REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIME DIVISION MILIMANI

CR. APPEAL NO. 9 OF 2018

JOHN GAKUO .....1ST APPELLANT (DECEASED)

ALEXANDER MUSANGA MUSEE.....2ND APPELLANT

SAMMY KIPNGETICH KIRUI ..... 3RD APPELLANT

MARY NGECHI NGETHE.....4TH APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an Appeal from the Conviction and Sentence of the Appellants by the Honourable D.N. Ogoti, Chief Magistrate Milimani Court in Anti-Corruption Case No. 20 of 2010 made and delivered on the 15th day of May 2018)

JUDGMENT

1. The Appellants herein John Gakuo (the1st appellant now deceased), Alexander Musanga Musee (2nd Appellant), Sammy Kipngetich Kirui (3rd Appellant) and Mary Ngechi Ngethe (4th Appellant) were on 29th April 2010 arraigned before the Chief Magistrate's court Milimani facing various corruption related charges.

2. In respect to Count one, Sammy Kipngetich Kirui (3rd Appellant) was charged with the offence of abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars were that, on or about 18th December 2008 at Jogoo House within Nairobi, being a person employed in Public Service to wit Permanent Secretary Ministry of Local Government, used his office to improperly confer benefit to M/s Naen Rech Limited by authorizing payment to the said Naen Ltd after it became known to him concerns had been raised by the City Council of Nairobi's Planning Department over the suitability for use as cemetery, the land the said Naen Rech Limited was offering for sale to the said Council.

3. He was also charged with an alternative count relating to the offence of willful neglect to perform official duty contrary to Section 128 as read with Section 36 of the Penal Code. Particulars were that, on or about 18th December 2008 at Jogoo House within Nairobi being a person employed in Public Service to wit Permanent Secretary Ministry of Local Government willfully neglected to perform his public duties in relation to public funds entrusted to him on account of City Council of Nairobi by neglecting after it became known to him, to independently verify concerns raised on the suitability for use as Cemetery, the land City Council of Nairobi was in the process of acquiring, prior to authorizing the release of the said funds; a duty he was bound to perform by virtue of the provisions of Section 18(2)(a) of the Government Financial Management Act.

4. Count two was in relation to the first appellant John Gakuo who died during the pendency of this appeal. The appeal having abated, I do not find it necessary to reproduce the charges against him in this appeal.

5. Count three, Alexander Musanga Musee(2nd appellant) and Mary Ngechi Ngethe(4th appellant) were jointly charged with the offence of knowingly giving misleading document to Principal contrary to Section 41(2) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars were that, on or about 10th November 2008 at City Hall Nairobi, being employees of City Council of Nairobi tasked respectively as Chair and Secretary to Tender Evaluation Committee, knowingly gave a misleading report of the minutes of the deliberations of the said Tender Evaluation Committee dated 10th November 2008 to the Tender Committee purporting that the Tender Committee had unanimously agreed that the land tendered by M/s Naen Rech was suitable for Cemetery use; an act which was to the

detriment of the City Council of Nairobi in that it misled the Council into procuring land not suitable for Cemetery use.

6. Relating to count four, Mary Ngechi Ngethe (4th Appellant) was charged with knowingly giving a false document to Principal contrary to Section 41(2) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars were that, on or about 12th November 2008 at City Hall in Nairobi, being an employee of City Council of Nairobi as Director of Legal Affairs, knowingly gave to the Council's Tender Committee, a false Valuation Report in respect of land which the Council was in the process of acquiring for Cemetery use; an act which was to the detriment of the City Council of Nairobi in that it misled the Council into procuring land at a price far above the prevailing market price for land in similar location as the land procured.

7. In the alternative to count IV, the 4th Appellant was charged with uttering a false document contrary to Section 353 of the Penal Code. Particulars were to the effect that, on or about 12th November 2008 at City Hall in Nairobi being an employee of City Council of Nairobi as Director Legal Affairs, knowingly and fraudulently uttered to the City Council of Nairobi's Tender Committee a false Valuation Report in respect of land which the said Council was in the process of acquiring for Cemetery use, purporting it to be a fair estimation of the market value of the said land.

8. Having returned a plea of not guilty, the case proceeded to full trial with prosecution calling a total of 16 witnesses. Upon being put on their defence, the appellants opted not to offer any defence. Having analyzed evidence tendered, exhibits and submissions by the respective defence counsel, the trial court delivered its Judgment on 15th May 2018 in which accused 1 (3rd Appellant) was convicted of Count 1. Accused two John Gakuo (1st Appellant now deceased), was convicted of Count 2 while accused 3 and 4 (4th appellant and 3rd appellant respectively), were convicted of Count 3. Accused 3 (4th appellant) was further convicted of Count 4.

9. Upon mitigation, the court meted out sentence as hereunder;

i. Count 1 and II,1st and 2nd accused persons (3rd appellant and 1st appellant respectively) were sentenced to both a period of 3-years imprisonment and a fine of 1 million.

ii. In Count III, 3rd and 4th accused persons (4th and 2nd appellants respectively), were sentenced to a period of 3years imprisonment. Further, 3rd accused (4th appellant) was ordered to pay a mandatory fine of Kshs. 52 million in default serve another one-year imprisonment. The 4th accused (2nd appellant) was also ordered to pay an additional mandatory fine of 32 million in default serve another one- year imprisonment.

iii. In respect of Count IV, 3rd accused (4th appellant) to serve 3- years imprisonment to run concurrently with the sentence in Count III.

10. Aggrieved by both conviction and sentence, the appellants variously moved to this court on appeal seeking the court to quash their respective convictions, set aside the said sentences and consequently acquit them. The 1st appellant vide **ACEC CR. Appeal No. 9/18** lodged his petition of appeal on 16th August 2018 citing several grounds. Since he is deceased, I may not wish to delve into his appeal in detail and therefore not necessary to reproduce his grounds of appeal.

11. The second appellant herein through **ACEC Appeal No. 10/18** also filed his Petition of appeal on 16th May 2018 citing 10 grounds of appeal as follows;

i. The learned Magistrate erred in fact and in law in convicting the appellant against the weight of evidence adduced.

ii. The learned Magistrate convicted the appellant applying the test of prima facie case; a standard below which is required in criminal proceedings.

iii. The prosecution did not prove its case beyond reasonable doubt.

iv. The learned Magistrate failed to evaluate all the evidence on record and make a finding on the relevant facts thereby misdirecting himself on arriving at a wrong decision. The court unreliably applied evidence to convict the appellant.

v. The learned Magistrate failed to consider all the evidence given by the prosecution witnesses during the cross examination which had the effect of clearing the appellant of any offence.

vi. The learned Magistrate failed to consider submissions by the appellant thereby prejudicing the appellant's case.

vii. The Magistrate failed to accord the appellant fair hearing as guaranteed in the Constitution of Kenya.

viii. The sentence is excessive in the light of the charges facing the appellant.

ix. The Magistrate erred in fact and in law in shifting the burden of proof to the appellant.

x. The entire conviction and sentence is against the provisions of the law and ought to be set aside.

12. On the other hand, the 3rd Appellant also listed his detailed grounds of appeal as cited in the amended Petition of appeal filed on 21st June 2018 as hereunder;

i. That the trial Magistrate erred in law and in fact in abandoning the prosecution theory, case, evidence and submissions, and creating his own theory of prosecution case as a basis for his erroneous conviction of the appellant.

ii. That the trial magistrate erred in limiting final evaluation of prosecution case under Section 215 of the Criminal Procedure to the principle and definition of a prima facie case enumerated in Ramanlal T. Bhatt v Republi. (1957) EAC 332.

iii. That the learned Magistrate erred in law in that he shifted the burden of proof to the appellant thereby lowering the standard of proof, failed to address his mind and reasoned judgment on the ingredients of each count.

iv. That the learned magistrate erred in law in citing and relying on the preamble to Anti-Corruption and Economic Crimes Act, No. 3/03 (ACECA) which simply expresses the intention and purposes of Parliament in enacting the Statute

v. That the learned magistrate erred in law in convicting the appellant on the charge of abuse of office without prosecution having proved the ingredients.

vi. That the learned magistrate failed to properly and judiciously address his mind to well-reasoned authorities cited which were binding.

vii. That the learned magistrate failed to take proper consideration, and make an express reasoned finding and decision recorded on the appellant's lawful, positive and proper acts in discharging his official duties under Section 18(1) of the Government Finance Management Act as read together with Section 2 of the PPDA, 2005.

viii. That the learned magistrate failed to consider Section 36 of the PPDA, 2005 whether the Permanent Secretary had legal responsibility to stop or interfere with the procurement process undertaken by the City Council of Nairobi and whether he had the obligation to adjudicate on the defects of tender documents.

ix. That the learned magistrate failed to consider binding superior court's authorities that prohibits charging of a person for failure to do an act that would constitute a violation of an express provision of the law as expressed in the case of R v. Director of Public Prosecution and 2 Others Exparte Praxidis Naomi Saisi (2016)eKLR.

x. That the learned Magistrate erred in law by accepting without giving reasons the purported expert testimony of PW2 and PW8.

xi. That the learned Magistrate erred in convicting the appellant based on unreliable evidence of the prosecution.

xii. That the learned magistrate failed to consider reasonable doubts available in the prosecution evidence and case against the appellant.

xiii. That the learned magistrate relied on highly unreliable and contradictory evidence to convict.

xiv. That the learned magistrate failed to accord weight to the exculpatory evidence in favour of the appellant extracted from cross examination of witnesses.

13. On her part, the 4th appellant lodged her Petition of appeal dated 17th May 2018 and filed on 18th may 2018 citing five grounds of appeal as below;

i. That the learned trial Magistrate erred in both fact and law in failing to properly evaluate the evidence on record pertaining to the charges that the appellant was charged with.

ii. That considering the circumstances and evidence adduced, the learned trial Magistrate erred in both fact and law in finding that the offences of knowingly giving a misleading document to Principal and knowingly giving a false document to Principal were proved against the appellant.

iii. That the learned trial Magistrate erred in both fact and law in failing to find that the offences of knowingly giving misleading document to Principal were not proved to the required standard of proof.

iv. That the learned trial Magistrate erred in both fact and law in convicting the appellant on the basis of contradictions and unclear evidence.

v. That the sentence meted to the appellant was harsh in the circumstances.

14. This being a first appeal, this court is duty bound to re-evaluate, re-examine and re-assess afresh the evidence tendered before the trial court and make an independent finding without losing site of the fact that the trial court had the advantage of seeing and assessing the general demeanour of witnesses. See the case of **Okeno vs. Republic (1972)EA 32 and Paul Thiga Ngamenya v Republic (2018)eKLR** where

the court stated that:-

> **"This being a first appeal, this court is, as a matter of law, enjoined to analyze and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses."**

Evidence before the trial court

15. As earlier stated, prosecution's case was anchored on the evidence of 16 witnesses and various supporting documents (Exhibits). PW1 Gibson Njamura Kanyi the Director procurement in the then Nairobi City Council told the court that, sometime 2008-2009, need to procure land for purposes of a Public Cemetery arose. Consequently, the process of procurement begun at the Head of Department (HOD). A team comprising of Peter Kibinda, Mr. Gitonga Chief Valuer, Mary Ngethe (Director Legal Services-4th appellant), Dr. Daniel Nguku (Medical Officer of Health council) and himself (PW1) was constituted by the then Deputy Town Clerk which sat and agreed on the tender document (PEx. 6).

16. Subsequently, an advertisement was placed in the print media inviting bids (see Standard advert. P.Ex. 1 and Nation newspaper advert P.Ex. 2). Vide a memo dated 7th October 2008 (PEx. 3), tender opening and Evaluation Committee was established and the membership was as follows; Mary Ngethe (4th appellant) as the Chair, Mr. Gitonga Akotha, Mr. Ngaca, Mr. Tom Odongo and Mr. Wanjohi as members. Mr. Alex Muthee (2nd appellant) was appointed as Secretary.

17. On 9th October 2008, the tender opening Committee opened the bids and minutes reflecting the exercise duly signed by the Chair and Secretary on 10th October 2008 (P.Ex. 4). The Committee proceeded to evaluate the tender documents and came up with an evaluation report as evidenced by the minutes of 14th October 2008 (P.Ex. 5). According to the minutes, members in attendance were M/s Ngethe (4th appellant), Mr. Gitonga, Mr. Wanjohi, Mr. Tom Odongo, Mr. Ngaca and Mr. Alex Musee (2nd appellant) assisted by one Mr. Ouko.

18. The said minutes were confirmed and signed by the Chair and Secretary on 10th November 2008. That the Evaluation Committee found that out of the 12 bidders none had met the mandatory requirements.

19. The witness went further to state that, according to the tender document, there were mandatory requirements which a bidder was required to meet before winning the tender. Among the requirements was; the land had to be within Nairobi Metropolitan region, soil depth was to cover a minimum of 1.8 metres (6 feet), the land preferably to be own holding, and in case several parcels were to be considered, the minimum size be 50 acres all under one title deed free from encumbrances, accessible from an all-weather road not more than 1km from a classified road, close proximity to water, electricity and telephone.

20. It was the witnesses' testimony that despite the bidder's failure to meet the requisite mandatory conditions, the tender committee meeting held on 12th November 2008 proceeded to award the tender to Naen Rech Co. Ltd who had offered L.R. No. 14759/1 measuring about 120 acres situated within West Mavoko Municipality at a price of Kshs. 2,360,000/- per acre making a total of Kshs. 283,200,000/-. The soil depth of the land offered by Naen Rech was $2\frac{1}{2}$ feet black cotton soil and $2\frac{1}{2}$ feet soft rock, totaling to five feet against the mandatory requirement of 1.8m (6feet). Among those who sat in the Tender Committee were; himself (PW1) as the Secretary, Mr. N. W. Otido (Chair), Deputy Chair Eng. K. Wanyundo, James Mwangi, Dr. Daniel Nguku, Mr. W. K. Martin, Mr. J. W. Kangethe and P. M. Kibinda.

21. That the award was based on the Ministry of Land's Valuation Report (P.Ex. 7) which put the value of the land at Kshs. 325,150,000/-.

22. Subsequently, one of the Evaluation Committee members one Tom Odongo (PW4) did a memo dated 19th December 2008 (P.Ex. 9) querying the procedure followed in awarding the tender. In the said memo Mr. Odongo claimed that the criteria set out in the tender documents was not sufficient to procure land for a Cemetery use. The said memo was addressed to the Chair Technical Evaluation Team (4th appellant) and copied to Mr. Musee (2nd appellant). Mr. Wanjohi, Mr. Gitonga, Mr. Kilei and Mr. Odongo and the Town Clerk (1st appellant now deceased).

23. On cross examination by Mr.Rugo, the witness stated that the 1st accused (3rd appellant) was not involved in any stage of the tender process and his role as a Permanent Secretary Local Government then was to facilitate the purchase of the land. He further stated that the tender committee did not reserve the right to waive the mandatory requirements. He also stated that the complaint memo came up much later after the tender had been awarded.

24. On further cross examination by Mr. Adan for accused two (1st appellant deceased) PW1 stated that he did not see anything unlawful about the award of the contract and that in awarding the contract, the tender committee relied on the recommendations of the Evaluation Committee. He further stated that the recommendation of the Evaluation Committee and Tender Committee were unanimous.

25. On cross-examination by Mbabu for the 4th accused (2nd appellant) the witness stated that none of the bidders met the requisite conditions for the award of the contract and that this fact was brought to the attention of the Tender Committee which nevertheless proceeded to award the contract notwithstanding the fact that they had no waiver rights. He further responded that the Evaluation Committee did not seek any advice from the Council's Land Valuation Department nor the Ministry of Lands.

26. PW2 David Mukubi Wanjohi Assistant Financial Superintendent in the then Nairobi City Council whose duties entailed Management of Mortuary, supervision of staff in funeral sector, management of Cemeteries was sometime in October 2008 invited by the Ministry of Health to join a team established to identity a suitable burial land. His role in the exercise was to ensure that the soil was suitable for burial.

27. Among the officials who accompanied him to various sites of land on offer for acquisition were Madam Ngethe (4th appellant), Alexander Musee (2nd appellant), Mr. Tom Odongo(pw4), Mr. Mathias Ouko and Mr. Ngacha. As a member of the Tender Opening Committee, the entire membership of the said committee was to physically inspect and evaluate various parcels of land on offer for sale.

28. Before visiting the said sites, each prospective bidder was required to dig five holes for purposes of sampling soil profile. Out of the 12 bidders the opening committee settled on, only five bidders among them Naen Rech Bidder No. 7 whose land was located at Kitengela about 8kms off Athi River Namanga Road turned up for the exercise.

29. That on 29th October 2008, the Committee visited Naen Rech sites. According to him, he noted that the soil did not meet the set requirements as the top had cotton soil instead of red soil and below it was rocky and the hole could not go up to six feet required to ensure that bodies were completely covered because of the smell. The rationale for red soil was because it is easier to excavate especially during rainy seasons and therefore easier to work on. According to the witness, none of the parcels of land on offer met the mandatory requirements.

30. Having observed that the soil had failed to meet the test, PW2 communicated his observations to the Ministry of health immediately. The witness expressed shock in seeing his name appearing in the minutes of 14th October 2008 (MF1-5) being an Evaluation Committee meeting which purported to have sat before site visits. He stated that he only sat in the Tender Committee Opening Committee meeting held on 9th October 2008 and which recommended for site visit and that he did not participate in subsequent meetings.

31. He emphasized on the fact that on 14th October 2008 no recommendation was made in favour of Naen. That after visiting the sites, the Evaluation Committee was meant to come up with a final report but that did not happen. He however admitted on cross examination by Mr. Rugo that he did not get to measure the holes on Naen Rech's land as the Committee had agreed that from the top the soil was cotton. He also admitted that he was not trained on Geology nor Soil Excavation and that his expertise was based on experience in grave digging. On cross examination by Mr. Adan, the witness stated that although red soil was not specifically stated in the procurement document, it was nevertheless a requirement as set out in the depth of the soil.

32. On further cross examination by Mr. Mbaabu, the witness stated that the score for soil profile was 10points and the Committee scored zero (0) for the same.

33. PW3 John Koye Barreh Acting Director Urban Planning City Council of Nairobi then stated that at the material time to this case, he was Assistant Director Forward Planning section charged with the responsibility to supervise professional, technical and support staff, implementation of work plans and performance. He stated that sometime in the year 2008, he was called and directed to see the Deputy Director of Planning Mr. Tom Odongo who asked him to see the Director Legal Affairs, Mary Ngethe for purposes of joining a team that was going to inspect prospective sites for Cemetery use. Later, he in company of Madam Ngethe(4th appellant), Mr. Gitonga Chief Valuer, Mr. Wanjohi, Mr. Musee Deputy Director Planning (2nd appellant), Mr. Ouko, Mr. Chege and another person he could not remember, proceeded to inspect various earmarked sites.

34. That none could qualify in terms of the set criteria among them soil profile. He later presented a report to the Evaluation Committee in which he categorically stated that none of the bidded parcels of land qualified for Public Cemetery use.

35. Realizing that plans to acquire a Public Cemetery land without the input of the Planning Department were in progress, he complained to the Deputy Director Planning recommending to raise their concerns vide a memo dated 11th November 2008 (P.Ex. 8). They expressed their concerns that the land targeted for acquisition did not meet the criteria. The said memo was addressed to the Technical Committee evaluation team and delivered to the office of the Director Legal Affairs (4th appellant). The same was acknowledged by stamping dated 14th November 2008.

36. On cross examination by Mr. Adan, he admitted that he was neither a member of the Evaluation Committee nor the Tender Committee and that his role was to represent his boss a Mr. Odongo Tom. He further confirmed that the memo he co-authored with the Deputy Director Planning was presented to the Town Clerk (1st appellant). On further cross examination by Mr. Adan, he stated that it could be illegal for the Town Clerk to cancel the contract.

37. When asked whether the Director Planning was aware of his memo, he stated that the Director was not happy as he (Director) and his Deputy (Mr. Odongo) were both members of the Committee. On being cross examined by Mr. Nderitu, the witness stated that although he did not see the tender document, he thought the same was defective.

38. PW4 Patrick Tom Odongo the Deputy Director City Planning by the year 2008 was a member of the Technical Evaluation Committee. Among his duties were, to assist the Director of Planning to ensure that Nairobi City Council discharges its mandate as a Local Planning Authority. Vide a memo dated 7th October 2008 (P.Ex. 11) he was appointed as a Committee member for purposes of evaluating bids on the requisition of land for Public Cemetery. His role was to ensure that the targeted land was functional in terms of accessibility and provision of other services. He confirmed participating in the opening of tender bids in question.

39. He however did not attend any land site visits when the evaluation committee did but was represented by PW3 who later on briefed him stating that none of the visited parcels met the requisite requirements as stipulated in the tender document especially its location and inaccessibility. He however denied attending the meeting held on 14th October 2008 which allegedly recommended Naen Rech Company's land as suitable for cemetery. He also told the court that, after PW3's brief on the unsuitability of the land, he did a memo dated 19th December 2008 (P.Ex. 9) expressing his dissatisfaction on the issues which had arisen.

40. He went further to state that, the property should have been acquired through compulsory acquisition and not direct purchase. He also confirmed that, he co-authored with PW3 a letter dated 11th November 2008(p.Ex.8) raising concerns on the suitability of the land in

question. He generally corroborated the testimony of PW3. He denied that there was any recommendation for any of the bidders to be awarded the contract (tender). He also denied participating in the Tender Awarding Committee.

41. On cross examination by Mr. Rugo, he admitted that land for public cemetery could not be rejected purely on grounds of planning consideration. He also admitted that his memos of 11th November 2008 and 19th December 2008 did not challenge the validity of the contract process. He further confirmed that he visited the sites but not with the evaluation team. He also stated that he did not attend the final Evaluation Committee meeting nor did he take part in the compilation of the report.

42. PW5 Peter Mburu Kibinda Director Planning City Council during the material time confirmed that sometime the year 2008, there was a concerted effort for acquisition of land for purposes of putting up a public Cemetery. Consequently, a committee was established comprising M/s Ngethe(4th appellant), Office of the Town Clerk, Finance, and Chief Valuer. Having invited expressions, the committee set up a criteria for the targeted land inter alia: the land must be accessible, serviced with water, electricity, 100plus acres and red soil.

43. That in the 1st attempt, there was no suitable land within the City. In the second attempt, the parcels could not meet the requirements hence the advice to look beyond Nairobi. Faced with this challenge, he, did a memo dated 17th December 2008, recommending compulsory acquisition of the required land. However, for purposes of the second attempt, an evaluation committee was formed. He confirmed seeing two memos dated 11th November and 19th December arising from his office authored by his Deputy Mr. Odongo PW4 and Assistant Director Planning Mr. Barreh (PW3) raising genuine concerns to the evaluation committee insisting that there was no suitable land identified for purposes of Cemetery use.

44. That the two memos (Ex. No. 8 and 9) were addressed to the town Clerk directly. Equally, the Town Clerk did a memo dated 4th December 2008 (Ex. 16) addressed to the Permanent Secretary Local Government (3rd appellant) then emphasizing on the importance of having a Public Cemetery but call for explanation on the two memos. Subsequently, the Town Clerk responded to the Permanent Secretary vide his memo dated 17th December 2008 (P.Ex. 15) appraising the PS on the concerns raised in the Department of Planning's memos (P.Ex. 8 and 9).

45. According to him, the distances of the bidded land was far beyond what was recommended, lack of red soil and inaccessible as the roads were not all weather.

46. He confirmed that he briefly sat in the Tender Committee that made the award (Ex. 13) on 12th November 2008. That during the tender meeting the memo authored on 11th November 2008 by Mr. Barreh and Odongo came up and he expressed concurrence thus associating himself with the concerns raised thereof and then left the meeting. Faced with the question why his juniors generated the memos dated 11th November 2008 and 19th December 2008 yet he was there, he explained that they were done with his blessings as he could not do it being a member of the Tender Committee.

47. He further stated on cross examination that his memo dated 17th December 2008 and the other two memos by his colleagues were deliberated on in a meeting convened by the Town Clerk. On cross examination by Mr. Adan, the witness stated that although the requirement for red soil was not specifically stated in the contract document, the requirement appeared in the advisory note prepared by his department.

48. On further cross examination by Mr. Adan, he stated that it was wrong for his two officers to write a letter (memo) without referring to him as the Director. He also stated that the Town Clerk could not by law interfere with the procurement process. That the tender award was done on 12th November 2008 and Odongo's memo received in the Director Legal Affairs' office on 14th November 2008. He further stated that the Chair evaluation committee could not on his own alter the findings of that committee.

49. On further cross examination by Mr. Nderitu, the witness stated that the requirement for red soil was not specifically provided in the contract document and that there was no basis for requiring 1.8 m in depth for red soil. Challenged why he did not raise his department's issues before the award yet he was a member of the Tender Committee, he insisted that he did it but the same was ignored and that he left the meeting before the award could be made.

50. PW6 Henry Musyoki Kilonzi stated that the year 2008, he owned a piece of land in Kitengela North of Athi in Mavoko township measuring 141 acres. He had purchased the land from one Ole Tranti Sache the year 1984 at KSHS. 600,000/-. That the year 2009, he sold 120 acres to Naen Rech Company and 10 acres to a Children's Home. That his lawyer Alphonse Mutinda arranged for a meeting between himself, Mr. Maina Chege and Mr. Mwaura then representing the purchaser. They agreed on the purchase price at Kshs. 110,000,000/-. (see agreement MF1-18 dated 19th December 2008). That the money was paid in two instalments of Kshs. 10,500,000/- and 97,000,000/- which was paid a month later. He identified a copy of the payment cheque dated 6th march 2009 (Ex. 19).

51. He thereafter effected a transfer in favour of Naen Rech Ltd. He denied signing a transfer of land in respect of L.R. 14759/2 dated 23rd January 2009 in favour of Nairobi City Council. He was shocked to see a copy of his photograph, PIN No. signature and ID attached to the said transfer (P.Ex. 20) although he had given them earlier on to his lawyer in the believe that they were meant for the sale transaction between himself and Naen Ltd. He only remembered signing the last page of the transfer on the land he was transferring to Naen Rech. That when he signed the transfer it was blank.

52. He further disowned the signatures on page 1 and 2 against the vendor. He denied appointing Naen Rech as an agent to act on his behalf. On cross examination by Mr. Aden, he stated that he never visited any government office for any transaction and that everything was done by his lawyer Alphonse Mutinda who took all the documents he signed and never returned them to him. He however acknowledged receiving his money as per the sale agreement.

53. PW7 Antony Matinge Itui Chief Government Valuer working at the Ministry of Lands then stated that, on 22nd September 2008, his department received a letter from Nairobi City Council dated 7th August 2008 (P.Ex. 23) authored by Mr. Otido for the Town Clerk. The letter sought valuation of LR. No. 14759 Mavoko. Upon receipt of the letter, he marked it for Mrs. Wanjohi, one of his valuers to liase with City Council of Nairobi and arrange for inspection.

54. The said Mrs Wanjohi did a letter to the Council requesting for arrangements to inspect the Plot. Since there was no response, the matter rested. However, on 13th November 2008 his department again received a letter dated 4th November 2008 from the City Council Office Director Legal Affairs one Mary Ngethe (4th appellant) seeking to review the matter on valuation. Once again, there was no response from the Council in organizing for inspection. Later, he received a letter from the external auditor dated 6th March 2009 (P.Ex. 27) with an annexture dated 1st November 2008 (P.Ex. 28) which was a letter purporting to have emanated from his (PW7) office confirming that an inspection had been carried out on the subject land and evaluation done.

55. He termed the letter (annexture P.Ex. 28) dated 10th November 2008 a forgery as the author by the name of 'A' Otieno did not exist in his department; reference No. 156708 reflected in the said letter did not exist in their offices; the letter was on a letter head which they had long abandoned; the letter read Ministry of Lands and Settlement instead of 'Ministry of Lands.' That the valuation given was Kshs. 325,150,000/-. The report did not indicate any payment of valuation fees nor did the valuation format comply with the format of writing valuation reports.

56. PW8 Pius Nyange Maithya a valuer and a forensic investigator working with EACC visited L.R. 14759/2 sometime in May 2009 in company of one Lubanga with a view to valuing the said property with the help of the owner one Kilonzi. In his assessment, the property was worthy Kshs. 30,000,000/- for 120 acres. He then prepared his report dated 7th May 2009 (P.Ex. 30).

57. PW9 Samuel Kariuki Mungai a banker then working with the Bank of Africa Nairobi as Branch Manager produced certificate of bank transactions made in respect of four transactions affecting this case namely: E. N. Amotii and co. Advocates account No. 01001730007, Mutinda, Onduso Odera and Co. Advocates, Account No. 0101910006, Alphonse Mutinda and Co. Advocates account NO. 01019150011 and Henry Musyoki Kalonzi account No. 01019450014. The bank statement for account No. 0101910006 was for the period 1st January 2009 to 19th May 2009 (ex. 31(a)), account No. 0100173007 for the period 1st December 2008 to 31st December 2008 (MF1.31) (b)), account No. 01019150011 for the period 1st January 2009 to 5th June 2009 (Ex 31(c) and account NO. 01019450014 for the period 1st March 2009 to 31st March 2009 (PEx. 31(d)).

58. PW10 Denis Yegon Head of Security and investigator National Bank of Kenya confirmed that in the cause of investigation of a reported case of fraud, he retrieved a bank statement (ex.33) in respect of account No. 0102002945900 in the name of Odero Osiemo and Co. Advocates client's account which reflected a credit of Kshs117 million made by A. Mutinda from Bank of Africa on 13th February 2009. That on 23rd February 2009, there was a banker's cheque applied for with Shell Kenya Ltd as payee for a sum of 4 million vide a voucher of application dated 23rd February 2009 (Ex. 34). On the same day, a banker's cheque of Kshs 4Million with Steve enterprise as the payee was applied for. The first cheque was applied for by Odero Osiemo while the second cheque was applied for by D. Osiemo. The cash cheque used to pay for the banker's cheque was cheque No. 274 for a sum of Kshs. 16,000,000/- (Ex. 36).

59. That on 23rd February 2009, there was another cash cheque No. 276 for Kshs. 33,000,800/- which was utilized in respect of a number of transactions among them; Kshs. 13,000,000/- to Bank of Africa Taifa Road Branch account No. 0100173002 with E. N Omotii and Co. Advocates as beneficiary (PEx. 39).

60. PW11 Jacob Mugeni Oduor Forensic Examiner working with EACC produced document examiner's report prepared by Antipas Nyanchwa whose handwriting and signature he was familiar with.

61. He identified document exhibits totalling to 22 marked as; A1-A22 being disputed documents, 31-38 specimen signatures of Henry Musyoki Kilonzi, C1-C3 specimen signatures of Janet Kavulwa Mulwa, D1-D12 being known signatures of Mary W. Ngethe, E1-E3 known signatures of Alphonse Mutinda, F1-F3 known signatures of Geoffrey Majiwa, G1-G2 known signatures of M. G. C. K. Katsole.

62. Upon examination of the documents marked A1-A12 with standard signatures on exhibits D1-38 there was no agreement.

63. He also analyzed signatures marked in pencil in Ex. A-13 with standard signatures on Ex. marked B1-B8 and found them to be similar and indistinguishable. Further, he confirmed signatures indicated with red arrows on Ex. A14-A15 with standard signatures in Ex. No. C1-C3 and found no agreement with the signatures.

64. Fourthly, he confirmed signature's marked in blue arrow on Ex. A16-A17 and A-19 with known signatures circled in pencil on exhibit marked D1-D2 and found the same to be similar.

65. Fifth, he confirmed signatures indicated with red ink on Ex. A18 with known signatures indicated with blue in Ex. E1-E3 and found them to be similar and indistinguishable implying that they were made by the same hand.

66. Sixth, he compared the signatures indicated with a pen in green ink exhibits A1-A11, A2-A22 with known signatures indicated in green ink on exhibits marked F3 and in his opinion they were similar and indistinguishable. In his opinion the known signatures on exhibit F1 and F2 had been written in different style, meaning that F1 and F2 could be an initial signature i.e in short form.

67. He also examined the signature indicated by an arrow in black on exhibit marked A22 with known signatures on Ex. marked G1-G2 and found the same to be similar and indistinguishable.

68. PW12 Kennedy Ochieng Olungo a Forensic Investigations Manager Barclays Bank confirmed that on 31st July 2009, the bank was served with a warrant to investigate the account of Steve Enterprises. They were also requested to supply bank statements in respect of that account. The witness made reference to the bank statement printed on 6th March 2015 (Ex. 43) with specific reference to entry made on 4th March 2009 when a local cheque from National Bank of Kenya was credited for a sum of 4 million.

69. PW13 Edward Omotii and Advocates of the High Court of Kenya trading in the name and style of E. N. Omotii & Co. Advocates confirmed that his law firm acted for the then Nairobi City Council in the purchase of L.R. 14959. He confirmed that they received instructions from Nairobi City Council vide a letter dated 16th November 2008 (Ex. 45) signed by M. N. Ngethe Director Legal Affairs (4th appellant). Attached to the letter was a notification of a tender award dated 13th November 2008 signed by M. N. Otido for Town Clerk. The said notification provided details of the property being sold by Naen Rech to City Council of Nairobi and the terms and conditions of sale.

70. Subsequently, a representative of the seller of the land one Chege called and informed him that in procuring their conveyance, they had appointed the law firms of Odero Osiemo and Co. Advocates, P. C. Onduso and Co.Advocates and, Alphonse Mutinda and Co. Advocates. Under the terms of the tender document, the purchase price was to be released to his law firm as stakeholder pending conclusion of the transaction.

71. Vide the council's letter dated 18th December 2008 (MF1. 47(a), cheque No. 005643 Central Bank (Ex. 47(b) for a sum of 175 million was released to his law firm client's account. Further, a sum of Kshs. 108 million vide cheque No. 005915 Central Bank (P. Ex. 48(b) was again forwarded to his law firm by the council through a letter dated 16th January 2009 (PEx.48(a)). He went further to prepare a sale agreement incorporating terms of the tender document with Henry Musyoki Kilonzi(pw6) and City Council dated 19th December 2008. That Henry Kilonzi signed the sale agreement the same day in the presence of his Advocate one Alphonce Musyoki. On the council's side it was signed and witnessed by his Worship the Mayor Geoffrey Majiwa and the then Deputy Town Clerk, Nelson Otido.

72. According to the terms of contract (sale agreement), the total purchase price was to be released to the seller's advocates on successful registration in favour of the buyer being put in actual possession. Subsequently, he prepared a transfer dated 30th January 2009 signed by Kilonzi Henry on 19th January 2009 as the transferor and witnessed by the D.Mayor N. Majiwa and Town Clerk on behalf of the transferee. The transfer was later registered on 3rd February 2009 and the seal affixed in the presence of M. N. Ngethe. That it was the seller's advocates one Alphonce Mutinda who undertook the registration exercise giving rise to a new deed plan No. 293538 and title No. I.R. 115561.

73. That Mr. Mutinda then forwarded the title deed to PW13 vide a letter dated 11th February 2009 (Ex. 49). Subsequently, Mr. Mutinda requested for payment of the purchase price being Kshs. 281,500,000/-. A sum of 1.7 million had previously been paid to the seller's advocates to facilitate payment relating to compilation of documents. Subsequently, he forwarded a banker's cheque No. 030300 for the sum of Kshs. 281,300,000/- in the names of the seller's law firms vide a letter dated 11th February, 2009. After winding up the sale transaction, Mary Ngethe (4th appellant) their client informed him that a sum of 13 million would be remitted to their account from National Bank and that she was to give them instructions on how to deal with it. The said amount was later remitted and released to her. Receipt of the said amount was acknowledged on 30th April 2009 by the 4th appellant (PEx. 52).

74. On cross examination by Mr. Adan, the witness stated that he was not aware of any sale transaction between Naen Rech and Kilonzi Henry in respect of the subject land. He however stated that there was nothing wrong with back to back sale transactions where the initial owner directly transfers land to a third party (purchaser) thereby skipping the first purchaser. He further stated that Naen Rech had put in a notification award on behalf of Henry Kilonzi Musyoki.

75. PW14 Stephen Githinji Kamau a businessman and proprietor of Thika road Shell petrol Station, Roysambu referred to Alexander Musee (2nd appellant) as his friend. That around 26th February, 2009, he informed Alexander that his (PW14) business was experiencing liquidity problems and needed some financial support to the tune of 10m. That Alexander informed him that he had a friend who owed him some money and once paid, he could lend him. He stated that Alexander offered to lend him 8 million out of which he (PW14) asked Alexander to issue two cheques of 4 million cash each in the names of Shell (K) Ltd and Steve Enterprises.

76. Accordingly, Alexander (2nd appellant) gave two banker's cheques as directed with one deposited at Barclays Bank and another cheque to the witnesses' account. That he later paid back in 36 instalments of Kshs. 100,000/- each as evidenced by payment vouchers marked Ex. 55.

77. PW 15 Philip Gatarwa Mwango personal clerk in charge of banking and delivery of messages as well as record keeping both personal and business confirmed that on instructions from his boss Githinji (PW14), he opened an account under the name of Musee (4th appellant) sometime 2009 in respect of a sum of 8 million. That the account had four columns reflecting date, deposit, paid and balance. He produced 36 vouchers amounting to 8 million being refunds to Musee by Stephen Githinji (see Ex. 55).

78. PW16 Tabu Lwangu the investigating officer in this case told the court that sometime 2009, EACC received an anonymous letter through their report office relating to embezzlement of Kshs. 283,000,000/- by the Nairobi City Council officers and others despite the fact that the actual amount paid to the actual seller was Kshs. 110,000,000/-. That upon investigations, they realized that the tender award through which the land was purportedly bought was riddled with corrupt conduct despite objections from one Odongo and Barreh terming the tender document as defective for use in the procurement of the Cemetery land and that the requisite conditions were not met.

79. The witness literally restated the testimony of the 15 witnesses and produced relevant exhibits. According to his investigations, one Henry Kilonzi the original registered owner denied that Naen Rech Company Ltd who won the contract for sale of land to city council was his agent and that he did not sell the land to Nairobi City Council. That upon conducting search on the Directorship of Naen Rech, it revealed that Chege Maina held 60% shares, Henry Kilonzi Kaya 10% and Winie Maina 30%. That further upon enquiring from the

companies' registry to confirm actual Directorship of Naen, it emerged that, Kilonzi Henry was not a shareholder nor Director as evidenced in the Registrar's letter dated 27th April 2009.

80. According to the investigating officer, the total amount of Kshs. 283,000,000/- paid by the City Council of Nairobi as the purchase price was arrived at after using a false Ministry of Land's Valuation report which was later disowned by the Chief Land Valuer. He also produced a chart showing how the purchase price of 283 million was distributed amongst various beneficiaries. That out of the 283 million, a sum of 281,300,000/- was deposited in an escrow account held in joint names of Odero Osiemo and Co. Advocates, P. C. Onduso and Co. Advocates and Alphonse Mutinda held at Bank of Africa.

81. That from the escrow account Kshs. 117,000,000/- went to Odero Osiemo and Co. Advocates through National Bank Harambee Avenue from which Kshs. 3,350,000/- was withdrawn in favour of Alphonse Mutinda, Kshs. 102,000,000/- internal transfer, Kshs. 30,550,000/- Mutinda and Co. Advocates Chase Bank Eastleigh, Kshs. 9,600,000/- to P.C. Onduso KCB, Kshs. 9,450,000 to Naen Rech Ltd, Gulf Africa Bank, and Kshs. 9,300,000 Cephars Kamande Mwaura. Equally, from the amount received by Osiemo, 26 more transactions were carried out. Out of the 26 transactions, Kshs. 4,000,000/- was paid to shell Kenya Ltd Standard Bank, Kshs. 4,000,000/- paid to Steve Enterprises Barclays Bank previously being monies paid to Stephen Githinji who claimed to have been lent the same by Alexander Musee (2nd appellant). Kshs. 13,000,000/- was also traced to the law firm of Omotii who allegedly claimed that the same was received on behalf of Mary Ngethe (4th appellant) who received the money and acknowledged the same vide acknowledgement marked (Ex. 52) which was subjected to forensic analysis and confirmed it was authored by the said Mary which she allegedly admitted having received.

82. On further investigation, he allegedly found that from forensic analysis the signature on the sale agreement purporting to be that of Kilonzi was forged as Kilonzi disowned it but admitted that the transfer was signed by him thinking that it was for his original sale for Kshs. 110 million to Naen Rech. The witness told the court that the sale agreement between Henry Kilonzi and City Council was a forgery. That it was strange to have a sale agreement over the same land done between Kilonzi Henry and Naen Rech Ltd and Nairobi City Council on a sale that Kilonzi disowned. According to the investigating officer, the money meant for Kilonzi was Kshs. 110,000,000/- and the balance from Kshs. 283 million is what the officers shared out with other people who facilitated the fraud hence a total of 273 million was stolen.

83. The witness blamed the 3rd appellant being the Permanent Secretary Ministry of Local authority which was sponsoring the purchase of the land for ignoring objections raised vide Odongo's and Barreh's memos as well as Kibinda Director Planning who raised weighty issues which the PS rubbished. He also blamed the Town Clerk (1st appellant – deceased) for not stopping the process pursuant to Section 36(a) of the PPDA (2005) after receiving complaints thereby authorizing release of the funds.

84. The 3rd accused (4th appellant) was also implicated by the investigating officer on grounds that, being the Director Legal Services, she ignored complaints and objections raised by pw3 and pw4 and instead went ahead to generate and sign an Evaluation report that did not meet the criteria for the procurement of the land in question. That she forged an Evaluation letter/report by A. Otieno to award a favourable contract to Naen and subsequently benefitted from a sum of 13 million receipt of which she acknowledged. Regarding Musee (2nd appellant), the investigating officer stated that he was the Deputy Director Procurement and a member of the Opening and Evaluation Committee as Secretary. That he fraudulently signed an evaluation report thus recommending Naen Rech for the tender from which he benefitted Kshs. 8,000,000/- through Stephen Githinji(pw4) as proxy.

85. On cross examination by Mr. Rugo for the 3rd appellant (accused 1) whether he came across a letter dated 3rd September 2008 from the 3rd appellant insisting on strict adherence to the law, he replied in the affirmative.

86. On cross examination by Adan on the role of the Town Clerk as an Accounting Officer and what he would have done in view of the objections raised by Odongo, he answered that he should have cancelled the contract.

87. On further cross examination by Mr. Mbaabu, the witness confirmed that exhibits by Odongo and Barreh were made after the evaluation committee had wound up its business and that there was nothing they could do.

88. Upon close of the prosecution case, parties agreed to submit. On 6th March 2017, the court delivered its short ruling finding that prosecution had established a prima facie case against the accused persons whom he put on their defence. However, they opted not to file any defence and the court proceeded to fix a date for judgment.

2nd Appellant's Submissions

89. On behalf of the 2nd appellant, Mr. Mbaabu relied on the submissions filed on 16th July 2018. Counsel argued on the ten grounds of appeal together. Basically, counsel faulted the court for convicting the 2nd appellant based on a charge which was not in the charge sheet.

90. It was counsel's argument that the 2nd appellant was charged with knowingly giving misleading document to Principal contrary to Section 41(2) as read with Section 48 of ACECA yet he was convicted of procuring, falsifying and presenting Ex. No. 5 (minutes of technical evaluation committee). According to Mr. Mbaabu, the court failed to apply the law applicable in procurement and subsequently failed to evaluate the evidence on record hence convicted the appellant based on evidence not on record. Further, that the trial court did not take into consideration the defence evidence as reflected on witnesses' cross examination and different exhibits. That no issue was framed in relation to the charge preferred against the 2nd appellant nor receipt of 8 million.

91. Mr. Mbaabu further submitted that the 2nd appellant was not a member of the Tender Committee yet the court found that he was capable of misleading the complainant thus concluding that he was a member of the Tender Committee. Learned Counsel contended that the trial Magistrate erred in framing an issue as to whether there was a contract between the City Council of Nairobi and Henry Kilonzi yet the same was not raised in the entire proceedings. That in any event, the seller (Kilonzi) did acknowledge at page 549 of the court proceedings that he

had signed the sale agreement and transfer thinking that it was in respect of receipt of 110m. That the court conceded that ignorance of the law could be a defence for purposes of convicting the second appellant.

92. Counsel faulted the trial Magistrate for making a finding that the Evaluation Committee was mandated to look for a land suitable for Cemetery use yet the committee's role was to make findings, evaluate lands offered by bidders and submit its findings to the Tender Committee as envisaged under Regulation 16 of the Public Procurement Disposal Regulations 2006.

93. It was counsel's contention that the back stopped with the Tender Committee on whether to award or not to award the contract pursuant to Regulations 10 and 11 of the PPDA 2006. Counsel further contended that from the evidence of all prosecution witnesses who made reference to the Technical Evaluation documents, they all recanted their evidence in chief on cross examination and that had the court considered their cross examination, it would have arrived at a different conclusion. In particular, counsel made reference to the testimony of PW1 at page 246 of the proceedings where the witness stated that the 2nd appellant did not misadvise the Evaluation Tender Committee and that none of the Evaluation Committee members ever dissented to the report and that he did not see anything wrong with the entire process.

94. Referring to the testimony of PW2 at page 243 of the proceedings, Mr. Mbaabu submitted that the witness stated that he was not challenging the procurement process and at page 376 that his memo of 11th November 2008 (PEx. 8) was only meant to be advisory. Mr. Mbaabu went further to submit that the testimony of PW16 (investigating officer) to some extent exonerated the 2nd appellant from any wrong doing after the witness at page 570 of the proceedings stated that the Chair of the Evaluation Committee or Secretary was not personally liable for the decision of the Committee.

95. Learned Counsel further faulted the trial Magistrate for making *suo motto* conclusion that minutes (Ex. 5 and 7) were doctored to include names of PW2 and PW4 as P.Ex. 5 and 6 clearly reflects their presence. Further, that Dex. 1 which was payment schedule proved that the two attended the Evaluation Committee meetings and that in their joint memo of 11th November 2008 (Ex. 8) they admitted having attended the meeting.

96. Touching on land suitability, Mr. Mbaabu submitted that the Evaluation Committee had no mandate or discretion to determine the suitability of the land. Learned counsel submitted that the tender document did not set mandatory requirements. That it is only on the scoring that the term mandatory is used against the requirement at 40 marks. That the Evaluation Committee's mandate was only to collect data and place it before the Tender Committee who had the power to accept or reject the award pursuant to Regulation 16(a) of the PPDA Regulations of 2006.

97. It was Mr. Mbaabu's contention that the Evaluation Committee did recommend bidder No. 7 for further consideration having attained the highest score. Learned Counsel opined that the Evaluation Committee did not recommend bidder No. 7 for the award and that PW1's testimony that the Evaluation Committee did recommend bidder No. 7 was erroneous and that he even admitted in his evidence that he did mislead the Tender Committee. Counsel asserted that the 2nd appellant was not charged with any allegation touching on P.Ex. No. 7 which in any event was not part of PEx. 5.

98. Regarding valuation of the land, Mr. Mbaabu stated that, a valuation report was not one of the documents the evaluation committee was required to consider.

99. Touching on the allegation that the 2nd appellant received cash 8 million suspected to be a kick back out of the purchase price of the land in question, Mr. Mbaabu held that there was no charge preferred against the 2nd appellant in respect of that money. Counsel further submitted that the evidence of PW14, PW15 and PW16 trying to connect the 2nd appellant with lending of 8 million to PW14 and how PW14 refunded the same vide payment vouchers was not supported by any proof and that his client did not sign any of the vouchers produced as evidence of acknowledgment.

100. He further contended that, PW16 had stated that he had nothing to connect the 2nd appellant with 8 million and that the appellant cannot be held liable for 8 million yet the EACC has filed a suit for recovery against PW14 one Githinji. That the fine of Kshs. 32,000,000/- without evidence that the 2nd appellant benefitted from the said amount was erroneous.

101. Regarding the application of the witnesses' demeanour, Mr. Mbaabu stated that the record did not reflect their truthfulness. That the court having recorded at page 479 of the proceedings that PW14 was uncooperative, he had no business relying on his testimony.

102. In support of his submissions, Mr. Mbaabu annexed various authorities among them, **Adan v Republic (1973)EA 445** in support of the proposition that, accused should be read of the charge in a language he understands before conviction and, **Gathenji Kariuki v Republic (1970)EA 230** in support of the holding that, sentencing is a discretion of the trial court but that discretion is exercised on facts and circumstances that are availed to the trial court by the prosecution in their address and the defence in mitigation. Lastly, counsel made reference to decisions in the case of **Macharia v Republic (2003)KLR 115** and **Ogalo S/o Owuor v R (1945)EACA 270** in which it was held that a superior court can interfere with the sentence of a lower court if shown that the trial court acted upon some wrong principle or overlooked some relevant facts when sentencing.

3rd Appellant's Submissions

103. In his submission, Mr. Rugo appearing for the 3rd appellant filed two sets of submissions. The first set was filed on 12th July 2018 together with a bundle of authorities filed the same day and a second set referred to as supplementary submissions filed on 17th October 2018 together with a bundle of authorities filed the same day.

104. In respect to grounds 1 and 13, it is Rugo's submission that, the charges of abuse of office and unlawful neglect to perform official duty,

had nothing to do with suitability of Cemetery land to which the rest of the accused persons were singularly charged. That the formulation of issue No. 1 on whether there was valid contract for sale of land between City Council and Henry Kilonzi was a misdirection as Kilonzi was not the complainant. That the validity or invalidity of the sale agreement between City Council of Nairobi and Kilonzi was not an issue before court hence the creation of the trial court thus contravening the holding in **Okethi Okale and Others v Republic (1965)EA. 555** in support of the proposition that a trial Magistrate cannot put forward his own theory in a case before him.

105. Touching on grounds 2, 10, 11, 12 and 14 on the court's misdirection on the application of law and fact concerning the standard of proof, shifting the burden of proof and failure to evaluate evidence as whole, Mr. Rugo submitted that the trial court made a generalized conclusion that the prosecution had proved their case beyond reasonable doubt without evaluating each piece of evidence against the evidence as a whole.

106. Mr.Rugo faulted the court for relying on the principles laid out in the case of **R. T. Bhatt v Republic (1957)EA 332** on proof of a prima facie case to allude that the prosecution had proved its case beyond reasonable doubt. That in so doing, the learned magistrate lowered the burden of proof thus shifting the same to the accused by stating that the accused did not challenge (controvert) the prosecution's case by not offering their defence even when the prosecution case was challenged on cross examination. Counsel submitted that the 3rd appellant's silence did not translate to proof of his guilty.

107. Counsel further submitted that, the trial court adopted contradictory, incredulous and inconsistent pieces of evidence from PW3 and Pw4 without evaluating the entire evidence.

108. Learned Counsel contended that, Ex. 8 co-authored by PW3 and PW4 only without proof raised concerns over use of a defective procurement document and approval to buy unsuitable land offered by Naen Rech. That PW3 having admitted in not seeing the procurement document could not purport to criticize the said document as defective. Counsel further asserted that PW4 admitted at page 340 of the proceedings that his personal concerns were pegged on planning element which on its own could not invalidate procurement process. Counsel urged that there was no evidence at all based on Ex. 8 to convict the 3rd appellant with the case as PW4's concerns were based on personal preferences which is not compliant with Section 66(2) and (3) (a) of the PPDA 2005. That in any event, PW4 admitted that his memos (Ex. 8 and 9) were not intended at challenging the validity of the procurement process.

109. Mr. Rugo further opined that there was no evidence that the said memos ever reached the 3rd appellant. That PW3 had no role in the procurement process as he was not a duly appointed alternate for any member absent a fact he admitted on cross examination at page 340. Besides, PW3 and PW4 did engage in informal meetings and visits to the land in question outside the official meetings thus interfering with a legal process. Counsel dismissed the evidence of PW2 a funeral superintendent as being a soil profile expert taking into account that he had no professional expertise and that he did not understand the basic elements on soil profiles like water table, standards of excavation etc.

110. In a nutshell, counsel urged that based on the contradictory evidence and admission of PW4 and PW16, there was no evidence to prove non-suitability of the land in question as no expert was called to prove that it was not suitable and that red soil profile was a requirement. That a benefit of doubt ought to have been given to the 3rd appellant. In support of that submission, counsel relied on the decision in the case of **Barasa v R (1992)KLR 98.**

111. Addressing ground 3 on misapplication and misappreciation of the principles and doctrine of the law, Counsel took issue with the court's finding that the 1st and 3rd appellants were aware of the flawed procurement process and that the law mandated them to stop the process. Learned counsel submitted that reliance on the doctrine of recent possession to convict the 3rd appellant was erroneous as the appellant was charged with abuse of office. That to hold the 3rd appellant guilty based on circumstantial evidence as elaborated in **Harry Amwai Etemesi v Republic (1997)eKLR** was erroneous.

112. Mr. Rugo submitted that the 3rd appellant had no role to play in the procurement process and that vide his letter addressed to the Town Clerk dated 8th December 20o8, he emphasized on adherence with the relevant legal process in awarding the tender. He contended that the comments by the Chief Finance officer on the said letter recommending to forward the sale agreement to the State Counsel for further consideration was yet a long bureaucratic process given that City Council had competent lawyers. Counsel submitted that the 3rd appellant had no powers to sit as an appellate body to nullify a procurement process to which nobody had complained.

113. Submitting on relevant statutory provisions on procurement, counsel contended that under Section 52 and 53 of the Public Procurement Act 2005, the Ministry and the 3rd appellant were prohibited from interfering with preparation or modulation of C.C.N tender documents. That Section 66(2) and (3) read with Section 38 of PPDA prohibited the appellant from interfering with Evaluation Committee and Section 93 and 99 of the PPDA provides for appeal.

114. Counsel submitted that, the Magistrate's reliance on the preamble under ACECA that accused persons being people in authority acted passively and failed to prevent corruption without basing that statement on any law, purposive interpretation of the law can apply. To that effect, counsel referred the court to the case of **Gathara v R (2005)2KLR 58**.

115. According to Mr. Rugo, the trial court failed to take into consideration Section 18(1) and (2) of the Government Finance Management Act Cap 412 which govern discharge of functions and exercise of public officer's mandate in procurement matters as well as Sections 5(1) and 5(2) of PPDA 2005 which ousted jurisdiction of public officials to manage funds from handling any procurement process.

116. Turning to grounds 4 and 8 on failure to analyze and determine the ingredients of the offences, counsel submitted that the trial court did not consider the ingredients of the offence of abuse of office and willful neglect of duty. Learned counsel submitted that Section 2(b) of the

ACECA defines the term 'benefit' which is a major ingredient in the offence of abuse of office to mean, "any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage." That there was no proof of any benefit conferred by the 3rd appellant upon Naen or receipt of any benefit by the appellant and that the words "improperly" and "confer" are not defined in law hence an ambiguity which ought to have been resolved with caution to avoid imposing a criminal sanction for mistakes constituting civil or administrative transgressions. To support this proposition, counsel referred to the decision in the case of **Joram Mwenda Guantai v Chief Magistrate's Court Nairobi (2017)eKLR.**

117. Turning to the ingredients of unlawful neglect, counsel submitted that there was no proof that the 3rd appellant neglected to perform an official duty which he was bound by law to do. Counsel contended that a person cannot be charged for not taking an action which would have violated an express provision of the law. To bolster this position, counsel relied on the decision in the case of **R v. Director of Public Prosecution and 2 Others Exparte Praxidis Namoni Saisi (2016)eKLR**.

118. In his supplementary submissions, these was basically a rejoinder to the respondent's submissions which is not so different from the original submissions. I will be considering the rejoinders together in my determination.

4th appellant's Submissions

119. On her part, the 4th appellant through the law firm of Mogikoyo and Company Advocate's filed her submissions on 20th July 2018 citing 5 grounds of appeal. It is Mr. Mogikoyo's submission that; prosecution did not discharge its burden of proof to the standard required; the burden of proof at all times rests with the prosecution and, that the same does not shift. In support of this submission, counsel relied on the often referred decision in the case of **Oketh Okale and others v Republic (supra)**. Counsel submitted that it was erroneous for the trial Magistrate to have accepted prosecution's case and convicting the 4th appellant before discharging its burden of proof.

120. In his submission, counsel opted to argue grounds 1 to 4 together thus contending that the conviction of the 4th appellant was against the weight of evidence. According to Mogikoyo, in both counts 3 and 4, prosecution did not prove that the 4th appellant knowingly gave a misleading and false document to Principal. Counsel went further to reproduce Section 38(1) of ACECA which defines who a principal is and in this case asserted that it was the Deputy Town Clerk who had appointed the 4th appellant as Chair to the Evaluation Committee. Mr. Mogikoyo went further and expanded the application of the word Principal to refer as well to the user department of the Public Cemetery being the public health department through Dr. Nguku who was a Tender Committee member.

121. Counsel contended that none of the principals was called to testify to confirm that they were given misleading documents and that the only logical inference is that their evidence was withheld because it would have been adverse to the prosecution's case.

122. Counsel made reference to the testimony of PW1 who stated at page 245 of the record that as head of procurement he did not see anything wrong with the procurement process.

123. Learned counsel further submitted that the trial court mainly relied on Sections 20 and 22 of the Penal Code to find that both accused 3 (4th appellant) and accused 4 (2nd appellant) acted in a concerted effort in committing the wrong thus ignoring the provisions under which they were charged. Counsel questioned the court's finding that only the 2nd and 4th appellants were liable yet there were more members in the Evaluation Committee.

124. Regarding Count III on the 4th appellant giving a false report, counsel submitted that the Tender Evaluation Committee acted within their mandate as provided by the tender document and Section 66(2) and Regulation 16(5) of the Public Procurement and Disposal Act 2005. That the bids were only opened, evaluated and a report submitted to the Tender Committee. Counsel termed PW4 as an uncreditworthy witness in that he denied attending the meeting of 14th October 2008 but signed on 10th November 2008 yet he admitted participating on the Evaluation Committee exercise. According to Mr. Mogikoyo, the 4th appellant being a Chair to the Technical Evaluation Committee was not a member perse. Counsel faulted the trial court for holding that the 2nd appellant was a member of the Tender Committee while she was not.

125. Regarding the allegation that Ex. 8 and 9 being memos authored by PW3 and PW4 raised concerns on the inadequacy of the contract document, counsel submitted that both documents were done after the Tender Evaluation Committee's minutes dated 14th October 2008 and signed on 10th November 2008 yet the two documents arrived at the 4th appellant's office on 14th November 2008 which time the 4th appellant could not do anything to address the concerns raised.

126. Regarding count four that the 4th appellant knowingly gave to the tender committee a false valuation report (Ex. 7) in respect of land the Council was due to acquire thus occasioning the Council to acquire it at an inflated price, counsel submitted that there was no requirement that a valuation report was necessary as the tender document did not require submission of such report.

127. As regards the allegation that the valuation report was a forgery, counsel submitted that there was no proof that it was forged nor was she charged with the offence of forgery.

128. Turning to ground 5 of the appeal, counsel submitted that there was no charge of fraudulent acquisition of public property contrary to Section 45 of ACECA against the 4th appellant. That there was no charge against the 4th appellant regarding receipt of 13 million. That no issue was framed regarding the appellant receiving 13 million.

Respondent's Submissions

129. M/s Aluda prosecuting counsel filed her submissions on 19th March 2018 basically giving an outline of prosecution's evidence. It was counsel's submission that the award of contract for sale of land at a price of 283 million was irregular as none of the bidders met the mandatory requirements among them the 6 feet depth hence the recommendation of Naen by the Evaluation Committee and in particular the signing of the minutes of 10th November 2008 (Ex. 8) by the 2nd and 4th appellant was illegal.

130. Counsel submitted that the confidential questionnaire filled by Naen Co. Ltd indicating that its Directors were Maina Chege 60%, Henry Kilonzi 10% and Winnie Maina 30% was false as the companies' registry revealed otherwise. However, a search at the Companies Registry (Ex. 53) revealed that the Co-Directors were Winnie Wanjiku Mwangi and Winnie Chege. According to counsel, the Evaluation Committee did not conduct due diligence to confirm that Naen Rech did not own any land by the time they tendered.

131. Counsel virtually relied on PW4's memos of 11th November 2008 (Ex. 8) and 19th December 2008 (Ex. 9) to conclude that both the Evaluation Committee and Tender Committee were notified of the inadequacy of the tender document as well as unsuitability of the subject land. Further, counsel submitted that the purported sale of land by Kilonzi to NCC was a forgery as Kilonzi denied ever selling land to NCC.

132. Concerning the 3rd appellant's involvement, M/s Aluda submitted that he was the accounting officer and therefore responsible and liable for ignoring serious concerns raised by PW3 and PW4 in their memos dated 11th November 2008 and 19th December 2008 which period was well before the sale agreement was signed on 19th December 2008. Counsel submitted that the 3rd appellant had been notified of the concerns in the said memo and the need to consult a State Counsel but he assumed the same and proceeded to pay the purchase price thereby conferring a benefit to Naen. Counsel questioned the legality of the contract for sale of land yet Naen did not enter into any contract with NCC for sale of land. To prove that Naen never sold the land, the 283m was not paid to them and instead the same was shared out between lawyers and Council officials.

133. Counsel submitted that the 3rd appellant abused his office by hurriedly releasing money for payment for land that was not suitable despite having been notified by the 1st appellant and PW4 through his memos.

134. Counsel asserted that the 3rd defendant neglected his official duty by not paying attention to the concerns raised. That under Section 18 of the Government Finance Management Act, he was to ensure prudent management of funds.

135. Touching on the 4th appellant's petition, M/s Aluda submitted that as a member of the Procurement Tender Committee she was aware of the fraud following dissents from other parties. That she participated in falsifying minutes to show that an award had been made to the bidder while fully aware that the bidder had not met the necessary criteria. Counsel submitted that the appellant submitted a false valuation report prepared by an unknown person putting the value of land at Kshs. 325,150,000/- and thereafter received a kick back of 13 million.

136. Counsel referred to the testimony of PW2 and PW4 who stated that they did not attend the Evaluation Committee held on 14th October 2020 yet their names appear a fact proving that they were determined to lie.

137. Touching on whether the 2nd and 3rd appellants were agents of a principal, counsel opined in the affirmative referring to C.C.N as the principal.

138. Turning into the 2nd appellant's appeal, M/s Aluda adopted similar approach as applied in respect of the 4th appellant discussed above. She contended that the 2nd appellant was a beneficiary of 8m out of the purchase price as confirmed by PW14. That receipt of this money circumstantially places the appellant at the centre of the fraud. To support this argument counsel relied on the decision in the case of **Abanga alias Onyango v Republic Cr. Application No. 32 of 1990**.

139. Finally, touching on sentence, counsel contended that the same was lawful and therefore appropriate.

Analysis and Determination

140. The consolidated appeals herein revolve around a controversially acquired land (L.R. No. 14759 Machakos) by the then City Council of Nairobi sometime the year 2008 to 2009 for purposes of rendering public cemetery services after it came out that the facility then and currently located at Langata public cemetery was/is already full. The parcel of land which was acquired at a cost of Kshs. 283,000,000/- allegedly from M/s Naen Rech Company LTD as the seller through competitive tendering method was according to the prosecution riddled with corrupt practices.

141. That the said corruption was allegedly perpetuated by City Council officials among them the 1st appellant (deceased) the then City Council Town Clerk, 2nd appellant City Council Deputy Director Procurement, 4th appellant the Director Legal Services and, the 3rd appellant then PS Ministry of Local Government which had sponsored the acquisition of the said land by funding the project.

142. The 2nd and 4th appellants were both members of the Tender Evaluation Committee which allegedly recommended to the Tender Committee to award to Naen Rech Company LTD a contract for the supply of the required land. According to the Directorate of Planning, the land in question was not suitable for Public Cemetery Services as it had not met the mandatory requirements in particular its location and soil profile. Thus, the alleged recommendation by the Technical Evaluation Committee and the subsequent tender award by the Tender Committee based on the said recommendation was illegal. It was the prosecution's case that the eventual clearance for payment by the 1st appellant (Town Clerk) and P.S for Local Government (3rd appellant) as the Accounting Officers while fully aware of the objections raised by the Department of Planning vide memos dated 11th November 2008 and 19th December 2008 (P.Ex. 8 and 9 respectively) was illegal hence amounting to abuse of office and willful neglect of official duty.

143. The acquisition of the said land according to the appellants was legally and regularly acquired after following the requisite procurement provisions under the Public Procurement and Disposal Act 2005 and its attendant Regulations of 2006. On their part, prosecution contended that the acquisition of the said land which has never been put into use due to lack of the recommended soil profile and inaccessibility was yet another scheme orchestrated by public officials in this case; the appellants who engaged in a corrupt scheme to acquire land with the main aim of acquiring monetary benefits as demonstrated by evidence of receipt of Kshs. 8,000,000/- by the 2nd appellant through an agent (PW14) who received the said money on his behalf from one of the law firms involved in the conveyance transaction and, Kshs 13 million received by the 4th appellant through the firm of Osiemo Odero Advocates a Law Firm instructed by the NCC to act on their behalf on the said conveyance.

144. I have considered the lower court record, Judgment by the Learned Magistrate and submissions by both parties. Initially, there were four appeals before this court. However, one abated after the first appellant died. I am therefore left with three appeals for consideration. Basically, the grounds for the three appeals which to a larger extent are common can be summarized as issues for determination as follows;

i. Whether the learned Magistrate failed to evaluate all the evidence on record hence convicted the appellants based on a prima facie evidence;

ii. Whether the court failed to consider relevant and applicable procurement laws and defence evidence given by prosecution witnesses through cross examination.

iii. Whether the trial court failed to consider and find that prosecution did not prove each and every ingredient of the offences preferred against the appellants.

iv. Whether the trial court shifted the burden of proof to the appellants and erred in finding that prosecution had proved its case beyond reasonable doubt.

v. Whether the trial Magistrate failed to consider defence submissions on record;

vi. Whether the learned Magistrate had the advantage of assessing the demeanour of witnesses having not heard and taken their evidence.

vii. Whether the sentence meted out is excessive in the circumstances

viii. Whether the applicants acquired for themselves or conferred any benefit to Naen Rech.

145. I will consider issues(grounds) No. 1 to 4 together as they are intertwined.

Whether the learned Magistrate failed to evaluate all the evidence on record before convicting the appellants based on a prima facie case; failure to consider relevant procurement laws; shifting the burden of proof to the appellants and; failure by prosecution to prove their case beyond reasonable doubt.

(A) Appeal in respect of Count 3 against the 2nd and 4th appellants

146. The 2nd and 4th appellants were jointly charged in respect of Count 3 with the offence of giving misleading documents to Principal contrary to Section 41(2) of the ACECA. It was alleged that being employees of City Council of Nairobi tasked as the Secretary and Chair respectively of the Evaluation Tender Committee, knowingly gave misleading report of minutes of the deliberation of the said Tender Evaluation Committee dated 10th November 2008 to the Tender Committee purporting that the Evaluation Committee had unanimously agreed that land tendered by M/s Naen Rech Ltd was suitable for Cemetery use.

147. It was the responsibility and indeed incumbent upon the trial court to analyze, evaluate and consider all the evidence tendered before court before making a determination. This duty is aptly captured under Section 169(1) of the Criminal Procedure Code which provides;

"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

148. From the record, the learned Magistrate did analyze the evidence and gave reasons for his determination. The reasons given for the decision may not necessarily be correct and pleasant to everyone. A trial court may make an error in its reasoning but that does not mean that there are no reasons advanced.

149. In respect to Count 3, the 2nd and 4th appellants were accused of acting in contravention of Section 41(2) of ACECA. For avoidance of doubt, I will reproduce Section 41 as a whole which provides: -

"Sub-Sec. 1 - An agent who, to the detriment of his principal, makes a statement to his principal that he knows is false or misleading in any material respect is guilty of an offence.

Sub-Sec. 2 - An agent who, to the detriment of his principal, uses, or gives to his principal, a document that he knows

contains anything that is false or misleading in any material respect is guilty of an offence."

150. The penalty for the above prescribed offence is provided under Section 48 of ACECA which provides that: -

"Sub-Sec. 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.

Sub-Sec. 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."

151. For purposes of the offence under Section 41(2) of ACECA, the court was duty bound to find whether;

a. **The 2nd and 4th appellants acted as agents.**

b. Who was the principal in this case?

c. Whether they gave to their Principal a document.

d. Whether they knew that the document given contained false or misleading information.

152. There is no doubt that the 2nd and 4th appellants at all material times to these proceedings were employees of Nairobi City Council. It is also not in dispute that they among other persons were appointed as members of the Evaluation Tender Committee in which they sat as Secretary and Chair respectively to the said Committee.

153. Were they acting as agents? If so, who was their principal? The word agent and principal are defined at Section 38 of ACECA as follows-

"Sub-Sec 1 – Agent means a person who, in any capacity, and whether in the public or private sector, is employed by or acts for or on behalf of another person;

"Principal" means a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent acts."

154. In the circumstances of this case, the 2nd and 4th appellants being employees of City Council of Nairobi a public body as defined under Section 2 of ACECA were acting as agents representing the Accounting Officer in this case the Town Clerk being the head of the procuring entity in this case City Council of Nairobi as their employer. The fact that the Deputy Town Clerk signed the letter of appointment to the Tender Committee did not make him principle because he was acting on behalf of the Accounting Officer in this case the Town Clerk in conformity with Regulation 11(3) and second schedule paragraph 5 of the PPDA regulations 2006.

155. Having held that the 2nd and 4th respondents were agents acting on behalf of their principal, did they submit any document to the principal in this case the Tender Evaluation Committee acting on behalf of the Principal? From the minutes of the Evaluation Committee meeting held on 14th October 2008, they were signed by the two appellants on 10th November 2008 and then forwarded to the Tender Committee vide a letter dated 5th November 2008 addressed to the Director of Procurement (D.Ex. 2) and signed by the 4th appellant. It is not in dispute that the minutes of the Tender Evaluation Committee sitting on 14th October 2008 forwarded the name of Naen Rech by stating;

"All the five bidders achieved more than the minimum of 60 points as stipulated in the tender and the nearest parcel of land from the City is bidder No. seven which is 38kms away."

In view of the above, bidder No. seven is recommended for further consideration having attained the highest Technical Score."

156. It is apparent from the minutes and forwarding letter to the Tender Committee that the two appellants did give to Principal the impugned document. The question is, did they know that the document they were giving to Principal was misleading or false? This is the crux of the matter. To answer this question a background needs to be laid.

157. It is clear from the evidence on record that the process of acquiring land for Public Cemetery use commenced the year 2006 and

subsequently a committee to explore modalities of acquiring the much needed land was put in place. Consequently, the committee recommended acquisition of land within Nairobi Metropolitan City and the criteria thereof set out as reflected in the tender document (P.Ex. 6) at page 12.

158. It is an undisputed fact that the Technical Evaluation Committee members comprising of the 2nd appellant as Secretary, 4th appellant as Chair, Mr. Akotha, Mr. Ngacha, Mr. Tom Odongo (PW4). Mr. Wanjohi (PW2) were appointed as the Evaluation Committee members by Mr. Otido D.Town Clerk (see P.Ex. 11). Their mandate as the Evaluation Committee was to open and evaluate the tender bids and make recommendation to the Tender Committee for tender award. The opening was duly done on 9th October 2009 as evidenced in the minutes of 10th October 2008 in the presence of the 2nd and 4th appellants, Tom Odongo (Pw4) and Ngacha.

159. Subsequently, Tender Evaluation Committee was held on 14th October 2008 and minutes signed on 10th November 2008 (P.Ex. 5). From the minutes, it is shown that the members who attended the Evaluation Tender Committee on 14th October 2008 were M/s Ngethe (4th appellant), Mr. Akotha Chief Valuer, Mr. Wanjohi Funeral Superintendent, T. Odongo Deputy Director Planning (PW4), Musee (4th appellant) Mr. Ngacha and Mr. Ouko (secretariat).

160. It was during this Evaluation Committee meeting that bidders who had been found responsive during the tender opening exercise were to be evaluated. Among the conditions set out which the responsive bidders were subjected to were;

1. Mandatory conditions: -

a. The land must be within Nairobi Metropolitan Region

b. The soil depth reaches a minimum of 1.8 metres deep

c. Preferably is under one title deed and is of freehold but where several parcels of land are offered the minimum parcel size must be 50 acres under one title deed and free from encumbrances and no encroachment on the ground.

d. Accessible from all-weather roads and preferably not more than 1km from a classified road.

e. The land should be close proximity to water, electricity and telephone.

f. Registration Certificate / or copy of National Identity Cards for administrators.

g. Value Added Tax Certificate (VAT) for business entities only.

h. Single business permit (for business entities only).

i. Provision of Authenticated Survey Plan.

j. Provision of certified copy of title deed.

k. Recent official search from Ministry of Lands.

161. A perusal of the Tender Evaluation Committee minutes dated 14th October 2008 at the award of points column reveals that, out of the 12 responsive evaluated bidders Naen Rech, a Company which was eventually awarded the contract did not meet all the mandatory conditions set out except for the title comprising all the required land under one title in which it was awarded 5 points. In fact, none of the bidders met the mandatory criteria fully.

162. Besides, Naen Rech, bidder No. 7 appears to have been given nil points in all categories of the conditions set out in the contract document except 5 points for having a title deed in which the entire land was comprised.

163. It is also apparent from the testimony of PW16 the investigating officer that, as at the time the evaluation exercise was being conducted, Naen Rech had neither acquired nor owned L.R. 14759/1 which they purported to sell to the City Council of Nairobi.

164. His testimony is also corroborated by the testimony of PW6 Philip Kilonzi the registered owner of the land at the material time who stated at page 323-324 of the proceedings that: he sold 120 acres of the said land to Naen Rech on 19th December 2008 at Kshs. 110 million. This is also further corroborated by the sale agreement dated 19th December 2008 between Kilonzi and Naen (P.Ex. 20).

165. Based on this evidence, Naen Rech as at 6th October 2008 when they tendered for sale of land to the City Council and 14th October 2008 when the Evaluation Committee recommended their name to the Tender Committee for consideration had no land capable of being sold to the City Council of Nairobi for use as Public Cemetery. In any event, the land did not meet the most critical consideration of 6 feet or 1-8 metres depth for ease of grave digging and that the land was far beyond the 1km distance requirement from a classified all whether road.

166. From the confidential questionnaire filled by Naen Rech at the back of their tender document (P.Ex. 6), they listed its Co-directors as Maina Chege holding 60%, Henry Kilonzi Kenyan (10%) shareholding and Winie Maina Kenyan 30%. However, this fact was disputed and controverted by Kilonzi (PW6) the registered owner then who categorically denied ever being a Director or shareholder of Naen Rech

Company. He also disowned a letter (Ex. 72) dated 7th October 2008 written by Alphonse Mutinda Advocate addressed to the Town Clerk purporting to introduce Philip Kilonzi as having appointed Naen Rech as his agent for the sale of the land.

167. Further, PW6 denied having sold land to Nairobi City Council as reflected in the sale agreement purportedly signed by him as the seller of land to City Council of Nairobi on 19th December 2008 (P.Ex. 14). He told the court that when he sold the land in question to Naen Rech on 19th December 2008 at 110m, he was made by his lawyer Alphonse Mutinda to sign several copies of the sale agreement and transfer form at the back without full details and that the use of his signature on the purported sale agreement of land to City Council of Nairobi was done without his knowledge and therefore a forgery. He denied selling his land at Kshs. 283,200,000/- to City Council of Nairobi nor receiving the said amount.

168. The testimony of PW6 was not controverted even on cross examination. His evidence in which he denied being a shareholder or Company Director to Naen was not at all challenged or controverted leading to a reasonable inference that his inclusion to Naen directorship in the tender questionnaire was conveniently done and intended for some people to harvest without sowing. The Evaluation Committee should have done due diligence to know that Naen did not have land to sell at the material time as they did not have any ownership documents nor Certificate of Incorporation with proof of directorship (See Regulation 16(5) (b) of PPDA Regulations 2006.

169. It is no wonder that the sale price over and above 110 million was shared out amongst various beneficiaries who never sold the land in the first place. PW6 was only paid 110 million the actual sale price for the land he sold to Naen and Naen according to the evidence of pw16 reflected in his fund's flow chart only received about Kshs 9 million yet they purported to have sold land at Kshs 283,000,000.

170. It is my finding that from the word go, Naen Rech had no land capable of being sold nor did the quoted land meet the criteria for public Cemetery use. This fact is confirmed by PW1, PW2, PW4, PW5 and PW16 as the depth was five feet against the required 6 feet and a distance of 38kms against the recommended 1km from a classified road.

171. Based on this finding, it is not clear how Naen Rech ended up being the highest scorer for their name to be recommended for consideration by the Tender evaluation committee to the Tender Committee for the award of contract.

172. Going back to the Opening Tender Committee, after the opening of bids, members agreed to physically visit various parcels of land offered by various bidders to ascertain their suitability. Among those who visited the said sites were PW2 David Mukuri Wanjohi; representing Public Health Department as the user Department. According to him, he was an expert in soil profile although not professionally trained. At page 267 Wanjohi stated that he was interested with seeing red soil as a condition to finding suitable land.

173. I must from the onset state and indeed agree with both counsel for the appellants that existence of red soil was not one of the conditions stated in the contract document. It was even admitted by PW2 on cross examination at page 274 by Adan.

174. It therefore means that, the Evaluation Committee could not deviate from the conditions set out in the tender document in compliance with Regulation 16(5) of the Public Procurement and Disposal Act Regulations of 2006 which provides that;

> **"A technical evaluation committee established in accordance with paragraph (2) (a) shall be responsible for—**
>
> **a. the technical evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents;**
>
> **b. performing the evaluation with all due diligence and within a period of thirty days after the opening of the tenders.**

175. Since the tender document only emphasized on the depth of the soil, the introduction of an extra condition of red soil will be contradicting the above provision and Section 64 (2) of PPDA (See **Republic v Public Procurement Administrative Review Board and another Exparte Athi Water Services Board and Another (2017) eKLR**.

176. According to PW4 Tom Odongo, after the tender opening exercise, the Tender Evaluation Committee embarked on site visit to verify whether the land met the criteria set. The witness said that he did not accompany the rest of the team but instead he was represented by Mr. Barreh (PW3) his colleague who kept briefing him on the site visits' progress.

177. That after site visits, they noted some planning problems which they shared with PW5 his boss being Director Planning. According to his testimony at page 337 line four, he did not attend the Tender Evaluation Committee meeting held on 14th October 2008 whereupon Naen was allegedly recommended for the contract award. Based on the unsuitable location and soil profile in terms of depth, he and Barreh (PW3) did a memo dated 11th November 2008 (Ex. 8) addressed to the Chairman Technical Evaluation Committee (4th appellant) stating that they had raised concerns over the suitability of the land and its valuation from the onset. They also raised concern with the defectiveness of the tender document and therefore disassociated themselves with any report that may be sent to the tender committee as they did not find any of the bids as having qualified. This memo was copied to the Town Clerk (1st appellant), 2nd appellant, Mr. Wanjohi, Akotha Chief Valuer, Tender Valuation Section, Ouko procurement, Chief internal auditor and City treasurer.

178. The said memo partly read as follows;

> **"The defectiveness of the said document notwithstanding; we applied this to examine the remaining five sites. At the end of this phase of the evaluation process, it is categorical that none of the five sites met the suitability criteria for land for cemetery use.**

This matter being very sensitive needed to be carefully handled to conclusion of the evaluation tender but if ever the evaluation was done, we were not represented/made aware of.

Nonetheless we would like to state our position that in the event that report is made to the Tender Committee that is contrary to the facts to the findings of the evaluation process, we shall disassociate ourselves from such a report.

It is noteworthy that as professionals with knowhow in the matter at hand we have applied our good conscience, common sense and professional mind to the above matter and have only one advise(sic) to give-the evaluation process did not get any suitable site for land meant for cemetery use''

179. The evidence of PW4 (Tom Odongo) was corroborated by PW3 Barreh at page 323 where he stated that he did accompany the tender evaluation team to the sites thrice but never sat in any evaluation committee. He basically denied sitting in the Evaluation Committee held on 14th October 2008 that recommended Naen to the Tender Committee for consideration in the award of the contract. Equally, pw2 at page 264 of the proceedings denied taking part in the evaluation tender committee held on 14th November 20008

180. It is pw2 and PW4's claim that they did not take part in the Evaluation Committee meeting held on 14th October 2008 that generated part of the particulars in count 3 that the evaluation was not by consensus.

181. To counter this claim, Mr. Mogikoyo submitted that at page 333 the witness stated that **"I confirm having seen the tender document in the tender evaluations, we were to be guided by his document."**

My perusal of the proceedings shows that there is a full stop after the word "documents" which gives a completely different narrative. This is the correct extract of PW4's evidence at page 333: -

"I confirm having seen the tender documents. In the Tender Evaluation, we were to be guided by this documents."

182. At page 11 of his submissions Mr. Mogikoyo submitted that PW4 participated in the Evaluation Committee. He went further to list some part of the testimony of PW4 at page 333. None of the two versions of the lifted evidence by Mogikoyo is correct.

183. Further, the allegation that PW4 did receive allowances (D.Ex. 3) to prove that he took part in the Evaluation Committee is not correct as he only signed for the visits of 17th, 16th, 17th, 22nd, 23rd and 29th October 2008. There is no allowance received by T. Odongo (PW4) for the meeting of 14th October 2008.

184. From his testimony, PW2 denied taking part in the Evaluation Committee meeting of 14th October 2008 which recommended Naen for the contract award. Just like PW4, he did not receive any allowance for sitting on 14th October 2008. At page 268 of the proceedings he stated that the Evaluation Committee only met on 14th October 2008 and agreed to visit some sites on 29th October 2008 before they could sit and agree on the recommendation to make to the Tender Committee. He too like Odongo disowned the minutes of 14th October 2008 recommending Naen. At page 268 he stated: -

"After the visits of 29th October 2008, we were meant to hold a meeting to come up with the final report, but this was not done. I confirm the minutes of 14th October 2008 have been signed by the Chairperson Mary Ngethe and the Secretary Alexander Musee. Mary Ngethe was Director Legal Services while Alexander Musee was Deputy Director Procurement. I do not know how these minutes came to be prepared. I first saw them when I went to record a statement.

I was surprised.''

185. From the above analysis of the evidence on record, it is clear in my mind that PW2 and PW4 or on his behalf PW3 did not attend an evaluation committee meeting of 14th October 2008. I must hasten to state that although the particulars of the charge sheet reflect the submitted document to principal to be minutes of 10th November 2008 instead of minutes of 14th October 2008, the same is not fatal as the two dates refer to the same document as it bears both dates. The argument by Mr. Mogikoyo that the court did not address this discrepancy although correct is not at all prejudicial as the appellants understood the substance of the charge. See **Ombuna v Republic (2019) eKLR** where the court of Appeal held that: -

"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

186. Therefore, I do agree with the learned Magistrate's finding that PW2 and PW4 did not attend the meeting of 14th October 2008 and that there is nowhere in cross examination they admitted attending. That is why in the memo dated 11th November (p.ex.8), pw4 and pw3 were categorical that they refused to be part of the evaluation committee geared towards recommending any of the bidders for the award of the contract.

187. Were the applicants aware that the minutes of 14th October 2008 signed on 10th November 2008 were false or misleading? Before I endevour to answer this question, it is worth referring to the role of the Evaluation Committee. Section 60(1) of PPDA gives the accounting officer powers to appoint a Tender Opening Committee which constitutes at least 3 members one whom shall not be involved in the

processing of the evaluation. Under Section 64(1) of the PPDA, a tender is said to be responsive if it conforms with all mandatory requirements. Section 65 of the PPDA 2005 further provided that, if the procuring entity declares that none of the tenders submitted is responsive, it shall notify the members.

188. In the instant case, Naen did not meet the mandatory conditions hence should have been rejected as a non-responsive tenderer instead of recommending his name to the Tender Committee for consideration. In the case of **Republic v Public Procurement Administrative Review Board and two others Exparte Industrial and Development Corporation (2017) eKLR** the court stated that;

> **"It is therefore my view that in determining whether the action taken by the procuring entity was a clarification of the tender or was a change or alteration of the terms of contract, one must look at the terms of the tender document and determine whether the action taken by the procuring entity substantially complied with the terms of the tender document"**

189. The appointment of an Evaluation Committee and its mandate is clearly spelt out under Regulation 16 of the PPDA Regulations 2006. Regulation 16(1) provides: -

> **"For each procurement within the threshold of the tender committee, the procuring entity shall establish an evaluation committee for the purposes of carrying out the technical and financial evaluation of the tenders or proposals''.**

190. Reg. (16) (5) further provides that;

> **"A technical evaluation committee established in accordance with paragraph (2) (a) shall be responsible for-**
>
> **a. the technical evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents**
>
> **b. Performing the evaluation with all due diligence and within a period of thirty days after the opening of the tenders."**

191. Reg. 16 (9) goes further to provide that an evaluation committee shall provide a report on the analysis of the tenders received and submit a report to the tender committee. Regulation 16 (10) (f) binds an evaluation committee to submit a report under Sub-Regulation 9 with a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.

192. In compliance with regulation 16(5) of the PPDA Regulations 2006, the evaluation committee was duty bound to exercise due diligence to confirm that Naen did not have land for sale. They did not even find out Naen's Directorship or even demand to know why he was offering for sale land they had not even bought nor assumed possession of from pw6 as part of due diligence before recommending the same for consideration for the award of contract.

193. From the above analysis of evidence, and in my humble view, the Evaluation Committee did forward the minutes of 14th November 2008 while fully aware that the information contained therein was misleading on the following grounds; Firstly, that Naen had scored the highest points hence recommending it for consideration of the tender and secondly; that PW2 and PW4 had attended the evaluation meeting.

194. Although Mr. Mbaabu and Mogikoyo argued that the Evaluation Committee did not recommend Naen, it is obvious from the minutes of 14th November 2008 that they had recommended Naen for consideration in compliance with regulation 16(10) (f) of the PPDA Regulations of 2006. The argument that the word consideration did not mean recommendation for award of contract is purely an issue of semantics. If they had not found bidder no 7 suitable, they should have clearly stated so. The technical use of the word recommended for consideration does not exonerate them from liability. The word recommended was aptly read and correctly understood by the Tender Committee as reflected in the minutes of 12th November 2008 at page 16 where they stated that the Technical Evaluation Committee had recommended bidder No. 7 (Naen).

195. Had the Technical Evaluation Committee given the correct position that Naen had failed from the word go, the Tender Committee could have taken a different trajectory. That does not mean that the tender committee was innocent. They too had the powers to re-examine the bids and reject the tenderer if they found the same not qualified or compliant.

196. In my humble view, both the Evaluation Tender Committee and Tender Committee failed the procuring entity by not performing their role properly and effectively as provided in the procurement law thus misleading their Principal.

197. The submission that the learned Magistrate did not correctly frame up the right issues for determination did not prejudice the appellants at all as there is no universal/standard method of framing up issues. What matters is the body of the analysis of evidence out of the framed issues. Even Advocates may not necessarily arrive at common issues for determination even in this matter.

198. As to whether the 2nd and 3rd appellants were members of the Tender Committee, I must agree that from the minutes of 12th November 2008 in which the tender was awarded, the appellants were not members in conformity with Regulation 16(4) which prohibit evaluation committee members from being members of tender committee. That was a misdirection on the learned Magistrate's part which in any event does not affect the appellant's liability in relation to Count 3.

199. Regarding the prosecution's failure to prove their case beyond reasonable doubt and the element of shifting the burden of proof to the

accused, the law is very clear: In the case of **Oketh Okale and Others v Republic (supra)** it was held that the burden of proof in criminal proceedings throughout lies with the prosecution, and it is the duty of the trial Judge to look at the evidence as a whole. Similar position was held in the case of **Republic v Silas Magongo Onzere alias Fredrick Namana (2017) eKLR** where the court held that: -

> **"In our criminal justice system there is no duty on the accused to prove anything on the allegation of a criminal nature filed by the State in a court of law."**

200. It is the duty of the prosecution even in circumstances where an accused opts to keep quiet to prove its case beyond reasonable doubt. However, the standard of proof beyond reasonable doubt does not translate to 100% certainty. Omissions or discrepancies that do not affect the substance of the charges or materially shake prosecution's case as to the culpability of an accused cannot be relied on to exonerate an accused person from liability. see **Miller vs Minister of Pension (1947)2 ALL ER 372-373** where Lord Denning held that:

> **"The degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.**

201. In its judgment, the court gave reasons for convicting the 2nd and 4th appellants in respect of Count 3 although with minor discrepancy like referring to appellants as members of the Tender Committee which is not significant as the charge they were facing did not relate to their actions in the Tender committee.

202. As to whether the court failed to consider evidence given on cross examination, the record is clear that in his analysis of evidence, the learned Magistrate did refer to evidence given on cross examination. He may have not referred to everything but substantially he did.

203. In nutshell, it is my finding that the learned Magistrate correctly evaluated and found the 2nd and 4th appellants liable of Count III based on the overwhelming evidence some of which as stated herein above was not challenged at all.

(B)Appeal in respect of count 4 against the 4th appellant

204. With regard to Count IV, the 4th appellant was charged alone for the offence of knowingly giving a false document to principal contrary to Section 41(2) as read out with Section 48 of ACECA. Under this count, she was accused of knowingly giving to the City Council's Tender Committee, a false valuation report in respect of land intended for acquisition for purposes of Public Cemetery use in that, it misled the Council into procuring land at a price far above the prevailing market price for land in a similar location as the land procured.

205. According to the appellant, the Tender Committee was not misled into acquiring the land in question. Mr. Mogikoyo submitted that there was no requirement of a valuation report in the tender document.

206. It is apparent that the valuation report (P.Ex. 7) was submitted to the Tender Committee by the 4th appellant. The authenticity of this document allegedly authored by one A. Otieno a valuer alleged to be an employee from the lands office was disowned by PW7 Anthony Itui the Chief Valuer ministry of lands. Mr. Itui denied the evaluation report was prepared by officers from his office. He denied knowledge or existence of an officer by the name of A. Otieno. He admitted that his office had received a request from the 4th appellant's office to conduct a valuation in respect of the land they intended to acquire but gave certain conditions which were never met. He wondered how a forged report using forged stationery would be submitted to the Tender Committee.

207. According to the valuation report tendered before the Tender Committee on 12th November 2008 for consideration, it gave the land in question a value of Kshs. 325,150,000/-. A. Otieno made reference to the 4th appellant's letter of 4th November 2008 Ref. No. DLA/MNN/924/EI 08 which sought for valuation. At page 40 of the minutes of 12th November 2008 the Tender Committee took into consideration among other factors like value of the land as indicated in the valuation report (P.Ex. 7) and made an award to Naen.

208. It is not correct for Mogikoyo to submit that the Tender Committee did not take into consideration the content of the valuation report to make the award. What was the purpose of asking for the valuation report? I believe it was out of due diligence that the Deputy Town Clerk through his letter of 7th August 2008 (P.Ex. 23) also wrote to the Chief Valuer to give a valuation report to determine whether the government was getting land for value based on a genuine prevailing market price and not inflated price.

209. Although the valuation report was not one of the criteria set out in the tender document, the procuring entity was duty bound to do due diligence by asking for a valuation report to inform its decision making process in buying land. It was not therefore necessary that it be included in the tender document specifically as a condition.

210. As to whether the document was genuine or false, the answer lies in its source which is denied. From the evidence of PW7, the Chief Valuer, the only conclusion to make is that the report was forged or obtained purportedly to influence the award at an inflated price to justify payment of the money over and above the actual price to be shared amongst other undeserving beneficiaries.

211. Since the report was classified as not being genuine and considering that it was one of the documents considered by the Tender Committee before awarding the contract, the same is a false document. According to Black Law Dictionary 10th Edition, the word 'false' is defined as –untrue, deceitful, not genuine, inauthentic, wrong or erroneous. The valuation report is clearly a reflection of this definition.

212. Who is responsible for its existence? Obviously, the prosecutor discharged its burden in proving that the document did not officially exist and the only logical conclusion is that the person who introduced it to the Tender Committee knows its source and in the absence of any

evidence to the contrary, the 4th appellant is responsible. That is not to say that the prosecutor had shifted the burden of proof. Section 111 of the Evidence Act provides;

> **"111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**
>
> **Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**
>
> **Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."**

213. This is one of the rarest exceptions in criminal proceedings where the burden of proof by law shifts to the accused. The 4th appellant did not on cross examination advance any evidence to disassociate herself from the false document. It is clear from the evidence on record that the document was a scheme to inflate the figure in order for some parties to benefit from part of the fund. This can be inferred circumstantially from the evidence of PW16 the investigating officer who prepared funds chart (P.Ex. 58) showing how money over and above 110m that PW6 received as the seller of the land was shared out amongst several parties who were not sellers of the land. Among the beneficiaries were the 4th appellant who received and acknowledged a sum of 13 million from E. A. Omotii Advocate. The acknowledgement by the 4th appellant duly signed and produced as exhibits No. 52 (MF1-73) was not challenged. Mr. Omotii an Advocate nominated by the 4th appellant to represent the Council in the land transaction testified as PW13. He confirmed that payment arrangement at page 466.

214. From the sequence of events circumstantially, one would safely link the purpose of having a forged valuation report to justify an award way above the prevailing market price yet PW6 sold it during the same time at Kshs. 110 million. If indeed pw6 sold it at 110million, how would the same property be sold the same day at 283million? That cannot be a realistic prevailing market price. Logically, the market could not have tripled to 283 million even when given an error of margin. It is trite that, before a court would eventually infer existence of a fact, it must be satisfied that there does not exist any other facts that would weaken the facts relied on to make an inference of guilty. See **Sawe v Republic (2003) eKLR 364, and Teper v Republic (1952) AL 48** where the court held that: -

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

215. I am in agreement with court's reliance on Section 111 of the Evidence Act and drawing a linkage between the money received by the 4th appellant from the law firm handling the sale transaction on behalf of the council. The purpose of which 13million was received by the 4th appellant was not advanced on cross examination to the satisfaction of the court.

216. In view of the above finding, I am satisfied that the 4th appellant was properly convicted of Count IV being the originator of the false valuation report and discharged of the alternative count

(C) Appeal in respect of Count 1 against the 3rd Appellant

217. The 3rd appellant who was the first accused before the lower court was charged with the offence of abuse of office contrary to Section 46 as read with Section 48 of the ACECA in that as Permanent Secretary Ministry of Local Government then, used his office to confer a benefit to M/s Naen Rech Ltd after it became known to him that concerns had been raised by the City Council of Nairobi's Planning Department over the suitability of the land. Although he was charged with an alternative count of neglect of official duty he was discharged of the same hence I will not delve over the same as there is no ground of appeal against it.

218. Mr. Rugo appearing for the 3rd appellant argued that the court convicted the 1st appellant based on his own creation and without sufficient evidence. Section 46 of ACECA provides that a person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

219. The trial court was duty bound to find; firstly, whether the appellant held an office; if so, whether he used his office to improperly confer a benefit to Naen. From the evidence on record, the 3rd appellant was brought into the land saga and forced to swim into dirty waters concerning acquisition of the Public Cemetery land by virtue of the fact that he was the accounting officer in the Ministry of Local Authorities then which had sponsored the funding of the acquisition of land for Public Cemetery.

220. It was alleged that, after the tender was awarded, he was notified of two memos raised by PW3 and PW4 dated 11th November 2008 and 19th December 2008 complaining that the land sought to be acquired did not meet the criteria recommended and that it was not suitable.

221. According to the memo dated 11th November 2008 (P.Ex. 8), it was addressed to the Chairman Technical Evaluation Committee and copied to the Town Clerk (Deceased 1st appellant). Apparently, the Town Clerk did not act and instead forwarded minutes of the tender award to the P.S (3rd appellant). The 3rd appellant in his letter of 4th December 2008 wrote to the Town Clerk (1st appellant) drawing his attention to the concerns raised by Planning Department through their memo dated 11th November 2008. He asked the Town Clerk to pay attention to the issues raised and revert back to him.

222. Consequently, PW5 the Director Planning wrote another letter to the Town Clerk dated 17th December 2008 (Ex. 17) still raising concern on the unsuitability of the land and recommended compulsory acquisition. On 19th December 2008, again PW4 did another memo emphasizing on the concern raised although not intended to scuttle the procurement process. Again, on 17th December 2008 the Town Clerk wrote to the PS enclosing the letter of PW5 Mr. Kibinda. On the notes made on the face of that letter, the Chief Finance Officer recommended the matter to be forwarded to the State Counsel office. On the said letter, the PS made remarks saying that the issue of a defective document had not been addressed. He advised Chief Procurement Officer urgently to examine them. He however added that consulting a State Counsel on matters that City Council lawyers could address was another bureaucratic way of handling issues yet their cash flow was being affected.

223. He eventually released the money after the procuring entity signed the contract and had the land transferred into their name despite the protestations from the department of Planning. He is accused of not stopping payment hence conferring a benefit to Naen

224. The trial court held at page 40 of his Judgment that;

> **"It is evident that the issue of the tendering process was brought to the attention of the A1 and A2. Despite all the protestations from PW3, PW4 and PW5 they went ahead to release funds, taxpayer's money by virtue of their positions. The above facts were not controverted. I find as fact that A1 and A2 voluntarily and intentionally caused tax payers money to be released after it had been brought to their knowledge that the tender was flawed and land being offered for sale to the CCN was unsuitable thereby improperly conferring a benefit to a firm called Naem Rech."**

225. It is not in dispute that the 3rd appellant held a public office being a Permanent secretary. It is also admitted that he authorized release of funds in question to Naen. The question to answer is; whether he acted improperly in releasing the funds and, whether legally he had the powers to stop payment hence frustrating the already executed contract.

226. Before making the above conclusion as the trial Magistrate did, the court ought to have evaluated whether the 3rd appellant had any lawful role to pray in the tendering process and whether he had authority under the PPDA 2005 and Public Procurement Act Regulations 2006 to stop the process. Mr. Rugo urged that vide the PPDA 2005, the 3rd appellant had no powers as the Ministry's Accounting Officer to stop or invalidate a contract by refusing to pay.

227. M/s Aluda for the respondent submitted to the contrary stating that the 3rd appellant acted in breach of Section 18 of the Government Finance Act which provides that the accounting officer is responsible to the Treasury to ensure that the resources of the Ministry are used in a way that ensures that no expenditure is made unless it is lawful, authorized, effective, efficient and recommended.

228. From the evidence on record, the 3nd appellant was not the head of a procuring entity in this case City Council. The head of the procuring entity and therefore the accounting officer in the context of the procurement in question was the Town Clerk. The 3rd appellant was not the Accounting Officer for City Council. To that extent I do agree with Mr. Rugo that the 3rd appellant had no role to pray in the tendering process.

229. It is a disputed fact that the concerns raised in the memos of 11th November 2008, 17th December 2008 and 19th December 2008 all came after the contract had been awarded and signed. The award was made on 12th November 2008. Under Section 68 of the Public Procurement Act, the contract was bound to be signed not less than 14 days from the date of the notification of the award. Section 68(2) of the PPDA provides;

> **"The written contract shall be entered into within the period specified in the notification under Section 67(1) but not until at least fourteen days have elapsed following the giving of that notification."**

230. In this case notification was issued on 13th November 2008 (P. Ex. 45(a)) implying that the contract could not be signed upon acceptance before 27th November 2008. The memo of 11th November 2008 was received in the office of the 4th appellant on 14th November 2008. It was equally received in the Town Clerk's office and thereafter the PS' office.

231. Under the law (section 36 of the PPDA 2005), the head of the procuring entity (city council) had powers to stop or terminate the contract before the expiry of 14 days after notification of the award. See **Republic vs Public Procurement Administrative Review Board and 3 Others exparte Saracen Ltd (2018) eKLR** that: -

> **"It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration."**

Section 36 of the PPDA provides: -

> **"Sub-Sec (1)- A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.**
>
> **(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.**
>
> **(3) …**

(4) …

(5) The procuring entity shall not be liable to any person for a termination under this section."

232. A procuring entity means a public entity which is defined under Section 3 of PPDA as a public entity including a local authority.

233. From the above definition, it is clear that the Accounting officer (Town Clerk) had a role to play under Section 36 of PPDA. In the circumstances of this case the 3rd appellant was not an Accounting Officer of the procuring entity hence had little role to play in terminating the contract which had long been awarded, accepted and signed. Under Section 27(2) of the PPDA, the Accounting officer of a public entity is responsible for ensuring that the public entity performed its obligations under Sub-Section 1.

234. It is clear that under section 5(1) of the PPDA, where there is a conflict between the PPDA and any other law or Act, the PPDA shall take precedence as the parent Act. Section 5(2) further provides that any Act or law which gives any person or body authority to approve any works or expenditure shall not be construed as giving such person or body authority with respect to procurement proceedings. To that extent, the 3rd appellant could not interfere with the procuring process courtesy of any authority conferred by Section 18 of the Government Finance Act or any other law. However, if he were the accounting officer of the procuring entity, he would have legally interfered under section 36 of the PPDA 2005 as read with the provisions of Section 27 of the PPDA and Government Finance Act section 18.

235. I am in agreement with Mr. Rugo that, the burden to prove that the 3rd appellant abused his office was upon the prosecution. The 3rd appellant had nothing to do with the legality of the sale agreement, the evaluation and tendering processes. It was the duty of the Evaluation Committee and Tender Committee and the head of procuring entity (Accounting Officer) to ensure that every bit of procurement process was followed to the letter as emphasized in the 3rd appellant's correspondence to the Town Clerk. His role was that of a conveyor belt upon being told that a contract had been awarded hence released the money.

236. In a persuasive decision made by the Public Procurement Administrative Review Board in **APPLICATION NO 48 OF 2017 OF 31ST MAY 2017 BETWEEN PLENSER LIMITED AND MOI TEACHING REFERRAL HOSPITAL and PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD REVIEW NO 39/2012 OF 31ST JULY 2012 BETWEEN ANHUI CONSTRUCTION ENGINEERING LIMITED IN JOINT VENTURE WITH CHINA AERO-TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION(CATIC) AND KENYA AIRPORTS AUTHORITY** the board held that;

"It is also clear to the board that the permanent secretary has no role to play in the decision of another procuring entity, notwithstanding the fact that the entity in question is under the line ministry over which he has superintendence. His role in decision making is limited to procurements which are under his ministry in his capacity as the accounting officer in the ministry, as set forth in Section 27 of the Act''

237. I am totally in agreement with the persuasive reasoning and finding of the Review Board in the two cases above quoted. The intention of parliament was to make procurement process as independent as possible and further insulate it from any external influence in compliance with section 44 of PPDA. The 3rd appellant would have been accused of interfering with the procuring process if he terminated the sale transaction. He cannot be held liable for obeying the procurement law. Had the trial magistrate properly addressed his mind to the relevant procurement provisions, he would have arrived at a different finding thereby exonerating the 3rd appellant.

238. Indeed, there was no proof that the 3rd appellant did confer a benefit upon self nor to Naen by doing what he was lawfully mandated to do. **See Republic v Director of Public Prosecutions and 2others Exparte Praxidis Namoni Saisi (supra).** In a nutshell, prosecution did not prove the offence of abuse of office against the 3rd appellant to the required degree or standard of proof beyond reasonable doubt.

Whether the trial Magistrate failed to consider submissions by the defence

239. Both appellants submitted that the trial Magistrate did not consider defence counsel's submissions. Indeed, in his determination, the learned Magistrate made reference to the defence counsel's submissions from page 33 to 35. Atrial court may not necessarily reproduce verbatim counsel's submissions. Courts make reference to submissions in summary depending on their relevance. I do not agree that the learned Magistrate did not consider their submissions.

Whether the trial court lacked the advantage of assessing the demeanor of witnesses

240. Assessment of witnesses' demeanour is crucial in making a determination. It is very crucial especially where there is a single witness with no other corroborating evidence. A magistrate or Judge taking over a case which had been heard by another Magistrate or Judge would be disadvantaged in conducting the assessment of witness' truthfulness. It is true that the learned Magistrate did not take evidence of witnesses. Unless recorded in evidence, he could not be able to assess the witnesses' demeanour.

241. However, he had several witnesses whom he relied on to corroborate each other's evidence. In this case the argument by Mr. Mbaabu that the trial court lacked the advantage of assessment of demeanour is not correct as the Magistrate did not rely on witnesses demeanour. Section 199 of the Criminal Procedure Code provides that;

"When a magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of the witness whilst under examination."

242. In the case of **Rebecca Mwikali Nabutola and 2 Others v Republic (2016) eKLR** the court held that it is not mandatory for a Magistrate to adopt remarks of witnesses' demeanor and that nothing prohibits a succeeding Magistrate from taking over a case.

243. Therefore, the taking over of the case by Hon. Ogoti after witnesses had testified and complied with Section 200 of the Criminal Procedure Code was proper and nothing unusual.

Whether the appellants acquired benefit from the land transaction or conferred benefit upon Naen

244. The trial court found that the appellants had acquired benefit and conferred benefit upon Naen. The trial court based his finding against the second appellant on account of the evidence and allegation of the investigating officer that he received Kshs. 8,000,000/- from PW14 acquired as a debt which was eventually refunded. This assertion was challenged by the defence on cross examination who produced a copy of a Plaint D.Ex. No. 3 being **Milimani Commercial Court Civil Case No. 402 of 2002** in which EACC is claiming the 8 million from Stephen Githinji (Pw14).

245. The investigating officer admitted the case was still pending. Based on this evidence, I do agree with Mr. Mbaabu that there was no proof that the 2nd appellant acquired a benefit or conferred a benefit of 8 million to Naen. To whom did he confer a benefit Kshs 8milion? There was no evidence. Did he acquire any benefit? Prosecution is not sure and that is why they sued PW4 without joining the 2nd appellant. It will be improper to conclude that the 2nd appellant acquired a benefit of money which is not proven.

246. To that extent, the sum of Kshs. 8,000,000/- allegedly received by pw14 on behalf of the 2nd appellant cannot form the basis of the mandatory sentence under Section 48(1) (b) nor 48(2) of ACECA.

247. Regarding the 4th appellant, there is watertight evidence that she received money from Amotii Advocates being part of the money paid through that law firm from the subject land. She even acknowledged receipt of the money. Mr. Amotii confirmed as such that part of the money he received out of the impugned sale transaction was given to the 4th appellant on her own instructions. She had no explanation to controvert or rebut this evidence. Under section 48 of ACECA which is the general penalty section for offences committed under part V of ACECA, she is liable for conferring a benefit to herself and occasioning loss to the procuring entity her employer. It is my holding that her sentence was properly computed and the mandatory sentence was applicable in the circumstances.

Whether the sentences imposed were excessive

248. Both counsel submitted that the sentence imposed was excessive.

It is trite that sentencing is at the discretion of the trial court **(see Janet Muthoni Nyaga vs. Republic)2016 eKLR** where the court found that, for an appellate court to interfere with the exercise of sentencing discretion of the trial court, it must be satisfied that, the trial court failed to take into account sentencing legal principles; took into account irrelevant factors or that the sentence was excessive and harsh.

249. In the instant case, the court took into consideration the appellants' mitigation and sentenced the 2nd and 4th appellants to 3yrs imprisonment. The law provides for a fine of 1 million or 10 yrs imprisonment or both. Save for the imposition of the mandatory fine under section 48(1) (B) and 48(2), the first limb of the sentence was not challenged. I do not find any illegality in imposing a 3yr jail term against the 2nd and 4th appellants, given that the prescribed period is 10years imprisonment. I have no reason to interfere with the same considering the gravity of the offence and that discretion was properly exercised.

250. As to the additional mandatory sentence of 32 million imposed against the 2nd appellant the same is hereby set aside for the reasons already stated. As to the mandatory sentence of Ksh 52 million against the 4th appellant, the same is hereby confirmed for reasons already stated. Regarding count 4, the 4th appellant was again sentenced to 3yrs imprisonment to run concurrently with the sentence in count 3. I do not see any reason to interfere with the same.

251. The upshot of it all is that, the appeals herein partially succeeds and fails to the extent that;

a. The conviction against the 3rd appellant be and is hereby quashed and sentence thereof set aside.

b. The 3rd appellant be and is hereby set free unless otherwise lawfully held.

c. That conviction of the 2nd appellant in respect of count 3 be and hereby upheld.

d. That the sentence of 3years imprisonment against the 2nd appellant be and is hereby confirmed.

e. That the mandatory sentence of Kshs 32 million under section 48(1)(b) and 48(2) of ACECA be and is hereby set aside.

f. That the conviction of the 4th appellant in respect of counts 3 and 4 be and is hereby upheld.

g. That the sentence of 3yrs imprisonment in respect of the 4th appellant for counts 3 and 4 to run concurrently is upheld.

h. That the mandatory sentence of 52million in default to serve another one-year imprisonment against the 4th appellant under section 48(1)(b) and 48(2) of ACECA is hereby confirmed.

i. For avoidance doubt, the mandatory sentence against the 4TH appellant is to be served consecutively with the terms of

imprisonment of three years imposed in respect of counts 3 and 4 which are to run concurrently.

j. The 2nd and 4th appellants' bail pending appeal be and is hereby cancelled and they forthwith be committed and detained at GK prisons to continue serving their sentence from where they had left when they were released on bail pending appeal.

k. The Deputy Registrar to cause, prepare and execute a committal order/Warrant in respect of the 2nd and 4th appellants to prison.

l. The sureties in respect of the appellants shall be discharged forthwith and any security deposited returned or refunded.

Right of appeal 14 days.

DATED, DELIVERED AND SIGNED AT NAIROBI IN OPEN COURT THIS 23RD DAY OF SEPTEMBER 2020.

…….

J.N.ONYIEGO

JUDGE