, transfer documents, he could not recall if he verified and signed the title deed.

48. He stated that he gave his specimen signatures at request of the DCI and it was established in the prosecution case that he signed the transactions in relation to entry No. 12 and 13. He explained that he never added any entries fraudulently and indeed, the DIC vindicated him on that. In cross examination by the prosecution counsel, he told the court that there was a second document examiner’s report which contradicted the findings of D. exhibit 5 (Document Examiner’s report dated 13th October 2016).

49. In the judgment, Hon. Victor Wakumile had this to say at page 55 and 58 ;

“Count v, vi, vii, viii, ix, x, xi, xii, xiii and xiv are founded on exhibit 41 and 45. Those implicated by the two reports cited defence exhibit 5 (A forensic document examiner report which gave a divergent opinion ... Ideally, whenever contradictory opinions are produced before a court of law by two equally competent experts, then the court must consider the report which is corroborated substantially by other evidence in the case. Expert opinion must never be considered in isolation. In the case of Murilal s/o Ram Singh vs state of Madhya Pradesh 1980 AIR 531, SCR (2) 249 The Supreme Court of India held in ‘particularly in criminal courts, opinion evidence of handwriting experts should not be acted upon without



substantial corroboration. “Exhibit 41 and 45 meet the test thus I find counts v, vi, vii, viii, ix, x, xi, xii and xiv sufficiently proved as required by law.”

50. This Court finds that Hon. Kombo was well versed with the celebrated case of Ramanlal Trambaklal Bhatt v Republic [1957]EA 332 when he put the 1st accused on his defence. In that case the Court had this to say of a prima facie case:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

51. It is apparent that Hon. Kombo placed the 1st accused on his defence to offer an explanation in respect of Count VI. However, there was already material contradiction and glaring disconnect in the prosecution case in relation to various counts and in particular Count VI which accused was being placed on his defence. There was no legal and evidential justification for placing the 1st accused on his defence.

52. Having found that there were contradictions between the two Document Examiners reports regarding entries No. 12 and 13 which were the subject of Count VI, then the trial Magistrate Hon. Wakumile ought to have borne in his mind that the burden of proof would never shift to the 1st accused at any stage as was held by Sir Udo Udoma CJ in Sekitoleko v Uganda (1967) EA 531 at p 533:

“As a general rule of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else. That burden always rests on the prosecution.”

53. The prosecution bore the duty to prove their case beyond any reasonable doubt. The contradiction in the two document examiners’ reports duly acknowledged by the learned magistrate ought to have been resolved to the benefit of the 1st accused person.

54. In the circumstances, I am satisfied that the conviction of the Appellant John Muiru Mwaura by Hon. V. Wakumile on Counts I, IV and VII in his judgment dated 30th March 2020 was irregular and unlawful as conceded by Ms Ndobi for the Respondent.

55. Further, I am satisfied that Count VI for which the Appellant was placed on his defence and finally convicted was not proved against him beyond any reasonable doubt as required by law. In the circumstances the appeal succeeds to the extent that this Court makes the following orders :

1. The conviction and sentence on the Appellant herein in Count I, IV VI and VII be and is hereby quashed and set aside.
2. The sum of Ksh. 1, 040, 000/= deposited by the Appellant herein as fine for all the four counts be and is hereby ordered to be refunded to the Appellant.



DATED,SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 31ST DAY OF MAY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

George Kimani for Appellant

Ms Ndobi for Respondent

Kevin Isindu, Court Assistant

