



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.24 OF 2018**

**(As consolidated with Appeals nos.23 & 25 of 2018)**

**DAVID KAMUNYA RUNO.....1<sup>ST</sup> APPELLANT**

**KAWA FALLS LIMITED.....2<sup>ND</sup> APPELLANT**

**DOSAMA HOLDINGS LIMITED .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(An Appeal arising out of the conviction and sentence of Hon. L. N. Mugambi CM delivered on 28<sup>th</sup> July 2017 in Nairobi CM Cr. Case No.465 of 2012)**

**JUDGMENT**

The 1<sup>st</sup> Appellant, David Kamunya Runo, and the 2<sup>nd</sup> Appellant, Kawa Falls Limited were charged in count 1 with the offence of uttering a false document contrary to 353 of the Penal Code. The particulars of the offence were that on 15<sup>th</sup> November 2001 within Nairobi Area, the Appellants, jointly and with intent to defraud knowingly uttered a false document to wit payment receipt number F 357876; Sale number 231702 for Ksh.1,146,540.00/- to the Commissioner of Lands, purporting it to be proof of payment of standard premium of Ksh.1,146,540.00/- being consideration for letter of allotment referenced 97831/111/259 dated 2<sup>nd</sup> June 1999. In the alternative charge, the Appellants were charged with the offence of fraudulent acquisition of public property contrary to Section 45(1) (a) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act. The particulars of the offence were that on 26<sup>th</sup> September 2006 within Nairobi Area, the Appellants fraudulently and unlawfully acquired a public utility piece of land comprising Land Registration No.9796 (Inland Registry No.102737) measuring approximately 1.172 hectares (2.93 acres) situated in Nairobi County and valued at Ksh.47,418,000/-, the property of the Republic of Kenya.

The 1<sup>st</sup> and 2<sup>nd</sup> Appellants were charged in count 2 with the offence of uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence were that on 11<sup>th</sup> March 2002 within Nairobi Area, the Appellants, jointly and with intent to defraud knowingly uttered a false document to the Commissioner of Lands to wit a payment receipt No.F 357880; Sale No.235092 for Ksh.754,860/- to the Commissioner of Lands purporting it to be proof of payment of Standard Premium of Ksh.754,860/- being consideration for letter of allotment referenced 93/103/119 dated 1<sup>st</sup> July 1999.

The 1<sup>st</sup> and 3<sup>rd</sup> Appellants were charged in count 3 with the offence of uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence were that on 14<sup>th</sup> March 2002 within Nairobi Area, the Appellants, jointly and with intent to defraud knowingly uttered a false document to the Commissioner of Lands to wit payment receipt No. F 357861; Sale No.221777 for Ksh.240,750/- being consideration for letter of allotment referenced 93/103/120 dated 1<sup>st</sup> July 1999. In the alternative charge, the Appellants were charged with the offence of fraudulent acquisition of public property, contrary to Section 45(1)(a) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act. The particulars of the offence were that on 26<sup>th</sup> September 2006 within Nairobi County, the Appellants fraudulently and unlawfully acquired a public utility piece of land comprising Land Registration No.9797 (Inland Registry No.102736) situated in Nairobi County measuring approximately 0.3601 hectares (0.90025 acres) and valued at Ksh.12,582,000/-, the property of the Republic of Kenya.

The Appellants were charged in count 4, 5 and 6 with the offence of obtaining registration by false pretences contrary to Section 320 of the

Penal Code. The particulars of the offence were that on 7<sup>th</sup> September 2006 within Nairobi County, the Appellants obtained the registration of a parcel of land, registration LR No.9796 (Inland Registry IR No.102737) and LR No.9797 (Inland Registry IR No.102736) situated in Nairobi by falsely pretending to have made payment of standard premium and other charges amounting to Ksh.1,146,540/-, Ksh.754,860/- and Ksh.240,750/- respectively as particularized in the charge sheet to the Commissioner of Lands, a fact they knew to be false or did not believe to be true.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellants were convicted as charged in counts 1,2,3,5 and 6. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants were each sentenced in count 1 to pay a fine of Ksh.3 million and in default serve one (1) year imprisonment for the 1<sup>st</sup> Appellant or civil debt attachment by State for the 2<sup>nd</sup> Appellant. In count 2, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were each sentenced to pay a fine of Ksh.2 million and in default serve one (1) year imprisonment for the 1<sup>st</sup> Appellant or civil debt attachment by State for the 2<sup>nd</sup> Appellant. The 1<sup>st</sup> and 3<sup>rd</sup> Appellants were each sentenced in count 3 to pay a fine of Ksh.1.5 million and in default serve one (1) year imprisonment for the 1<sup>st</sup> Appellant or civil debt attachment by State for the 3<sup>rd</sup> Appellant. In count 5 and 6, the Appellants were each sentenced to pay a fine of 1 million in each count and in default serve one (1) year imprisonment for the 1<sup>st</sup> Appellant or civil debt attachment by State for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant.

In their petitions of Appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They faulted the trial court for convicting them yet the evidence on record was not sufficient to sustain a conviction. They were of the view that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt. They were aggrieved that the trial court shifted the burden of proof to the Appellants. They asserted that none of the prosecution witnesses faulted the transactions leading to the present charges preferred against the Appellant. They were further aggrieved by the sentence meted by the trial court stating that the same was harsh and excessive in the circumstances. In the premises, the Appellants urged this court to allow their respective appeals, quash their conviction and set aside the sentences that were imposed on them.

During the hearing of the Appeal, the parties presented to court their respective written submission. This court also heard oral submission from Mr. Odoyo for the Appellants and Ms. Aluda for the State. Mr. Odoyo was of the view that the prosecution failed to discharge their burden of proof to the required standard beyond any reasonable doubt. He stated that the Appellants' titles were signed and approved. He asserted that PW8 who was the Land Registrar testified that he had no reasons to doubt the validity of the documents presented by the Appellants. He was of the view that the trial court improperly shifted the burden of proof to the Appellants. He submitted that the Appellants had no way of accessing the receipt books. The burden of proving that the Appellants made the payments should therefore not have been shifted to the Appellants. He asserted that the fine imposed on the Appellants was excessive in the circumstances. He therefore urged this court to allow the Appellants' appeal.

Ms. Aluda for the State did not oppose the appeal. She averred that the 1<sup>st</sup> Appellant was the proprietor of the two companies that acquired the two parcels of land. Eventually, the plots were transferred to a 3<sup>rd</sup> party. She averred that it was established from the evidence of PW1 that the land was properly allotted to the Appellants. PW3 confirmed that he generated the Deed plan for the purpose of registration. PW5 confirmed that the registration and transfer of the parcels of land were duly processed. The same was done within the confines of the law. Learned State Counsel stated that the trial court relied on the evidence of PW4 in convicting the Appellant. PW4 stated that the receipts alleged to have been issued to the Appellants were issued to another party. However, PW4 was not the one who issued the said receipts. No evidence was led to ascertain who issued the receipts from the Ministry. The prosecution also failed to avail the third parties who were issued with the receipts to adduce evidence. She averred that the trial court relied on the evidence of a single witness which had no probative value. She was of the view that if the parcels of land were not properly acquired, then the consent to transfer the same should have been denied. In the premises, she urged this court to allow the Appellants' appeal.

The facts of the case according to the prosecution are as follows. PW1 Peter Waweru Mungai, was the Acting Principal Physical Planning Assistant at the Ministry of Lands. He was tasked with ensuring that all plans prepared by the Department of Physical Planning adhered to the set standards, vetting and verifying plans by external parties and registration of approved plans. On 30<sup>th</sup> June 2008, an officer from EACC, Mr. Sambai, paid him a visit. He had a Part Development Plan (PDP) No.42.28.99/6 for Nairobi South. He instructed him to verify whether the PDP was prepared by the Ministry's Department of Physical Planning and whether the details of the plan corresponded with details in their records registry. The PDP was prepared on 15<sup>th</sup> July 1999 at a scale of 1 in 5,000. It was also signed by the Director of Physical Planning on 18<sup>th</sup> July 1999. It was for proposed residential plots to be situated in areas around Wilson Airport, University of Nairobi and Nairobi National Park. The PDP had been certified by the Records Section of the Commission of Lands on 19<sup>th</sup> February 2008.

PW1 checked the details of the stated PDP No.4.22.99.06 against the details in their official register for Nairobi South. He discovered that according to their records, the said PDP had a different preparation scale of 1 in 2500. It was prepared on 2<sup>nd</sup> June 1999. It was for proposed industrial plots. The plan was yet to be approved since the approval date had not been indicated. The original plan was however missing from their records. He testified that the details of a PDP cannot vary with those in the official register. He stated that if a plan was prepared by a private practitioner, the same had to be approved by the Ministry and entered in the official register.

PW2 Peter Nzuki Muthiwa was the Assistant Commissioner of Lands. In 1999, he was the Acting Senior Lands Officer at the Ministry of Lands in Nairobi. He was summoned to the EACC offices by the investigating officer (PW11) on 1<sup>st</sup> August 2007. PW11 showed him some letters of allotment pertaining to various properties that were allegedly signed by him. The first letter of allotment Ref. No.97831/vol.2 dated 2<sup>nd</sup> June 1999 was in favour of Mart Properties for Residential Plot No.A Langata Nairobi. The second allotment letter was Ref. No.97831/vol.3 dated 2<sup>nd</sup> June 1999 in favour of Mart Properties Ltd for Plot No.B Langata Nairobi. The third letter was Ref.No.97831/Vol.III dated 2<sup>nd</sup> June 1999 in favour of Senate Services Ltd for Plot No.C Langata Nairobi. The fourth letter of allotment was Ref. No.97831/Vol.II dated 2<sup>nd</sup> June 1999 in favour of Frab Investors. The fifth letter of allotment was for Ref. No.97831/Vol.III dated 2<sup>nd</sup> June 1999 in favour of Gerent Investments Ltd for Residential Plot No.E Langata Nairobi. The sixth allotment letter was Ref. No.97831/Vol.II dated 2<sup>nd</sup> June 1999 in favour of Kawa Falls Ltd Plot No.F Langata Nairobi. In all the said allotment letters, PW2's name appeared as the signatory. He however stated that the appended signatures were not his. He denied processing any of the said allotment letters. He stated that the allotment letters were in relation to Authority No.102749.31/DA/Vol.XXXII which was ordinarily granted by the

Commissioner of Lands after documents have been processed. He stated that he had never seen the said allotment letters in the course of his duties, nor had he interacted with any of the beneficiaries.

PW3 Gordom Odeka Ochieng was the Chief Lands Administration Officer at the Ministry of Lands in 2006. He was based at Ardhi House. On 26<sup>th</sup> June 2006, he received a letter from EACC requesting for copies of documents relating to parcels of land L.R No.26348 to 26353. In year 2000, his duties at the Ministry included *inter alia* verifying letters of allotment. After ascertaining that all details were in order, he would stamp and sign the allotment letter to confirm that the same had been verified. With regard to allotment letters (*PEX3-PEX8*), PW3 stated the same had a plan attached to each letter. The plans seemed like survey plans but did not bear any survey number. He testified that if a parcel of land is allocated before a survey is done, a part development plan ought to be attached to it. However, if the land is allocated after a survey has been done, then a land reference number is issued. In the present case, the parcels of land in question were issued prior to a survey being conducted. However, no part development plans had been prepared.

PW3 further testified that he did not sign the letters of allotment (*PEX3 to PEX8*). He stated that parcel LR. No.26353 was allocated to Kawa Falls Ltd as unsurveyed plot No.F. The title deeds was yet to be issued. He contacted the 1<sup>st</sup> Appellant who was the director of the said company. The 1<sup>st</sup> Appellant informed him that he had been allocated two parcels of land LR No.9796 through Kawa Falls Ltd and LR No.9797 through Dosama Holdings Ltd. PW3 perused the files in respect of the two parcels of land. After the allotment letter for LR No. 9797 was issued, Dosama Holdings Ltd through a letter dated 14<sup>th</sup> March 2002 signed by the 1<sup>st</sup> Appellant accepted the offer and presented a cheque No.034349. An official receipt No.F357861 was issued. The title deed for the said parcel had been processed. It was registered on 7<sup>th</sup> September 2009. The letter of acceptance by Dosama Holdings Ltd quoted a LR number yet at the time of allotment, the land was unsurveyed. The land was also alleged to have been transferred to China-Kenya Great Way on 27<sup>th</sup> March 2007, yet there was no evidence of the same in the file.

With regard to parcel LR No.9796, PW3 stated that the letter of allotment to Kawa Falls Ltd was dated 1<sup>st</sup> July 1999. It was an allocation for unsurveyed residential plot B. A part development plan attached to the allotment letter was dated 15<sup>th</sup> July 1999. Kawa Falls Ltd submitted an acceptance letter on 14<sup>th</sup> March 2002 and made a payment of Ksh.754,860/-. An official receipt No.F357880 was issued. The title deed in respect of the said plot was registered on 7<sup>th</sup> September 2006. The plot was transferred to China-Kenya Great Way Ltd. The application for consent to transfer the plot was dated 7<sup>th</sup> March 2007.

PW3 stated that on perusal of the stated two files (LR 9796 and LR 9797), he noted a number of anomalies. The two files were alleged to have been opened by Mr. Thuo who was in-charge of opening files at the Lands Records office. PW3 stated that he was familiar with Mr. Thuo's signature having worked with him for almost 10 years. The signature that appeared on the said files did not resemble Mr. Thuo's signature. He stated that the payments that were alleged to have been made in respect of the two plots were not received since the banker's cheques were not recorded in the register as was the practice. The receipts issued in respect of the said payments were not captured in the cash analysis register. Further, the receipts that were issued on 14<sup>th</sup> March 2002 were from Serial No. F011370 up to F0011827. The receipt alleged to be issued on 14<sup>th</sup> March 2002 in respect of LR No.9797 reflected Serial No.F357861. The receipt issued in respect of LR No.9796 reflected Serial No. F357880.

PW3 further stated that it was unusual that the two plots were issued with survey numbers in the absence of approval from the Director of Survey and Commissioner of Lands. Finally, he stated that if registration documents in respect of a parcel of land are signed by a commissioner and the said commissioner leaves office before the title is registered, the said documents are required to be re-typed for signature by the incoming Commissioner. In the present case, the registration documents were signed in 2002 by Commissioner Sammy Komen Mwaita and registered in 2006 by Judith M. Okungu who was the Commissioner at that time. The documents were however not retyped in 2006 as required.

PW4 Joseph K. Tarus was working as a Senior Accountant in-charge of the Lands Department at Ardhi House in 2009. On 1<sup>st</sup> December 2009, EACC officers paid him a visit at his office. They came with receipts which they wanted him to confirm whether the same were issued by the Accounts Sections at the Ministry. The first receipt Serial No. F357861 was issued to the 3<sup>rd</sup> Appellant on 14<sup>th</sup> March 2002 for Ksh.240,750/- in respect of Title No. LR No. 9797. He stated that the serial number for the said receipt matched the serial number recorded on the receipt book issued to Enoch Nyamweno on 19<sup>th</sup> September 2009. He produced the counterfoil receipt book register in evidence. However, according to the quadruplicate receipt in the receipt book, the receipt was issued to Arithi & Co. for LR No.7918/130, Isiolo.

PW4 stated that it was not possible for a serial number to be issued to two different parties. He added that all issued receipts were also recorded in the cash analysis register. According to the cash analysis register, receipt Serial No. F357861 was issued to Arithi & Co. Advocates on 23<sup>rd</sup> March 2003 for Ksh.350/-. The second receipt Serial No.F357880 was issued to 2<sup>nd</sup> Appellant on 14<sup>th</sup> March 2002 for Ksh.754,860/-. However, the quadruplicate receipt on the receipt book indicated that the receipt was issued to David Nganga Mburu on 21<sup>st</sup> March 2003 in respect of Title No. Dagoretti/Riruta/3768. The third receipt Serial No.F357876 was issued to the 2<sup>nd</sup> Appellant for Ksh.1,146,540/- in respect of Title No.UNS Residential Plot F Nairobi. However, the quadruplicate receipt and cash analysis register indicated that the said receipt was issued to Peter Simon Kariuki for Ksh.200/- in respect of Nairobi/Block 79/787 and 788. PW4 produced in evidence the quadruplicate receipts.

PW5 Fredrick Idoko Lubulellah, was a Senior Land Registrar at the Ministry. His duties included registration of various documents presented to the Land Registry. With respect to Title LR No.9796 issued to Kawa Falls Ltd (*PEX 15*) and Title L.R No.9797 issued to Dosama Holdings Ltd (*PEX16*), PW8 told the court that he registered both titles on 7<sup>th</sup> September 2006. They had been signed by the Commissioner on 24<sup>th</sup> December 2002. Both titles were transferred to China Great Way Enterprise Ltd on 27<sup>th</sup> March 2007. He testified that he registered the two transfers as well. On cross-examination, PW8 stated that he had no reason to doubt the validity of the documents presented to him with regard to the two parcels of land.

PW6 Felistas Ambasa Onyango worked as an Accountant 1 at the Ministry of Lands from year 2005 to 2010. Her duties included, *inter alia*, preparing certificates of stamp duty. She stated that in year 2005 she signed for ten books of stamp duty ranging from Serial No.69,501 to

70,000. The Counterfoil Receipt Book Register produced in evidence indicated that she received the said stamp duty receipt books. The books were kept in an open office available for use by any of the accountants in the Accounts Section. They had a stamp duty movement register where they recorded the stamp duty serial numbers that had been utilized (PEX26). PW6 testified that stamp duty Serial No. 69,951 to 70,000 were not utilized since they did not appear in the said movement register (PEX26). PW6 was shown certificates of stamp duty Serial No.69,977 (PEX12) issued to the 2<sup>nd</sup> Appellant and Serial No.49,977 (PEX27) issued to the 3<sup>rd</sup> Appellant. She stated that she could not tell who had signed the said certificates as the handwriting was not familiar to her.

PW7 Dominic Obel was a Land Surveyor at Geomatics Services Ltd. Sometime in October 2001, he received letters of allotment from Joseph Maina, who was a cartographer at Survey of Kenya. The letters of allotment were for plots marked A-F located in Langata in Nairobi County. They were all part development plans. Plot A and B were allotted to Mary Properties Ltd, Plot C was allotted to Senator Services Ltd, Plot D was allotted to Gerend Investment Ltd, Plot E was allotted to an Arab investor while Plot F was allotted to the 2<sup>nd</sup> Appellant. PW7 surveyed the said plots and prepared a survey plan (PEX28). He stated that he did not physically visit the land. He delegated to his assistant John Kinyanjui who did the actual survey. He forwarded the survey plan to the Director of Survey in Ruaraka for authentication. The Director authenticated the same via a letter dated 14<sup>th</sup> June 2002. Afterwards, the plots were allocated land reference numbers for purposes of issuance of title deeds. PW7 forwarded the deed plans of the said plots to the Commissioner of Lands. He however did not avail the said deed plans in evidence.

PW8, John Odhiambo, was the Head of Land Management at Kenya Wildlife Services (KWS). He was asked to identify a title deed belonging to Royal National Park of Kenya for parcel number LR 10758 as well as a deed plan no.75880. He explained the procedure of change of title as provided under Section 7 of the Wildlife Act. He stated that to his knowledge, no part of the said land had been transferred.

PW9, Pius Maithya, was a valuer attached to the Ethics and Anti-Corruption Commission (EACC). He produced in evidence a valuation report for property LR. No.28022 dated 9<sup>th</sup> October 2009. He received instructions to value the said property from the investigation officer (PW11). He visited the plot on 9<sup>th</sup> October 2009. The property was located to the North of the Nairobi National Park and to the south of Wilson Airport. There were several residential buildings that had been developed on the property. He valued the property at Ksh.60 million. He also conducted a search of the property at the Land Registry. The property had an encumbrance, i.e. a charge to Kenya Loan (K) Ltd. The Appellants were not registered as parties to the said charge. The registered owner was China Great Wall Enterprise Co. Ltd.

PW10, Peterson Wachira, worked as a clerical officer at Registrar of Companies office. On 6<sup>th</sup> October 2009 he received instructions from PW11 requesting for a list of directors of Dosama Holdings Ltd as well as Kawa Falls Ltd. He testified that the directors of both Dosama Holdings and Kawa Falls Ltd were David Kamunya Runo (1<sup>st</sup> Appellant) and Zipporah Wangithi Kamunyu. He produced CR 13 forms for the said companies into evidence.

PW11, Kipsang Sambai, investigated this case. He was a forensic investigator at the Ethics and Anti-corruption Commission. He was instructed to investigate the present case in relation to irregular allocation of public land near Wilson Airport (i.e. Plots A-F). Plot F was allotted to the 2<sup>nd</sup> Appellant (Kawa Falls Ltd) on 2<sup>nd</sup> June 1999. The amount due for the allotment was Kshs.1,146,540/-. The 1<sup>st</sup> Appellant was a director at the said company. The sketch plans attached to the letter of allotment seemed to have been copied from survey plan no.412/13 i.e. Folio 412 reference no.13 (PEX28) which was approved on 14<sup>th</sup> June 2002. PW11 stated a development plan ought to be approved before allocation of public land. The 2<sup>nd</sup> Appellant accepted the allotment vide a letter dated 15<sup>th</sup> November 2001. Attached to the letter was a bankers cheque for Kshs.1,146,540/- being full payment for the allotment. It was PW11's testimony that the reference number (Ref.No.97831/II) indicated on the letter of allotment was different from the reference number (Ref.No.97831/II/259) indicated on the acceptance letter. Additionally, the acceptance letter was authored two years after the letter of offer was issued, despite the 30 days deadline given on the letter offer.

PW11 further testified that he perused the file for the said parcel at the land registry. He recovered a triplicate receipt serial no. F357876 for payment of Kshs.1,146,540/- paid in by the 2<sup>nd</sup> Appellant for unsurveyed residential Plot No.F Nairobi. The said receipt was not genuine since the serial number indicated on the receipt was traced back to another receipt issued to Peter Kariithi on 21<sup>st</sup> March 2003 for payment of Kshs.200/-.

The 1<sup>st</sup> Appellant informed him that he had been allocated two parcels of land LR. No.9796 and LR. No. 9797. The allotment letter for Plot No.9796 Nairobi dated 1<sup>st</sup> July 1999 issued to Kawa Falls Ltd. The acceptance letter by the Appellant was dated 14<sup>th</sup> March 2002. The acceptance letter indicated that attached to it was a banker's cheque for Kshs.754,860/-. PW11 recovered a triplicate receipt Serial No.F357880 for the said payment from the parcel's file at the Land Registry. The receipt was issued on 14<sup>th</sup> March 2002. However, the quadruplicate receipt Serial No.F357880 retained by the lands department indicated that that serial number was issued to David Nganga Mburu for payment of Ksh.372/-. It was issued on 2<sup>nd</sup> March 2003. PW11 stated that the quadruplicate receipt was genuine. Therefore, the triplicate receipt (PEX16) was not genuine. The letter of allotment in respect of Plot LR No.9797 was issued to the 3<sup>rd</sup> Appellant on 1<sup>st</sup> July 1999. The acceptance letter was dated 14<sup>th</sup> March 2002 and the receipt issued on the same date was Serial No.F357861. However, the quadruplicate receipt at the Land Registry indicated that the said receipt was issued to Ariithi & Co. Advocates for Ksh.350/- on 23<sup>rd</sup> March 2002. PW11 further stated that the Plots LR No.9797 and LR No.9796 were later amalgamated and a new LR No.28022 was issued in the name of China Great Wall Enterprise Company Ltd. PW11 testified that the allocation of the two parcels of land to the Appellants was fraudulent. The 1<sup>st</sup> Appellant was a director in both companies (2<sup>nd</sup> and 3<sup>rd</sup> Appellants).

The 1<sup>st</sup> Appellant was put on his defence. He identified allotment letter F (No.97831/11/259) which was issued to the 2<sup>nd</sup> Appellant. He stated that the said land was allotted to the 2<sup>nd</sup> Appellant. However, the title was not issued since the allotment was cancelled. He told the court that the investigating officer failed to avail documentary evidence to establish that the said land was public land. He asserted that he has never received any communication from the relevant authorities instructing him to surrender the land allocated to his two companies (2<sup>nd</sup> and 3<sup>rd</sup> Appellants). He was of the view that none of the prosecution witnesses adduced any evidence to prove that the parcels of land in question were set aside for public use. He said that the Land Registrar (PW5) testified that the titles were lawfully registered. The prosecution also

failed to produce in court the Title Deed files and the correspondence files relating to the parcels of land in question. Duplicate and triplicate receipts for the said parcels of land were not produced in evidence either. These documents were in the custody of the Land Registry. He stated that the prosecution failed to prove that the documents uttered were false. The prosecution did not avail a document examiner to establish whether the documents were not genuine. The Appellant denied the charges against him.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). The issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the guilt of the Appellants to the required standards of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the parties to this appeal. The facts in support of the prosecution's case are rather straight forward. The 1<sup>st</sup> Appellant is a Director of two limited liability companies namely; Kawa Falls Limited and Dosama Holdings Limited. The two companies were allocated by the Commissioner of Lands parcels of land in Langata area in 1999. Kenya Wildlife Services claimed the parcels of land allocated to the two companies. However during trial, Kenya Wildlife Services was unable to establish to the required standard of proof that it owned the two parcels of land prior to the same being allocated. The trial court, correctly in the view of this court, held that the prosecution had failed to establish to the required standard of proof that the Appellants had fraudulently obtained registration of the two parcels of land. A Land Registrar who testified before court indeed confirmed that, although there were procedural issues with the issuance of the titles to the two parcels of land, the procedural issues would not invalidate the titles that were issued to the two companies.

The Appellants challenged the finding reached by the trial court to the effect that they had obtained registration by false pretending that they had paid the standard premium that was required of them before the two parcels of land were registered. The Appellants insisted that they had indeed paid the sums in question. The receipts that were issued to them was proof that they had paid the said sums of money. According to the evidence adduced, the sums of money which the Appellants were required to pay as standard premium were respectively Kshs 1,146,540/-, Kshs 754,860/-, and Kshs 240,750/-. The receipts that were produced in court were receipts No. F357876, 357880, and 357861. All these receipts, according to the prosecution, were issued in respect of other transactions at the Land Registry relating to other parcels of land.

The testimony of PW4 Joseph Kiptum Tarus, then working as a Senior Accountant in charge of Lands Department at the Ministry of Lands and Settlement was pertinent. He produced the receipt books where the particular receipts are said to have been issued. The receipt books contained quadruplicates of the receipts that were issued. The Appellants claimed that they had paid the said sums of money with banker's cheques. However, from the evidence of PW4 it was clear that the particular receipt numbers related to sums which were much lower than the ones the Appellants claimed that they paid. The quadruplicates indicated that the sums paid were respectively Kshs350, Kshs375/-, and Kshs200/-. The receipts were issued to Arithi and Company Advocates in respect of land No. 7918/130 Isiolo, to David Ng'ang'a in respect of LR No. Dagoretti/Riruta 3768 and to Simeon Kariuki in respect of LR No. Nairobi/Block 79/787 and 788. From PW4's evidence, it was clear that the receipts that the Appellants used to procure the registration of the two parcels of land, were indeed falsified.

This court cannot fault the finding reached by the trial court when it held **thus**:

**“On the strength of this evidence, it is the finding of this court that the triplicate receipts P. Exhibits 23 d, 18 and 12 are not receipts of accurate payments made to the Ministry of Lands. The Ministry disowned the said receipts and demonstrated this fact through the documents produced from its custody. These receipts were therefore not valid receipts issued at the Ministry as payment of requisite consideration that was required for the allotment. They purported to be evidence of payment of requisite consideration which they were infact not. They were thus false receipts.”**

The trial court then proceeded to find that the Appellants had uttered the said receipts in order to secure issuance of the two titles of the allotted parcels of land which they later transferred to a third party.

The Appellants were aggrieved that the trial magistrate had shifted the burden of proof when it required them to establish that they had indeed made the payments in question. In that regard, the Appellants argued that the burden of establishing any charge against them lay with the prosecution. For the trial court to purport to shift the burden of proof, in their view, amounted to breach of their constitutional right to fair trial and to be presumed innocent until proven guilty by a duly constituted court of law.

The legal position that the Appellants are trying to put forward, was given judicial interpretation in Isaac Robert Murambi Vs Attorney General and 3 others [2017]eKLR where Korir J. in a constitutional petition challenging a requirement by the court for the accused to give an explanation in respect of certain aspects of evidence that had been adduced by the prosecution. In material part of the judgment, the learned Judge held thus:

**“98. According to the petitioner the section [Section 323 of the Penal Code] invites a reversal of onus contrary to the constitutional principle of innocent until proven to the contrary. In Peter Wafula Juma case & 2 others (supra) F Gikonyo J explained that there is a difference between legal burden of proof and the evidential burden of proof. He emphasized that the legal burden of proof does not shift and referred to Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, paragraph 13 which defines it as “...the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.” The learned judge then proceeded to cite paragraph 15 of the same volume of the said treatise and concluded that “[e]vidential burden is the basis for the practice in criminal law where the trial court makes a ruling as to whether the prosecution has adduced prima facie evidence as to warrant the accused person to be placed on his defence.”**

The Court of Appeal in Okero Vs Republic [1981]eKLR held thus:

**“The position under English Law is stated in Phipson on Evidence (9<sup>th</sup> Ed) at p 38 as follows:**

**“When, however, the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a prima facie case, for then the burden is shifted to the prosecution, which has still to discharge its original onus that never shifts, ie that of establishing, on the whole case, guilt beyond a reasonable doubt.”**

**We accept that statement of the law. In Republic Vs Carr-Briant [1943] KB 607, which is one of the cases in Phipson in support of the proposition just stated (and is also cited in the commentary on Section 105 of the Indian Evidence Act in Sarkar on Evidence (4<sup>th</sup> Ed) at p 808) the court of Criminal Appeal said, at p 612;**

**“In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person ‘unless the contrary is proved, the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.”**

**Section 111 of the Evidence Act, Cap 80 is now the equivalent of Section 105 of the Indian Evidence Act.”**

In the present appeal, it was clear from the proceedings of the trial court that indeed the trial magistrate was aware of this legal requirement as regard the shifting of evidential burden of proof rather than the shifting of the legal burden of proof which is prohibited by law. The legal burden of proof always lies with the prosecution. It never shifts to an accused. However, the evidential burden of proof shifts depending on the evidence that the prosecution has adduced. If the evidence adduced by the prosecution is such as the facts are within the special knowledge of the accused, then, the least that the accused will be required to do is to give an explanation that may raise reasonable doubt as to the thrust of the prosecution’s case regarding the particular fact in issue.

In the present appeal, the prosecution adduced evidence which, *prima facie*, established that the receipts that the Appellants relied on to secure the registration of the titles were not genuine. They were forgeries. In their defence, the Appellants asserted that they had indeed paid the sums in question and were issued with official receipts by the Land Registry. Once the veracity of the receipts became an issue, it behooved the Appellants to adduce further evidence to disprove the prosecution’s case. For instance, the Appellants could have produced bank statements or copies of application for banker’s cheques which they allegedly paid to the Ministry of Lands. When the 1<sup>st</sup> Appellant was cross examined on why he did not avail bank documents to show that he had indeed purchased the banker’s cheques for the sums in questions, he was evasive. In the considered opinion of this court, the trial magistrate was within its jurisdiction to make the finding that the Appellants had failed to rebut the evidence adduced by prosecution witnesses which established to the required standard of proof beyond any reasonable doubt that the Appellants used forged receipts to procure registration of the two parcels of land. By requiring the Appellants to give an explanation, the trial court was not shifting the legal burden of proof: Rather, it required the Appellant to give an explanation in light of the evidence that had been adduced by the prosecution.

It is clear from the foregoing that the Appellants’ appeal cannot succeed. The prosecution was able to establish the charges brought against them to the required standard of proof. The Appellants’ defence was considered. It did not dent the otherwise strong, cogent, credible and corroborative evidence that was adduced by the prosecution. The sentences meted on the Appellants fitted the crime. This court will not interfere with the same.

For the above reasons, the appeal herein lacks merit and is dismissed.

**It is so ordered.**

**DATED AT NAIROBI THIS 28TH DAY OF OCTOBER 2020**

**L. KIMARU**

**JUDGE**