Director of Public Prosecutions v Kilele & another (Anti-Corruption and Economic Crimes Revision 14 of 2019) [2022] KEHC 11397 (KLR) (Anti-Corruption and Economic Crimes) (19 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11397 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION 14 OF 2019

EN MAINA, J

MAY 19, 2022

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

AND

ANTHONY KYALO KILELE ..... 1ST RESPONDENT

FRED MOSES AYIELA ..... 2ND RESPONDENT

(eing an Appeal from the judgment of the Chief Magistrate's Court at Nairobi (Hon. D.N. Mulekyo) delivered on 9th April, 2015 in Nairobi Anti-Corruption Case No. 11 of 2012)

JUDGMENT

Introduction

1. The respondents herein were charged with willful failure to comply with the applicable law relating to the procurement of services contrary to Section 45(2) (b) as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003. It was alleged that on or about the 10th day of September 2009 at Herufi House in Nairobi Area within Nairobi Province being persons charged with management of Public Revenue as Director-General and Procurement Manager respectively of the Kenya National Bureau of statistics jointly and willfully failed to comply with the law relating to procurement namely the *Public Procurement and Disposal of Assets Act* by not using the open tendering methods as stipulated in section 29(1) of the Public Procurement and Disposal Act in the procurement of storage space for census material. The charges facing the respondents were as follows:-In Count 1, the respondents were jointly charged with the offence of willful failure to comply with applicable law relating to procurement of services contrary to section 45(2)(b) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*. The particulars were that the 1st and

2nd respondents , on or about 10th September 2009 at Herufi House within Nairobi Province, being persons charged with management of public revenue as Director General and Procurement Manager respectively of the Kenya National Bureau of Statistics jointly and willfully failed to comply with the law relating to procurement namely the Public Procurement and Disposal Act by not using the open tendering method as stipulated in section 29 (1) of the *Public Procurement and Disposal Act*, 2005 in the procurement of storage space for census materials.In Count 2, the 1st Respondent was charged with abuse of office contrary to section 46 as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act*,2003. The particulars are that on or about September 25, 2009 at Herufi House within Nairobi Province, being the Director General of the Kenya National Bureau of Statistics used his said office to improperly confer a benefit of Kshs. 5,3930,000 on Samuel Ogot Baker by signing a cheque in favour of BM logistics (EA) Co. Ltd, a non-existing entity that purported to have provided warehouse services for census materials to Kenya National Bureau of Statistics.In Count 3, the 1st Respondent was charged with abuse of office contrary to section 46 as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act*,2003. The particulars are that on or about September 30, 2009 at Herufi House within Nairobi Province, being the Director General of the Kenya National Bureau of Statistics used his said office to improperly confer a benefit of Kshs. 1, 460,000 on Samuel Ogot Baker by signing a payment voucher in favour of BM logistics (EA) Co. Ltd, a non-existing entity that purported to have provided warehouse services for census materials to Kenya National Bureau of Statistics.

2. Upon hearing and evaluating evidence from the prosecution witnesses and the respondents and upon considering the submissions of their Counsel the trial magistrate came to the conclusion that the prosecution did not prove its case beyond reasonable doubt and acquitted the respondents . Being aggrieved, the prosecution preferred this appeal. The grounds of appeal are:-

> " 1) That the learned trial magistrate's judgement and Order acquitting the respondents under section 215 of the *Criminal Procedure Code* constituted a failure of justice.
>
> 2) Thatthe learned trial magistrate fatally erred in law and fact in holding that the provision contravened by the respondents was section 29(3) of the *Public Procurement and Disposal Act* (PPDA) and not section 29 (1) of the PPDA
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> 3) Thatthe learned trial magistrate erred in law and fact in holding that section 29 (1) of the *Public Procurement And Disposal Act*was not violated.
>
> 4) Thatthe learned trial magistrate erred in law in holding that Count 1 of the Charge Sheet was defective.
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> 5) Thatthe learned trial magistrate erred in law and in fact in holding that the indictment in Count 1 of the Charge Sheet failed to charge the respondents with an offence disclosed in the evidence.
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> 6) Thatthe learned trial magistrate erred in law and in fact in acquitting the respondents on Count 1 of the Charge Sheet under section 215 of the CPC.
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> 7) Thatthe learned trial magistrate misdirected herself in finding that the 1st Respondent's action of signing the cheques referred to in Counts II and III without noting the discrepancy and establishing the legal status of B. M. Logistics EA Co. Limited was more in the nature of an administrative lapse.
>
> 8) Thatthe learned trial magistrate erred in law and in fact in holding that the element of a guilty mind was missing from the 1st Respondent's acts of signing

the cheques referred to in Counts II and III and that his failure to notice the variations in the names of the two companies was an honest mistake.

9) Thatthe learned trial magistrate erred in law and in fact in acquitting the 1st Respondent of Count II and III of the Charge Sheet under section 215 of the Criminal Procedure Code.

10) Thatthe learned trial magistrate's order acquitting the respondents lost sight of the court's over-riding objective of doing substantial justice to all parties."

3. The appeal which is vehemently opposed was canvassed by way of written submissions.

The Appellant's case

4. The Appellant relied on its written submissions dated March 2, 2022filed herein on March 16, 2022. Learned Counsel for the Appellant submitted that the appeal raises two issues for determination: firstly, whether the learned trial magistrate erred in law and in fact in holding that Count 1 of the charge sheet was defective; and secondly, whether the learned trial magistrate misdirected herself in finding that the 1st Respondent's action of signing the cheques referred to in Counts II and III and that his failure to notice the variations in the names of the two companies was an honest mistake.

5. Counsel stated that the test for a defective charge sheet is a substantive one namely whether the respondents were charged with an offence known to law and whether the offence was disclosed in a sufficiently accurate manner as to give the respondents notice of the charges facing them. Learned Counsel for the appellant submitted that the respondents were charged with the offence of willful failure to comply with procurement laws and there is no prejudice that was caused to the respondents since it is clear that both understood the charges facing them well enough to understand the ingredients.

6. On the second issue, the Appellant submitted that, the Black's Law dictionary defines "willful" as a voluntary and intentional act that involves conscious wrong or evil on the part of the actor or at least inexcusable carelessness, whether the act is right or wrong. Counsel argued that in order to prove willful failure, the prosecution was required to establish that the accused persons breached the provisions of the Public Procurement and Disposal act either consciously or for an evil purpose or for an inexcusable carelessness.

7. Counsel stated that section 29(2) of the *Public Procurement and Disposal of Assets Act* provides for Direct Procurement in accordance with Part VI of the Act. That direct procurement by public bodies is restricted to the circumstances outlined in section 74 (2) of the *Public Procurement and Disposal of Assets Act* which were not met by the respondents . Counsel stated that the respondents were well aware of the procurement needs of the census exercise well in advance and hence there was neither an urgency nor other circumstances which warranted the use of direct procurement.

8. Counsel further submitted that the prosecution sufficiently proved the case against the 1st and 2nd respondents at the trial. Counsel urged this court to uphold the appeal and set aside the order acquitting the 1st and 2nd respondents .

Submissions of the 1st Respondent

9. Learned Counsel for the 1st Respondent submitted that the Trial Magistrate carefully analyzed count No. 1, the evidence adduced on it and the law before reaching the conclusion she reached, that in fact the respondents should ideally have been charged with the contravention of section 29 (3) of the Public Procurement and Disposal of Assets Act but this conclusion was reached in the final judgment

where the prosecution and defence cases had already been heard and closed hence leaving no room for amendment of the charge sheet.

10. Counsel stated that to hold that what Trial magistrate did was wrong is tantamount to saying that she did not have to apply her mind to the evidence and the law which is untenable. Counsel stated that it is the duty of a Trial Magistrate to test the charges and the evidence against the law and satisfy herself that the same was satisfactory. He relied on the Supreme Court of India case of K 0 Anbazhagan v. State of Karnataka and Others where the court stated:-

> ...The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely The duty of the Judge is to consider the evidence objectively and dispassionately... The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

Counsel further submitted that the evidence could not support the charge and the Trial Magistrate had the courage and discretion to say so, and in our submission, correctly so; that, the Trial Magistrate found that Count I had failed to charge the respondents with an offence disclosed in the evidence which she found was a miscarriage of justice and on that strength she rejected the charge for being defective. Counsel stated that the reasoning of the Trial Magistrate in reaching her conclusion that Count 1 was defective cannot be faulted and it is correct and on all fours with the case of *Peter Ngure Mwangi v Republic* [2014] eKLR where it was held:-

> " A charge can also be defective if it is in variance with the evidence adduced in its support."

11. Counsel further contended that a thorough and holistic review of the evidence adduced by the prosecution leads to the following conclusion regarding the 1st Respondent's role in the matter:

> " i.) The 1st Respondent did not know the beneficiary of the payment, one Ogot Samuel Baker;
>
> ii. The 1st Respondent did not sit in the Tender Public Procurement Committee of the Board;
>
> iii. The 1st Respondent did not initiate the procurement of the warehouse space at all;
>
> iv. The procurement of the warehouse space was made at the request of the management committee's Board;
>
> v. When confronted with the discrepancy in the two names , the 1st Respondent immediately reported the matter to his superior, the Permanent Secretary of the parent Ministry for further investigations and reconciliation of the parties; a move which was inconsistent with the actions of a guilty party."

12. Counsel asserted that it is the foregoing considerations that led the Trial Magistrate to the inescapable conclusion that the 1st Respondent did not have the guilty intent for the offences charged in Counts II and III and hence there was no other option open to the Trial Magistrate other than to acquit the 1st Respondent under section 215 *Criminal Procedure Code*.

13. On whether the judgment was "a failure of justice" Counsel relied on the definition of the phrase in The *Black's Law Dictionary* 8th ed. (2004) (at p. 1019) which defines it as follows:-

> " A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite lack of evidence on an essential element of the crime also termed failure of justice."

Counsel also relied on the case of *Koigi Wa Wamwere v Attorney General* [2015] eKLR where the Court of Appeal stated that

> "Miscarriage of justice" is more consistent with failings in the judicial process of a rather glaring nature. [Emphasis own]

14. Counsel submitted that the Trial Magistrate acquitted herself well; that she summarized all the evidence adduced at the trial; identified the issues for determination and discussed the applicable law, before she made her findings on each issue and count and that there is no justification for this court to interfere with the judgment and hence the appeal ought to be dismissed.

Submissions by the 2nd Respondent

15. The 2nd Respondent's written submissions are dated February 15, 2022.

16. Counsel for the 2nd Respondent submitted on four issues which are very similar and which are argued in the same order as those of the 1st Respondent. Those issues are:- whether the Trial Magistrate erred by finding that the provision of law contravened was section 29(3) and not section 29(1) of the *Public Procurement and Disposal of Assets Act*, whether Count No. I of the charge was defective; whether the Trial magistrate erred in law and fact in acquitting the respondents on Count I of the charge under section 215 of the Criminal Procedure Code; and whether overall, the Judgment was a failure of justice.

17. Counsel for the 2nd Respondent submitted that the Trial Magistrate carefully analyzed the evidence adduced on Count I and the law before arriving at the conclusion that the respondents should have been charged with the contravention of section 29 (3) *Public Procurement and Disposal of Assets Act*; that, the Trial Magistrate correctly found that section 29 (1) did not create an offence as particularized on the charge sheet. Counsel stated that unfortunately for the prosecution, this conclusion was reached in the final judgment where the prosecution and defense cases had already been heard and closed and so charge could not be amended. Counsel submitted that the burden was on the prosecution to adduce evidence which would prove its case beyond reasonable doubt and in the absence of credible evidence proving the guilt of the accused, the prosecution cannot invite this Court to convict the accused on the basis of inferences and conjecture.

18. Counsel for the 2nd Respondent further submitted that it is the duty of a trial Magistrate to test the charges and the evidence against the law and satisfy herself that the same was satisfactorily proved. Counsel argued that the Magistrate made a correct finding that the evidence tendered by the prosecution against the accused could not support the charge. Counsel cited a decision of the Supreme Court of India in the case of K. Anbazhagan v. State of Karnataka and Others in support of this submission.

19. Referring to paragraph 27 of the judgement Counsel stated that the learned Magistrate correctly found the charge was defective, that it was evident during the hearing that there was a lot of variance between the evidence adduced and the charges preferred against 2nd Respondent hence informing the Learned Magistrate's finding that there was a miscarriage of justice on the strength of which she rejected the charge for being defective.

20. On whether the trial magistrate erred in law and fact in acquitting the 2nd Respondent on Count I Counsel submitted that a guilty mind, a guilty or wrongful purpose, a criminal intent, all these components or ingredients of a crime were not proved against the 2nd Respondent. Counsel contended that a thorough and holistic review of the evidence adduced by the prosecution leads to the conclusion that the 2nd Respondent was the Secretary to the tendering committee and had no implementation powers or authority unless approved by the tender committee through its chair and members who included PW3, PW6, PW7, PW8, PW 10 and PW11 amongst others; that, the 2nd Respondent's main role in the committee was to take minutes and keep records of the deliberations passed by the tender committee as a whole. Counsel submitted that the 2nd Respondent did not initiate the procurement of the warehouse space at all as this was done by the Director of Population and Social Statistics and approved by the Tendering committee allowing the use of direct tendering method as prescribed under the *Public Procurement and Disposal of Assets Act*. Further that the 2nd Respondent had no authority nor capacity to make decisions on his own as an individual because there was a committee duly mandated to pass such imminent resolutions.

21. Counsel submitted that the impugned judgment cannot be termed a failure of justice. That the trial Magistrate acquitted herself well as she summarized all the evidence adduced at the trial, identified the issues for determination, discussed the applicable law, before she made her findings on each issue and count and delivered a reasoned judgment. Counsel contended that the trial Magistrate was totally right as a matter of fact and law and that in her judgment she was impartial and fair minded within the confines and provisions of a fair hearing. For this Counsel cited the case of *Koigi Wa Wamwere v Attorney General* [2015] eKLR.

Issues for determination

22. As the first appellate court my duty is to reconsider and evaluate the evidence before the trial court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who gave evidence. Having done so I find that the issues arising for determination are:

    1. Whether the learned trial magistrate erred in finding that Count I was defective; and in acquitting the respondents of the charges.

    2. Whether overall, the Judgment was a failure of justice

Analysis

Whether the learned trial magistrate erred in finding that Count I was defective and in acquitting the respondents .

23. The Appellant's major contention in regard to Count I of the charge is that Count 1 was not defective, that the offence was proved by evidence and the respondents understood the charges as explained to them.

24. section 45 (2) (b) of the *Anti-Corruption and Economic Crimes Act* upon which Count 1 was premised reads as follows:

> "45. Protection of public property and revenue, etc.
>
> (2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—

(a) fraudulently makes payment or excessive payment from public revenues for—

(i) sub-standard or defective goods;

(ii) goods not supplied or not supplied in full; or

(iii) services not rendered or not adequately rendered,

(b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or

(c) engages in a project without prior planning.

(3) In this section, "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body." [Emphasis mine]

25. section 48 which is the penalty section for the offence provides as follows:

"48. Penalty for offence under this Part

(1) A person convicted of an offence under this Part shall be liable to—

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—

(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

26. section 29 of the *Public Procurement and Disposal Act*, 2005 (repealed) provided as follows:-

> "29. Choice of procurement procedure
>
> (1) For each procurement, the procuring entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.
>
> (2) A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI.
>
> (3) A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity—
>
> (a) obtains the written approval of its tender committee; and
>
> (b) records in writing the reasons for using the alternative procurement procedure.
>
> (4) A procuring entity shall use such standard tender documents as may be prescribed"

27. The Trial Magistrate found that section 29(3) of the *Public Procurement and Disposal of Assets Act,* 2005 (repealed) was the provision that was offended and therefore the law upon which the charges should have been framed. The learned Magistrate stated as follows at page 25 of the judgment:-

> " From the evidence adduced, it is not in dispute that the method used to procure the warehousing services was direct procurement. The only issue is whether this offended the provisions of section 29(1) of the Public Procurement and Disposal Act as contended by the prosecution."

28. The court then proceeded to hold as follows at page 27 of the judgment:

> " This would appear to be the provision that was offended for as most witnesses who were members of the Tender Committee testified they were not aware even as they deliberated on the issue of the godown and awarded the contract to B.M Logistics E.A. Co. Limited on the 25th of September 2009 that an L.S.O had already been drawn up. The question that the Court is grappling with is "then why did the framers of the charge not refer to this particular subsection?" It cannot be said that it was an oversight. That argument would have held had they merely referred to section 29 of the Public Procurement And Disposal Actin their particulars leaving it to the court to decide which provision under that section is the "applicable one "to use their own words yet they were careful to single out this subsection (1) which for the reasons herein before set out this court has found was not violated. It would be a gross miscarriage of justice for the court at this stage based on the evidence that was led to purport to second guess the intentions of the prosecution and conclude that it must have intended to charge the accused persons with violation of the provisions of subsection 3 of section 29 of the PPDA."

29. It is my finding that the holding by the learned Magistrate that Count 1 was defective and the subsequent acquittal of the1st and 2nd respondents mainly on that ground was erroneous for being

based on a wrong principle of the law. This is given that the offence they were charged with was anchored on their having awarded a contract through direct evidence rather than through tendering. The offence is prescribed under section 45(2)(b) of the *Anti-Corruption and Economic Crimes Act* and the offence prescribed under section 48 of the *Anti-Corruption and Economic Crimes Act*. section 29 of the Public Procurement and Disposal of Assets Act merely prescribes for the different methods of procurement but does not create the offence. The Trial Magistrate therefore misdirected herself in coming to the conclusion that the charge was defective. The Trial Magistrate should have been guided by the rules for framing charges set out in section 137 of the *Criminal Procedure Code*. That section states:-

> ""137. Rules for the framing of charges and informations
>
> The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code—
>
> (a)
>
> (i) Mode in which offences are to be charged.—a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;
>
> (ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;
>
> (iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;
>
> (iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;
>
> (v) where a charge or information contains more than one count, the counts shall be numbered consecutively;

b. Provisions as to statutory offences.—where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence;

(ii) it shall not be necessary, in a count charging an offence constituted by an enactment, to negative any exception or exemption from, or qualifications to, the operation of the enactment creating the offence; ....."

30. The contention of the Appellant was that the Respondent did not follow the procurement method prescribed in section 29 (1) of the *Public Procurement and Disposal of Assets Act* and this rightly formed the particulars of the charge as provided in section 137 (b) of the *Criminal Procedure Code*. The acquittal of the respondents on Count I on the ground that that count was defective was therefore erroneous and this ground therefore succeeds.

Whether overall, the Judgment was a miscarriage of justice

31. In my considered opinion, the acquittal of the accused persons on Count I on the technicality despite the incriminating evidence tendered constituted a miscarriage of justice. In *Koigi Wa Wamwere v Attorney General* [2015] eKLR, the Court of Appeal stated that "Miscarriage of justice" is more consistent with failings in the judicial process of a rather glaring nature." Miscarriage of justice may happen equally to the defence or to the prosecution. In this instance, the disregard of the evidence by the prosecution occasioned injustice to the Appellant.

32. In the case of *K. Anbazhagan v. State of Karnataka and Others*

> " The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely.....
>
> The duty of the Judge is to consider the evidence objectively and dispassionately... The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

33. From the foregoing, it is my finding that the acquittal of the respondents on Count 1 amounts to a miscarriage of justice. The trial magistrate should have considered the evidence adduced and the relevant provisions of the *Public Procurement and Assets Disposal Act* in this case section 29 and 78 to determine whether an offence had been committed as prescribed in Section 45 (2) (b) of the *Anti-Corruption and Economic Crimes Act*.

34. Counts 2 and 3 which were preferred against the 1st Respondent relate to the payments made by the 1st Respondent to Samuel Ogot Baker in respect of the subject tender. In acquitting the 1st Respondent the trial magistrate held that the element of a guilty mind was missing, that his signing of the cheques

without noticing the variations in the names of the two companies (B M Logistics Ltd and Bulk Movers E A Ltd) was an honest mistake. It is my finding that these charges are intricately connected to Count I and a fresh re-look into the evidence would be required.

35. I accordingly allow the appeal, reverse the order of acquittal of the respondents and remit the case to the lower court for re-hearing as provided in section 354(3)(c) of the *Criminal Procedure Code*. I direct that the Respondents shall be presented before the Chief Magistrate Nairobi Anti-Corruption Court on June 6, 2022 for directions.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MAY, 2022

E N MAINA

JUDGE