



**Nyantika v Republic (Anti-Corruption and Economic Crimes Appeal E003 of 2022)
[2023] KEHC 18771 (KLR) (Anti-Corruption and Economic Crimes) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E003 OF 2022**

PN GICHOHI, J

MAY 31, 2023

BETWEEN

DANIEL KIMORI NYANTIKA 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 Appellant Daniel Kimori Nyantika was the 2nd Accused charged alongside John Muiru Mwaura (1st 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 as follows .
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 Economic Crimes Act](#), 2003

Particulars of the offence 3rd accused Charles Onyambu Birundu.

On or about 7th of August 2015 at Nakuru Lands 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 Muiru Mwaura:

On or about 8th day of May 2012 at the offices of 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 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 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 the 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 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 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 Ministry of Lands , Housing and Urban Development, in Nakuru Town, within Nakuru County in the Republic of Kenya, being a Sate 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 procures the Registration 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 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, vii A2 is convicted on counts; ii, iv, vii, ix A3 is convicted on counts; iii, iv, x, xi, xii, xiii A4 is convicted on counts; iv, xiv, xv, xvi, xvii, xviii A5 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 was dissatisfied and aggrieved by the conviction and sentence by Hon. V. Wakumile SPM. He therefore filed his Record of Appeal on 30th December 2022 and an Amended Memorandum of Appeal dated 26th April 2022.
24. He raised the following six grounds of appeal :-
1. That the learned trial magistrate erred in fact and law in finding that the prosecution had proved its case and convicting the appellant on the basis of unreliable evidence and inconclusive evidence.
 2. That the learned trial magistrate erred in fact and law in trying and convicting the Appellant on charges which he had been he was not charged, testified and tried in the charge sheet.
 3. That the learned trial magistrate wholly ignored the Appellant ‘s evidence as Civil Servant and denied him the benefit of obvious doubts.
 4. That there was no credible evidence adduced to sustain a conviction consequent to which the conviction is unsafe.
 5. That the learned trial magistrate erred in law and fact in proceeding with selective evidence and ignoring the evidence in favour of the Appellant.
 6. That the learned trial magistrate erred in law and fact in not finding that the prosecution witnesses did not link at all nor mention the Appellant in the offence as a County land Registrar and further failed to connect the offence to the Appellant.
 7. That the learned trial magistrate erred in law and fact in finding the appellant guilty of all counts while he was put on his defence on only 2 counts.
 8. That the learned trial magistrate erred in law and fact in failing to sufficiently appreciate that the complainant’s evidence did not disclose an offence against the appellant and the entire prosecution case fails to meet the standard of proof required in criminal cases and conviction of ”beyond reasonable doubt.”
 9. That the learned trial magistrate erred in law and fact by making conclusions not supported by evidence.
 10. That the learned trial magistrate erred in law and fact in by shifting the burden of proof to the accused person to prove his case when the same was legally and purely the duty of the prosecution.
 11. That the learned trial magistrate erred in law and fact in not complying with the law after High Court gave direction that the case proceeds with different Magistrate after declaring mistrial.
 12. That the learned trial magistrate erred in law and fact in by overlooking and ignoring the defence and submissions.

Submissions

25. This appealed was canvassed by way of written submissions. In their brief three-page submissions dated 9th January 2023 filed by David Okoyo Ondieki & Associates Advocates for the Appellant, counsel



- submits that the Appellant was put on his defence on two charges that is; Count 2- Abuse of office contrary to section 46 as read with section 48 (1) of the [Ant -Corruption and Economic Crime Crimes Act](#) of 2003.Count 9- 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.
26. Counsel further submits that during the defence hearing, the Appellant was put on trial for two counts and was cross- examined by the prosecution counsel. Further, the Appellant and prosecution filed their submissions on the two counts but in his judgment, the trial magistrate pronounced himself and convicted the Appellant on all charges as in the charge sheet yet he was not tried for the said charges nor did he testify on the same that is; Count II- Abuse of office contrary to section 46 as read with section 48 (1) of the [Ant -Corruption and Economic Crimes Act](#) of 2003.Count IV -Conspiracy to defraud contrary to section 317 of the [Penal Code](#).Count VIII - Fraudulently making an entry contrary to section 103(1) (c) (ii) of the [Land Registration Act](#) No. 3 of 2012.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.
27. While citing Art. 50 of the [Constitution](#), Section 207 and 134 of the [Criminal Procedure Code](#), counsel submits that there were irregularities and omissions that mean that the Appellant was tried and condemned on the offences he did not answer to and as a civil servant who has served this country impeccably has been affected and incarcerated falsely. Counsel therefore urges the court to allow the appeal and quash the conviction on all charges.
28. The Respondent filed their submissions dated 16th January 2022 but filed on 18th January 2023, The Respondent submits that the Appellant had been charge with;Count 1 : Abuse of office contrary to section 46 as read with section 48 (1) of the [Anti- Corruption and Economics Crimes Act](#), 2003Count IV -Conspiracy to defraud contrary to section 317 of the [Penal Code](#).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.Count VIII - Fraudulently making an entry contrary to section 103(1) (c) (ii) of the [Land Registration Act](#) No. 3 of 2012.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.
29. The learned prosecution counsel submits that the prosecution called 14 witnesses while the defence called witnesses after which the Appellant was convicted under section 215 of the [Criminal Procedure Code](#). In response to the Appellant’s grounds of appeal, counsel lists three issues for determination , that is;
1. Whether all charges the Appellant was facing were proved to the required standard.
 2. Whether the Appellant was convicted on charges that he was not placed on defence.
 3. Whether the trial magistrate considered the Appellant’s defence and submissions.
30. Counsel submits that the prosecution proved all charges the Appellant was facing. On the charge of abuse of office, counsel cites the ingredient of the offence and which must be proved and submits that it was established that the Appellant was the Land Registrar and therefore a public officer. Further, counsel submits that the prosecution led evidence to demonstrate how PW5 Mohamed Nissar Ahmed bought his parcel of land from Justus Mongare Onyiko (PW1) through the firm of Seth & Wathigo and Company advocates through a sale agreement dated 30th October 2010. That the complainant denied having transferred the land to Peter Alfred Hans who allegedly sold the land to Yusuf Mustafa Ratemo (PW3) .
31. Counsel further submits that failure by Appellant to verify the documents presented to him by the purchaser of the subject land through the advocates indicates that he did abuse the authority bestowed upon him by causing a transfer of the said parcel of land without knowledge of the owner.



32. On the charge of conspiracy to defraud, counsel submits that by permitting the said entries be made on the white card and permitting transfer, then it can be inferred that there was a common intention to defraud and that the Appellant perpetuated the various entries on the white card and issued a certificate of lease with the intention to defraud the complainant. However, counsel submits that if the court is inclined to make a finding that the Appellant acted in good faith, when documents were presented to him , then it can make a determination of the same.
33. In regard to Count VIII, IX and X, counsel refers to the provisions of section 103 (1) (c) (i) of the *Land Registration Act* and further submits that the Appellant’s defence was considered at page 31 and 32 of the judgment dated 30th March 2022. He maintains that the prosecution discharged its burden in this case.

Determination

34. 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] EA 32. In doing so, there are three issues for determination:
 1. Whether the Appellant was convicted on charges that he was not placed on defence.
 2. Whether the trial magistrate considered the Appellant’s defence and submissions.
 3. Whether all charges the Appellant was facing were proved to the required standard.
35. 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 I 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”

36. 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 person.



37. 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.
38. 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).
39. 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
40. 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]

41. I have looked at the original lower court record of proceedings soon after the above judgment. The parties appeared before Hon. Ogoti CM on 15th June 2021 and this is where confusion started. Ms Kaniu who was holding brief for Mr. Riungu for the State addressed the court on the purpose of the mention as follows;

“It is before you following Wakiaga J’s decision issued on 20th May 2021 in *ACECA Appeal 24 of 2019* which allowed the appeal by the State and overturned decision by the trial magistrate issued on 22nd November 2019 and placed all the accused persons on their defences. The purpose is to seek re-allocation of the matter to a different Magistrate other than Hon. Kombo the presiding trial magistrate.”

42. There was no appeal No. 24 of 2019 but the learned trial magistrate may have meant 34 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 had no issue with the other accused persons. In any event, the State did not file any appeal against the Appellant herein.



43. The record also shows that the Appellant herein opted to give a sworn statement in defence. At page 454 of the handwritten proceedings, the Appellant introduced himself and stated;

“I face Count II and IX which were allegedly committed during my tenure as a Land Registrar in Nakuru.”

44. It is clear that the Appellant was defending himself on two counts and not all counts he had been charged with. Before an accused person takes to the stand to give his statement in defence whether sworn or unsworn, it is the duty of the trial court to remind the accused person of the charges he is defending him on. That is in essence a process towards a fair trial. The minute the Appellant made no reference to any other count, the learned magistrate ought to have reminded the appellant of the same. That way, the Appellant would have had an opportunity to state that he had been acquitted on Count IV and VIII.

45. The reasoning behind the Appellant’s acquittal on Count IV and VIII under section 210 of the [Criminal Procedure Code](#) is found at page 25 and 26 of the Ruling by the learned trial magistrate where he stated:

“I now address counts 1, 4, 5, and 7 and 8 which in view must fail...”

46. Ultimately, the Appellant was acquitted by Hon. F. Kombo on Count 4 and 8. He was placed on his defence in Counts 2 and 9. These are: Count II -Abuse of office contrary to section 46 as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#), 2003 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.

47. In his judgment, the learned magistrate stated on page 35:

“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.”

48. This shows further confusion perpetuated by the court as far as the Appellant was concerned. It is clear that even the submissions by the parties were in respect of Count II and IX as relate to the Appellant. There was no basis for the learned Magistrate to place the Appellant on his defence on charges he had been acquitted on and purport to convict him of the said charges in his judgment dated 30th March 2022.

49. In the circumstances, this was a violation of the Appellant’s constitutional right to a fair hearing under 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.”

50. On that ground, conviction and sentence on Count IV and VIII are not only irregular but unlawful and cannot stand.



51. This court now turns to Count II and IX on which he defended himself and was convicted. In Count II where the Appellant is charged with the offence of Abuse of office contrary to section 46 as read with section 48 (1) of the Anti- Corruption and Economic Crimes Act, 2003, he is alleged to have used his office as a Land Registrar Nakuru to improperly confer a benefit to a Mr Yusuf Mustafa Ratemo that is plot Nakuru Municipality Block 6/95 the property of Mr. Ahmed Muhammad Nissar by transferring the said plot and issuing a certificate of lease to Mr. Yusuf Mustafa.
52. The Appellant denied this charge and explained that he saw Yusuf Mustafa Ratemo for the first time in court. From the evidence on record, it was not in dispute that the Appellant was a land Registrar and hence a State Officer. The District Land Registrar Caleb Wanjala Sunguli (PW9) took the trial court through the process followed in the land registry. He testified that entries 10, 11, 12, 13, 14 and 16 were made by the inspecting clerks and the entries are never made by Land Registrars. He testified that the transactions were ordinary and which he too would have approved.
53. A look at the evidence by Yusuf Mustafa Ratemo whose evidence the prosecution heavily relied on was too inconsistent and contradictory to sustain a conviction. His particulars were in the documents presented in the lands office and no sample signatures had been taken from him for examination by the document examiners. The two document examiners reports were contradictory. If that was the case then, it is not clear how the land registry was expected to know that the signatures and writing in the documents presented were not in order. It was not therefore proved that the Appellant failed to verify the land transfer instruments therein.
54. That analysis affects Count IX too where the Appellant is charged with the offence of 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. The Appellant was accused of making entries No. 14 and 15 dated 12th July 2013 on the white card. The white Card was Exh. 19.
55. Whereas he admitted in his defence that entry No. 10 and 11 bear his signature, he denied making entry 14 and 15 which he referred to as forgeries. He explained that forgeries were rampant in the registries. That EACC may have used the wrong signatures as his sample signatures being entry No. 10 and 11 as opposed to the signature on entry on entry 14 and 15.
56. The evidence was that sample signatures were obtained from the Appellant and that was D10- 15. On being cross examined by the counsel for the Appellant , the document examiner Jacob Oduor told the court that the Appellant’s signatures were lifted from a computer to a page. He stated that at he did not know where the signatures came from but he lifted them to his report. The document examiner’s report (Exh. 41 contradicted the document examiner report Exh. 45.
57. In the judgment, Hon. Victor Wakumile had this to say about those reports;

“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 when never contradictory opinions are produced before a court of law by two equally competent experts, then the court must consider the report which is corroborated by substantially by other evidence in the case. Expert opinion must never be considered in isolation. In the case of Murilal s/o Ram Singh v 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.””



58. From the totality of the evidence of record, this Court finds that the trial court relied on contradictory evidence to arrive in his decision to convict the Appellant. The prosecution was obligated to prove the charges against the accused persons before him beyond reasonable doubt and “sufficiently proved” cannot be equated to proof beyond any reasonable doubt.
59. As regard the proof beyond reasonable doubt, the Court of Appeal in *Philip Nzaka Watu v Republic* [2016]eKLR, had this to say ;
- “The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.”
60. In this case, doubts caused in the prosecution case by contradictions and inconsistencies more so brought about by witnesses found to be unreliable ought to have been resolved to the benefit of the Appellant herein. In the circumstances, this Court finds the that the prosecution failed to discharge its burden and therefore the convictions on Count II and IX were unsafe.
61. In the upshot, this appeal therefore succeeds. The convictions on Counts II, IV, VII and IX are hereby quashed and the sentences are thereof are set aside. This Court directs that the money deposited by the Appellant in form of fine be refunded to the Appellant forthwith.

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

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Lukoy holding brief for Mr. Ondiek Appellant

Ms Ndobi for Respondent

Kevin Isindu, Court Assistant

