REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

CRIMINAL APPEAL NO. 14 OF 2018

STEPHEN OTIENO ONYANGO .....1ST APPELLANT

CARGO ROLLERS LTD ..... 2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. On 1st July 2010, Stephen Otieno Onyango (accused one), Anthony Jordan Hudson (accused 2), Leonard Karanja (accused 3) Susan Wanjiru Lee (accused 4), Cargo Rollers Ltd (accused 5) and Hellman Worldwide Logistics (accused 6) were jointly arraigned before the Nairobi Anti-Corruption Chief Magistrate's Court facing various charges ranging from acts of fraud, uttering false documents and conspiracy to defraud.

2. Specifically, and for purposes of this appeal, Stephen Otieno Onyango and Cargo Rollers Ltd (hereinafter the appellants) were jointly charged with fraudulent failure to pay taxes payable to a public body contrary to Section 45 (1) (d) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003(count I). Particulars are that, on or about the 18th August 2008, at the National Bank of Kenya in the City of Nairobi within the Nairobi area of the Republic of Kenya being the director of a clearing and forwarding company named Cargo Rollers Ltd, fraudulently, failed to pay a sum of Kshs.2,448,817/= being customs duty payable to Kenya Revenue Authority in respect of 400 cartons of sealed solar batteries imported from China by Davis and Shirtliff Ltd.

3. Count II, the 2nd, 3rd, 4th and 6th accused were charged with failure to pay taxes payable to a public body contrary to Section 45 (1) (d) as read together with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars are that, on or about the 18th August 2008 at National Bank of Kenya in the city of Nairobi within Nairobi area of the Republic of Kenya being the managing director, operations director and operations manager respectively of a freight forwarding company namely Hellman World Wide consultants Ltd and acting through a sub-contracted agent namely Cargo Rollers Ltd, fraudulently failed to pay a sum of Kshs.2,448,817 being customs duty payable to Kenya Revenue Authority in respect of 400 containers of assorted solar batteries imported from China by Davis and Shirtliff Ltd.

4. Count III, the appellants jointly faced the charge of uttering a false document contrary to Section 353 of the penal code. Particulars are that, on or about the 15th August 2018 at the Kenya Revenue Authority, customs and excise department in the city of Nairobi within Nairobi area of the Republic of Kenya, being

the director of a clearing and forwarding company named Cargo Rollers Ltd, knowingly and fraudulently used a false import declaration form (IDF) No. E6808093853 for USD 8,412 dated 12th August 2008 to lodge import entry No. 2008 Msa 1332514 into the Kenya Revenue Authority electronic Simba system, purporting to be the import declaration form that Davis and Shirtliff Ltd had applied for and availed to Hellman World Wide Consultants Ltd to clear 400 cartons of sealed solar batteries imported from China by Davis and Shirtliff.

5. Count iv, the appellants again were charged with uttering a false document contrary to Section 353 of the penal code in that, on or about 15th August 2008, at the Kenya Revenue Authority customs and excise duty in Nairobi being the director of a clearing and forwarding company named Cargo Rollers Ltd, knowingly and fraudulently used a false commercial invoice No. P10 8089 for USD 8,412 dated 13th July 2008 to lodge entry No. 2008 MSA 1332514 into the Kenya Revenue Electronic Simba system, purporting it to be the commercial invoice that Davis and Shirtliff Ltd had received from the supplier Gaston Enterprises Development Ltd of China and availed to Hellman World Wide Logistics Ltd to clear 400 cartons of sealed batteries imported from China by Davis and Shirtliff Ltd.

6. With regard to Count V, the 2nd, 3rd, 4th and 6th accused persons were also charged with uttering a false document contrary to Section 353 of the penal code. Particulars are that, on or about the 27th day of August 2008 and being the Managing Director, Operations Director and Operations Manager respectively of a freight forwarding company named Hellman World Wide Logistics Ltd knowingly and fraudulently presented a false import entry No. 2008 MSA 1315800 for Kshs 2,772,262 to Davis And LTD, purporting it to be an entry processed and passed through the electronic Simba System of Kenya Revenue Authority for the clearance of 400 cartons of sealed solar batteries imported from China by Davis and Shirtliff Ltd.

7. Count vi, the 2nd, 3rd, 4th and 6th accused persons were jointly charged with the offence of uttering a false document contrary to Section 353 of the penal code. Particulars states that, on or about the 27th day of August 2008 and being the Managing Director, Operations Director and Operations Manager respectively of a freight forwarding company named Hellman World Wide Logistics Ltd knowingly and fraudulently presented a false National Bank of Kenya Revenue Authority customs and excise collection account No. 0100******** to clear 400 cartons of sealed solar batteries imported from China by Davis and Shirtliff Ltd.

8. Count vii, the six accused persons were jointly charged with conspiracy to commit an offence of corruption or economic crime contrary to Section 47 (a) (3) as read together with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003. Particulars are that, on diverse dates in the month of August 2008 at Kenya Revenue Authority customs department in the city of Nairobi, being the Director of Cargo Rollers and Managing Director, Operations Director and Operations Manager of Hellman World Wide Logistics Ltd respectively, jointly conspired to commit the economic crime of fraudulent failing to pay customs duty payable on 400 cartons of sealed solar batteries imported from China by Davis and Shirtliff Ltd.

9. Count VIII, the six accused persons were again charged with conspiracy to defraud contrary to Section 317 of the penal code. Particulars are that, on diverse dates in the month of August 2008 at the Kenya Revenue Authority Customs department in the city of Nairobi within Nairobi area being the Director of Cargo Rollers Ltd, Operations Director and Operations Manager of Hellman World Wide Logistics Ltd respectively, jointly conspired to defraud the Kenya Revenue Authority Kshs.2,448,817/= being customs duty payable on 400 cartons of sealed solar batteries imported from China by Davis and Shirtliff Ltd.

10. After entering a plea of not guilty, prosecution called 17 witnesses and closed their case. On being placed on their defence, the accused persons opted to keep quiet and did not called any witness. The trial court however found the 1st and 5th accused persons (the appellants herein) guilty of counts 1 and 3 and convicted them. Accordingly, the 1st appellant (accused 1) was sentenced to a fine of Kshs.1,000,000/= in default serve one-year imprisonment with a mandatory sentence of the double the amount lost totalling to Kshs.4,897,634/= in default 1year imprisonment. In respect to count 3, he was sentenced to a fine of

Kshs.50,000/= in default to serve 3 months imprisonment. Sentences were to run consecutively.

11. Aggrieved by the conviction and sentence, the appellants lodged a petition of appeal dated 6th June 2018 citing 13 grounds as follows:

> **(1) The learned trial magistrate erred in law and fact by finding that the appellant was one of the Directors of the Cargo Rollers Limited.**
>
> **(2) The learned trial magistrate erred in law and fact by finding that the appellant failed to pay tax of Kshs.2,443,817.00.**
>
> **(3) The learned trial magistrate erred in law and fact by finding that Entry No. 2008MSA 1332514 was false.**
>
> **(4) The learned trial magistrate erred in law and fact by finding that the appellant misrepresented the value of the imported goods.**
>
> **(5) The learned trial magistrate erred in law and fact by finding that the appellant had no mandate to apply for an Import Declaration Form No. E0808093853.**
>
> **(6) The learned trial magistrate erred in law and fact by disbelieving the appellant's defence of alibi without any evidence of rebuttal.**
>
> **(7) The learned trial magistrate erred in law and fact by finding that Bill of Lading No. S2HAA3205 was sufficient to clear the subject goods.**
>
> **(8) The learned trial magistrate erred in fact by finding that the appellant had received all first documents from accused 6.**

12. Being the 1st appellate court, this court is obligated to re-evaluate, reconsider and re-analyse the evidence before the trial court afresh and arrive at an independent conclusion or finding taking into account that the trial court had the benefit of seeing and listening to the witnesses and assessing their demeanour. See **Odhiambo vs R Cr. appeal No. 280/2004 (2005) eKLR** where the court held that:

> **"on a first appeal, the court is mandated to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

13. Before I proceed to determine the appeal, a brief background of the evidence before the trial court would suffice. At all material times to this case, the Cargo Rollers Ltd the second appellant herein (5th accused) was registered as a clearing and forwarding firm/company while Hellman World Wide Logistics Ltd the 6th accused person was a registered freight forwarding firm. This fact was confirmed by Karen Rono (PW15) a state counsel working with the companies' registry who produced incorporation file for the 5th and 6th accused persons as P. Exhibits 31 and 32 respectively.

14. From the said registration records, it was clear that the 1st appellant (1st accused) was one of the directors to the 2nd appellant (the 5th accused) while the 2nd and 3rd accused persons were some of the Directors to the 6th accused person. The 4th accused person was identified by Dony Mutua (PW5) and Sammy Syengo Musunza (PW8), her former colleagues as the 6th accused person's operations manager and the 2nd and 3rd accused persons as its Directors.

15. The prosecution case was that, sometime during the month of March 2008, Davis and Shirtliff Ltd expressed the intention to import a consignment of 400 cartons of sealed solar batteries from Gaston

Enterprises Development Ltd of China. Subsequently, PW11 one Anthony Maina Wang'ondu the company's Supply Chain Director and PW12 David Gatende the Managing Director undertook the process. To kick start the importation exercise, PW11 raised a purchase order No. FPO3121 (PExh 16) to Gaston Enterprises Development Ltd China with the 6th accused as the clearing agent.

16. Subsequently, Gaston Enterprises acknowledged the transaction by issuing a pro forma invoice No. 10880089 worth 86,839 USD (PExh 17) to Davis and Shirtliff to facilitate a costing sheet for the transaction which was calculated by PW11 at Kshs.1,323,086/=. On 18th April 2008, Davis and Shirtliff applied for an import declaration form from Kenya Revenue Authority for which they paid Kshs.5000/= through National Bank.

17. Through their financier Standard Chartered Bank, David and Shirtliff obtained a letter of credit on 9th July 2008 guaranteeing payment of USD 86,839 to the suppliers on their behalf. Consequently, Gaston Enterprises issued a commercial invoice to the Standard Chartered Bank their financiers. A bill of lading S – ZHAA 3205 was then issued by Maersk Shipping Line on 26th June 2008 for the freight of the consignment in containers No. POM490 4256.

18. Finally, Davis and Shirtliff asked their clearance agent the 6th accused to clear the goods. The 6th accused person acknowledged the appointment and received the necessary documentation to facilitate clearance. Since the 6th accused person was not a licensed customs clearance agent with Kenya Revenue Authority, they decided to sub-contract the work to Warton Agencies a recognised licensed clearance agent. Through its Director Catherine Karimi Ndege (PW16), Warton Agencies agreed to undertake the clearance exercise and therefore took possession of the letters and documents from accused 6.

19. On 4th August 2008, PW16 lodged necessary documents with Kenya Revenue Authority Electronic Simba System which automatically calculated the tax payable at a sum of 2,767,260 vide import entry No. 2003 MSA 1315800. To confirm on how Simba System works, Julius Musyoki (PW1) Simon Muiruri Ndegwa (PW2) and Zaphaniah Orina Onchiri (PW7) all revenue officials from KRA told the court that the calculations by Simba electronic System was automatic and always accurate.

20. However, PW16 could not complete and cancelled the transaction after disagreeing with accused 6 over non-payment of the payable tax. She then returned all the documents she had received for clearance to accused 6.

21. In the meantime, Nelson Mwanzia (PW3) the 6th accused person's Chief Accountant had prepared an invoice for interim payment of Kshs.159,449/= and attached the import entry form generated by PW16. In response, PW11 made an advance payment of the amount involved to accused 6. He also drew a cheque No. 65383 dated 5th August 2008 worth Kshs.2,767,260/= in favour of the 6th accused person as duty due and payable to Kenya Revenue Authority.

22. Since Wanton Agencies had terminated their agency services, the 6th accused sub-contracted the work afresh to the 2nd appellant (Cargo Rollers Ltd the 5th accused) who agreed to clear the goods.

23. On 12th August 2008, the 5th accused commenced the importation and clearing process afresh by applying for import declaration form using a commercial invoice of USD 8,412. As a consequence, import declaration form No. EO808093853 was generated. The 5th accused then went on to lodge import entry No. 2008 MSA 13325 in which tax was automatically calculated at Kshs 323,443 on 15th August 2008. The said entry was passed by Julian Ngina Muasya (PW10) who then left the matter to the verifying officers among them PW9 one Anthony Wafula Wekesa and PW13 David Ndambuki Muli who approved the process.

24. On 18th August 2008, PW13 did a portal verification of goods and then released the goods to Davis and Shirtliff on 25th August 208. Thereafter, accused 2 sent an invoice No. 1475 dated 24th August 2008 in which the clearance payment was made based on the documents of the original duty of

Kshs.2,767,260/=.

25. It later emerged that, the 6th accused was engaged in tax evasion tactics. The matter was then escalated to EACC whereof Abdul Hamad forensic investigator (PW17) was tasked to investigate the matter. After conducting thorough investigations, it emerged that Kshs.2,447,217/= tax was not paid to Kenya Revenue Authority after the accused persons allegedly conspired to pay less tax. This was confirmed by PW4 an employee of National Bank a financial institution appointed to receive tax payments on behalf of Kenya Revenue Authority. PW6 Caroline Adede an employee of National Bank confirmed that the receipt purportedly issued and stamped using a false stamp was a forgery as no duty of Kshs.2,767,260/= was ever paid and the receipt in question dated 11th August 2008 was forged.

Trial Court's Finding

26. The appellants having not tendered any evidence in defence, the trial court proceeded to consider and analyse the evidence of the prosecution starting with the uncontroverted issues regarding accused persons directorship to their companies. The learned magistrate went on to address what he considered as a simple and straight forward matter of non-payment of Kshs.2,448,817/= and as to whether there was any conspiracy to defraud and who was liable.

27. It was the trial court's finding that the 1st and 5th accused persons deliberately concealed the original import declaration form No. E0808040 887 which had the correct duty at Kshs.2,767,260/= but instead lodged a fictitious fresh import declaration form underrating the value of the imported goods from Kshs.86,839/= to 8,412. The trial court questioned why the appellants did not use the correct Bill of Lading with the correct value of the goods and instead used fake documents which did not emanate from the importer.

28. He faulted the accused persons for raising their defence through submissions thereby blaming accused 2, 3, 4 for not giving them the correct clearance documents. The court further found that since the 6th accused person was not licensed to clear goods, they were not in a position to access the Simba electronic clearance System hence they could not be accused of fraud or tax evasion together with their Directors the 2nd, 3rd and 4th accused persons. The court therefore found that it was the appellants who uttered false documents namely; import declaration form, commercial invoice and import entry number different from the genuine ones processed by the importer.

29. The court also found that there was no proof of conspiracy although it blamed the investigating officer for concealing some evidence which eventually favoured the 6th accused person.

Appellant's submissions

30. Relying on the submissions dated 28th September 2018 and filed on 1st October 2018, Mr. Gachuba for the appellants submitted that the prosecution had not proved its case beyond reasonable doubt as there was no proof that a sum of Kshs.2,448,817/= paid to Hellman the 6th accused by Davis and Shirtliff was indeed paid to the appellants. Counsel submitted that there was no proof that the appellants were made aware of the earlier tax amount as per the pw16's tax assessment. Counsel further shifted blame to Kenya Revenue Authority whom they accused of not detecting if there was any anomaly. Mr. Gachuba submitted that an offence of uttering false document had not been proved to the required degree. To support that position, counsel relied on the decision in the case of **Joseph Mukuha Kimani vs R (1984) eKLR** where the court held that to prove the offence of uttering, the court must be satisfied that the document was forged and therefore not genuine and that the accused knew that he intended to defraud using that document.

31. Learned counsel wondered why the 6th accused was not made to explain how and where he got a receipt of Kshs.2,767,260/= submitted to the importer and that if there was any blame it was for the 6th accused who should be held responsible.

Respondent's Submissions

32. On the part of the state, M/s Aluda relied on her submissions filed on 3rd October 2018 basically reproducing the prosecution's evidence. Counsel submitted that there was sufficient evidence to prove that the 6th accused had paid the appellant their full fees and that it was the appellants who forged a receipt with Kshs.2,767,260/= and not the 6th accused. She further submitted that the appellants were aware of the bill of lading which had the value of the property but chose to under declare and or undervalue the goods knowingly with the intention to defraud.

Analysis and Determination

33. I have considered the evidence tendered before the trial court, submissions thereof and the grounds of appeal. During the hearing, Mr. Gachuba collapsed the grounds of appeal into two issues:

> **(a) Whether the prosecution proved count I against the appellants beyond reasonable doubt.**
>
> **(b) Whether the prosecution proved Count III against the appellants beyond reasonable doubt.**

Whether prosecution proved Count 1 beyond reasonable doubt.

34. The appellants were convicted of Count I and III and acquitted of the rest of the counts. Count I refers to fraudulent failure to pay taxes payable to a public body contrary to Section 45 (1) as read together with Section 48 of the ACECA. Section 45 refers to protection of public property and revenue. Sub-Section one provides – a person is guilty of an offence if the person fraudulently or otherwise unlawfully –

> **(a) acquires public property or public service or benefit.**
>
> **(b) .....**
>
> **(c) .....**
>
> **(d) fails to pay any taxes or any fees, or levies or charges payable to any public body or effects or obtains any exemption, remission, reduction, abatement from payment of any such taxes, fees, levies or charges.**

35. In the instant case, it was the duty of the prosecution to prove that it was the appellants who failed to pay duty amounting to Kshs.2,448,817/= which was public property due to Kenya Revenue Authority. The onus to discharge the burden of proof always lies and constantly remains throughout the trial with the prosecution **(See Peter Mwangi Kariuki vs R (2015) eKLR)**.

36. However, it has fully been appreciated in a number of judicial precedents that proof of a case beyond reasonable doubt is not equivalent to certainty at 100% degree. Instead, the yard stick is that it must carry a high degree of probability. This position was pronounced by Lord Denning in the case of **Miller vs Ministry of Pensions (1947) Z ALL ER 372** where the court addressed what constitutes reasonable doubt as follows:

> **"that degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of** a **doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'Of course, it is probable but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice".**

37. It is incumbent upon the prosecution to prove that the appellants did not pay tax through fraudulent means. As correctly stated by the trial magistrate, there is no dispute that the 1st appellant was one of the Directors of the 5th appellant. It is the prosecution's case that sometime in March 2008, a company known as Davis and Shirtliff wanted to import 400 sealed solar batteries from Gaston Enterprises China.

38. To carry out the transaction, they raised a purchase order No. PP 03121 to the supplier. The supplier acknowledged the request vide a proforma invoice No. 1080081 (PExh 17) showing the value of the consignment at USD 86,839 being the production and freight charges. This proforma was used to prepare costing sheet which was calculated by PW11 Davis and Shirtliff supplies chain Director at Ksh.1,373,086/=.

39. Consequently, a commercial invoice was issued by the supplier to the financiers Standard Chartered Bank and a bill of lading No. ZHAA 3205 issued reflecting 400 batteries sealed in container No. POM4904256. To assist in clearing, Davis and Shirtliff requested the 6th accused to clear the goods. Since the 6th accused did not have clearance license, they sub-contracted Warton Agencies who through their Director PW16 received all documents for clearance from them. On 4th August 2008, Kenya Revenue Authority Simba Electronic System calculated the tax payable at Kshs.2,767,260/=. PW16 lodged an import entry No. 2008 MSA 1315800 which she later cancelled due to a dispute with accused 6 over non- payment of tax and their fees. PW16 allegedly returned all documents to pw6 but after she (PW16) had submitted an invoice of Kshs.159,449/= and attached an import entry form she had generated.

40. Based on this documentation, Davis and Shirtliff remitted the required tax to accused 6 vide cheque No. 65383 dated 5th August 2008. Later, accused 6 sub-contracted the 5th accused (appellant) who started the process afresh by applying for import declaration form entry commercial invoice account No. USD 8,412 on 12th August 2008. Based on this declaration, import declaration form No. EO 808093 853 was issued. Accused 5 then proceeded to lodge import entry No. 2008 MSA 133 251 in which tax was calculated at Kshs.323,443/= on 15th June 2008 hence the appellants paid that amount as tax.

41. It is at this point that the fraud started. What was the actual tax payable? There is no dispute that Davis and Shirtliff did pay the tax assessed at Kshs.2,767,260 to the 6th accused who did the clearance work through another company as they did not have a clearance licence. Why would the same Simba tax assessment electronic System calculate and generate two different taxes for the same goods? It is obvious that the appellants fed the Simba System with an undervalued value of the goods imported by quoting US dollars 8,412 instead of the actual value of USD 86,839 as per the bill of lading No. SZHAA 3205 which was issued by Maersk Shipping Line and a commercial invoice issued by the supplier.

42. According to the evidence of PW11 and PW12 their documents were clear that their goods were worth 86,839 inclusive of tax. Where did the appellants get the figure of 8,412 yet the bill of lading and commercial invoice as the original documents used for clearance by PW16 were showing a sum of 86,839? There is no way the appellant would have started the clearance process without the original documents which included the bill of lading and commercial invoice and import declaration form No. EO 804040887 which were used by PW16 to generate the entry No. 2008 MSA B15800.

43. How the appellants managed to go about the other way round to secure a tax calculation much less than what was originally assessed by PW16 is something which only Kenya Revenue Authority officials and the appellants could have answers and explain. I do not imagine a situation where a Simba Electronic Tax assessment system can be lied to or cheated without a verification method by KRA staff. PW9 and 13 who verified the goods and documents as KRA officials stated that all the documents were okay and they could not detect any anomaly. What does verification entail? Is it that Kenya Revenue Authority had no system of verifying the actual cost of imported goods? It is inconceivable.

44. I do not think PW6 gave clearance documents different from what they had given originally to PW16 who processed clearance documents generating duty payable at Kshs.2,767,260/=. The claim by the appellants in the original submissions before the trial court that commercial invoice dated 13th July 2008

from the 6th accused is what they relied on to process tax calculation cannot stand. Evidence before a trial court is not given through submissions. Such allegation cannot be tested as it is evidence from the bar and such documents quoted by way of submissions cannot be classified as evidence for determination of a case.

45. In fact, it was accused 2 who raised the red flag as how the 1st appellant was engaging in tax evasion through fraud. It is not clear how the appellants managed to have tax assessed without the original documents which would have given the same tax assessment as it happened when PW16 had the same assessment correctly done. In the absence of the original bill of lading (MF1-9), commercial invoice No. P1080089 (MFI-13) and letter of credit (MFI.20) both showing the worthiness of the consignment, then, it was not possible to have tax assessed. Why would the appellant generate a fresh import declaration form while fully aware from the bill of lading that there was one?

46. The appellants want that this court to believe that they were given wrong documents? Why would the 6th accused give wrong documents yet they gave proper documents to PW16 who had tax assessed correctly at Kshs.2,767,260/=. I am not convinced with the appellants' explanation.

47. Why would the appellants process a fresh letter of importation yet there was one indicated in the bill of lading? Who processed a receipt of Kshs.2,767,260/= with National Bank? Why wouldn.t the appellants use the original bill of lading and commercial invoice which clearly reflected the cost of importation and freight charges? National Bank official PW6 disowned the purportedly issued receipt by National Bank for a sum Kshs 2,767,260/= through a cheque issued by one Kinoti. She disowned the receipt as a forgery and stated that it was not generated from their office. She also stated that the bank stamp used to authenticate the receipt was not recognized by the bank.

48. According to PW11 Anthony Mwangi's testimony at page 77 of the proceedings, it was Hellman the 6th accused who requested for Kshs.2,767,260/= as duty for clearance purposes. He stated that on 27th August 2008 they (Davis & Shirtliff) received an invoice No. 1475 from the 6th accused person. They were also given a payment receipt to Kenya Revenue Authority through National Bank for a sum of Kshs.2,767,260/=. The receipt was passed over to them by the 6th accused person.

49. The witness disowned the import declaration (MFI.1) eventually used to clear the goods. He only recognised their official import declaration form (MFI.14 (PExh.14).

50. It is not in dispute that the sum of Kshs.2,767,260/= duty was not paid. It is also admitted that only Kshs.373,443/= was paid by the appellants as duty far below the official tax. It is also not in dispute that the receipt from National Bank for Kshs.2,767,260/= was forged. How did the 6th accused get the National Bank receipt for Kshs.2,767,260/= to pass over to Davies and Shirtliff? PW16 at Page 97 and 98 of the proceedings stated that:

> **"taxes due were 2.7 million. Hellman requested to pay the taxes for them as they had no money at the moment. Hellman requested him to take back the documents when he could not raise the taxes for payment. I requested for cancellation after 2 to 3 weeks."**

51. From PW16's evidence it would appear that the 6th accused was at some point unable to raise the tax payable despite receiving the money from his client Davis and Shirtliff. PW11 stated that they were not aware that the 6th accused did not have a license when they took the clearance business.

52. From the chain of events and considering that all the accused persons opted to keep quiet in their defence some questions were not answered. The secret remained with the 6th accused person and the appellants.

53. According to the investigating officer, the Kshs.2,767,260/= cheque was credited to the 6th accused person's account and that later a sum of 4.1 million was transferred by the 4th accused to 5th accused's

(appellant's) account which they admitted in their submissions but claimed it may have been for other purposes. Accused 6 claimed to have used the clearance documents given by the appellants among them the receipts for Kshs.2,767,260/= (PExh.4) and import entry marked Ex.3.

54. I do agree with the trial court that, the generation of a fresh import declaration form No. E0808093853 instead of using the original import declaration form No. E804040587 and commercial invoice dated 1st July 2008 by the importer was calculated at paying less tax thus defrauding the government of tax. There was nothing to show that the appellants received the fake import declaration form and commercial invoice from the 6th accused person. All genuine documents were with the 6th accused and even the importer hence it is not believable that the appellants would ignore the importer for clarification in case there was doubt considering that the bill of lading had an already existing import declaration form showing the actual value of goods. It was not necessary to have another one.

55. Having found that the declaration form used by the appellants to clear the goods was not authentic, the only logical inference or conclusion to draw is that, it must have been generated by the clearance agents in this case the appellants. In the same vein, there is a reasonable presumption that the person who lodged the fake papers for tax payment must have submitted a fake National Bank receipt reflecting a sum of Kshs.2,767,260/= as duty paid to justify expenditure of the same to Davis and Shirtliff.

56. As I said, the evidence of the prosecution was not shaken considering that no other version of evidence was given in defence to challenge the prosecution case. Accordingly, it is my finding that the prosecution fully and properly discharged its burden of proof and the conviction in respect of count I is upheld.

Whether the appellant uttered a false document

57. The appellants are accused of submitting a false import declaration form (IDF) No. E0808093853 for USD 8,412 dated 12th August 2008.

58. For the offence of uttering a false document to stand, the prosecution must prove that the document in question was false (forged document), that the accused knew it was false and uttered it with the intention to defraud. **See Joseph Mukuha Kimani vs R Cr. Appeal No. 76/83 (1984) eKLR**).

59. In the case of **Kilee vs R (1967) EA 713** quoted by the appellant, the court stated that, a false document must lie about itself and not about the maker. The prosecution is duty bound to prove that the uttered document was actually made by the person uttering it knowing that it was not genuine and that it was intended to defraud somebody. In the case of **R vs Gambling (1974) 3 ALL ER 479**, the court stated that:

> **"forgery is the making of a false document in order that it may be used as genuine. This definition involves two considerations; first, that the relevant document should be false, and secondly, that it might be used as genuine".**

60. There is no dispute that the import declaration form was generated and submitted to Kenya Revenue Authority by the appellants. It is not controverted that it is the said form that gave rise to a false value of the imported goods at 8,412 instead of 86,839 as per the original import declaration form.

61. As a consequence of this declaration form, the correct tax was not paid. The question as to whether the false document was intended to defraud is obvious. That the amount paid as tax was Kshs.323,443/= down from Kshs.2,767,260/= is a clear indication that the person who uttered the same had the intention of defrauding the government of the payable tax.

62. Having held that there is every reason to believe beyond reasonable doubt that the appellants were aware of an original import declaration as evidenced in the bill of lading, they had no business generating a second document showing a lower value of the goods due for importation. Nobody would stand to benefit by uttering the said document other than the utterer himself in this case the appellants. There was

no evidence to connect the rest of the accused persons to the acts of forgery or uttering the documents.

63. It is unfortunate that none of the accused persons gave evidence to shade light on engagements or the nature of contract between a licensed and non-licensed clearing agent (the appellants). Or, what happens where a non-licensed clearing agent engages a licensed agent and how the agreement for such undertaking is entered or executed and whether the documents passed on to the person or agent to clear the goods are recorded and the agreement signed. They however decided to keep quiet and kept the truth to themselves.

64. Nevertheless, I am satisfied from the chain of events and the circumstances surrounding this case that, a guilty finger properly pointed at the appellants. To that extent, it is my conviction that the importation declaration form submitted by the appellants to facilitate clearance of goods was forged and the same was falsely uttered purporting it to be a genuine document.

65. Accordingly, I do not find the appeal merited and the same is dismissed, conviction upheld and the sentence which I find to be lawful confirmed.

Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF AUGUST 2019

J.N. ONYIEGO

JUDGE