**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ANTI- CORRUPTION CRIMINAL APPEAL NO. 5 OF 2018**

***(CONSOLIDATED WITH ACEC CRIMINAL APPEAL NO 6 OF 2018)***

**BONIFACE OKEROSI MISERA ..... 1ST APPELLANT**

**CEPHAS KAMANDE MWAURA ..... 2ND APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal arising from the Judgment in C. M's Nairobi ACC 44 of 2010 delivered by Felix Kombo SPM on 23rd March 2018).***

**JUDGMENT**

1. **Boniface Okerosi Misera** "the 1st appellant" and **Cephas Kamande Mwaura** "the 2nd appellant" were jointly charged with two others before the Magistrate's Court Anti Corruption Court Nairobi with various offences under the Anti Corruption & Economic Crimes act "ACECA". The charges in respect of the appellants were as follows:

**COUNT 1**

**Conspiracy to commit an offence of corruption contrary to section 47A(3) as read with section 48 of the Anti Corruption and Economic Crimes Act, No. 3 of 2003.**

The particulars being that the appellants on diverse dates between December, 2008 and April, 2009 in Nairobi within Nairobi Province conspired together to commit an offence of corruption with others before this court by acquiring the sum of Kenya shillings two hundred and eighty three million, two hundred thousand (Kshs.283,200,000/-) from Ministry of Local Government purporting it to be the purchase price payable by the city Council of Nairobi for L.R. Number 14759/2.

**ALTERNATIVE COUNT**

**Conspiracy to defraud the public contrary to section 317 of the Penal Code.**

The particulars being that the appellants on or about December, 2008 and April 2009 in Nairobi within Nairobi Province conspired together with others before the court with intent to defraud the public, by acquiring the sum of Kenya shillings, two hundred and eighty three million, two hundred thousand (283,200,000/-) from the Ministry of Local Government purporting it to be the purchase price payable by the City Council of Nairobi for L.R. number 14759/2.

**COUNT V**

**Fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48 of Anti Corruption and Economic Crimes Act, No. 3 of 2003.**

The particulars being that the 1st appellant on or about 24th February, 2009 in Nairobi within Nairobi Province fraudulently acquired from the City Council of Nairobi, public property to wit the sum of Kenya shillings ten million (Kshs 10,000,000/-)

**COUNT VI**

**Fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48 of Anti Corruption and Economic Crimes Act, No. 3 of 2003.**

The particulars being that the 2nd appellant on or about 16th February, 2009 in Nairobi within Nairobi Province fraudulently acquired public property from the City Council of Nairobi to wit the sum of Kenya shillings, nine million, three hundred thousand (Kshs 9,300,000/-)

2. The matter proceeded to full hearing and the appellants were acquitted on the 1st count under section 210 Criminal Procedure Code (CPC) but convicted on the 5th and 6th counts. The rest of the accused were acquitted on all counts under section 210 CPC. The 1st appellant was sentenced to two(2) years imprisonment and fined Kshs 40 million in default one year imprisonment. The 2nd appellant was also sentenced to two(2) years imprisonment and fined Kshs 37,200,000/- in default one year imprisonment.

3. Being aggrieved they each filed an appeal (Nos. 5 of 2018 and 6 of 2018) and the same were consolidated into ACEC Criminal Appeal no 5 of 2018. The grounds of appeal as filed in the supplementary appeal dated 3rd April 2018 and filed on 16th April 2018 are as follows:

*1. The trial court erred in law by convicting the appellants on the basis of a defective charge sheet that was also duplex.*

*2. The trial court erred in law and fact by acquitting the 1st and 2nd accused persons entirely and convicting the appellants on similar circumstances.*

*3. The trial court misdirected itself as to the full impact of section 45(1)(a) and 48 of the ACECA Act taking into account that the trial court did not have the benefit of the demeanor of witnesses.*

*4. The trial court misdirected itself and applied wrong legal principles to the* prejudice of the appellants.

*5. The trial court failed to appreciate that there were material contradictions and inconsistencies in the testimony that ought to be resolved in favour of the appellants.*

*6. The trial court failed to appreciate that the charges were never proved beyond reasonable doubt.*

*7. The trial court erred in law and fact by failing to appreciate that the conviction was based on suspicion which should never be the basis of conviction.*

*8. The trial court erred in law by failing to appreciate that the constitutional rights of the appellants under the preamble, article 10, 25 (c), 50(1)(2) 159 of the Constitution were violated.*

*9. The court failed to appreciate that the critical witnesses were never called to testify to the prejudice of the appellants.*

*10. The circumstantial evidence relied on to convict was disjointed and of the weakest point to the prejudice of the appellants.*

*11. The trial court erred in law by putting a lot of emphasis on PW14 and PW21 whose evidence was not credible as they were accomplices to the prejudice of the appellants.*

*12. The trial court erred in law by holding that the 3rd accused received public money from Nairobi City County when there was no evidence to support this theory.*

*13. The trial court erred in law by holding that the 4th accused obtained from City County of Nairobi 9,300,000/- fraudulently without evidence to support this theory.*

*14. The trial court erred in law and fact by failing to take into account the plausible defence given by the appellants.*

*15. The trial court misdirected itself by imposing a sentence that contravenes the law.*

*16. The trial court failed to appreciate the sentence it imposed violated the Constitutional principles of double jeopardy.*

*17. The trial court erred in law by failing to appreciate that the sentences imposed contravenes article 50(2)(p)(q) of the Constitution and section 28, 35, 36 & 37 of the Penal Code.*

18. *The superior court and trial court erred in law b*y failing to *appreciate the full import and implications of section 200 of the Criminal Procedure Code to the prejudice of the appellants.*

*19. The trial court failed to appreciate that the appellants were materially prejudiced within the meaning of section 200(4) of the Criminal Procedure Code.*

*20. The trial court erred in law by shifting the burden of proof to the appellants contrary to the law.*

*21. The trial court erred in law by proceeding on the premise that*

*The doctrine of recent possession applied to the appellants which assumption caused a miscarriage of justice.*

*22. The trial court relied on the evidence of PW4, PW14 and PW21 to convict the appellants yet their testimony violated article 50(4) of the Constitution.*

*23. The trial court erred in law and fact by finding the appellants guilty of corruption yet the court had cleared the offences.*

*(i) Conspiracy*

*(ii) Corruption*

*(iii) Collusion. It was wrong to convict on charges that were spent.*

*24. Evidence of PW 14 required corroboration, it was wrong to convict on the basis of evidence that required corroboration but was never corroborated.*

4. The prosecution presented a total of 22 witnesses to establish their case. A summary of the prosecution case is that sometime in the year 1998, there was need for purchase of cemetery land, since the Lang'ata cemetery was getting full. The Ministry of Health was notified. It was only in 2007 that the process of acquiring the cemetery land spearheaded by the (N.C.C) started.

5. **PW9 Peter Mburu Kibinda** was a former director for city planning NCC having left the Council in March 2010. He testified that he had joined the City Council in 1978 as a training valuer and became a planner in 1979. He said that in 2007 the Nairobi City Council wanted to acquire land for the cemetery. He was one of the Committee members and his role was advisory. A task force was formed comprising of :

Director of Legal affairs – Mary Ngethe

Director of procurement - Kanyi Nyamuna

Director of Planning & others

Ministry of health – Director Dr Nguku

6. An expression of interest which laid down the criteria was put in the press. They got a few responses, which were vetted and found unsuitable. Still confining themselves to the Nairobi area they did a second expression of interest but again failed to get a seller. In their 3rd attempt they extended the expression to anyone with suitable land to apply to the council and a number of people applied.

7. The applications were to be evaluated by an Evaluation Committee (EC) which had been formed. PW9 was represented by his deputy **Patrick Tom Odongo** (PW4), who reported to him on regular basis about the progress. It was PW4's evidence that he is a physical planner, and their department dealt with planning for use of land; the department gives advice on matters of location of site and mode of acquisition of land among others. In respect to the subject herein he was appointed to participate in the tender opening evaluation committee.

8. On 9th October 2008 the bids were opened in the presence of all committee members, and representatives of eight(8) bidders, while four(4) were not represented . Upon opening they looked at the bids and the evaluation indicators set down e.g survey record, ownership documents, official searches etc. Bid documents were produced as **(EXB4).** He testified that the mandatory requirements were the location and suitability for the purpose. The committee however placed a lot of weight on the documents of ownership and survey plans than the mandatory requirements.

9. He therefore had issues with the tender documents and he raised this in the meeting of 14th October 2008 which was their 2nd meeting **(EXB 5).** He also had a problem with **EXB5** which he said did not contain all the minutes of the meeting of 14th October 2008

10. It was his further evidence that recommendations should not have been made as reflected in **EXB5** since no site visits had been done. On 11th November 2008 he did a memo **(EXB8**) protesting the way things were being done, as no recommendations would be done without the 2nd phase of the evaluation. The memo **(EXB16)** was addressed and delivered to the EC Chair (M/s Ngethe) vide a delivery report **EXB15**. The Memo was copied to other people. He again raised further concerns through a memo to the Town clerk dated 19th December 2008, (**EXB16).** There was never any response to this and the award was eventually made by the tender committee (TC).

11. The award was made in favour of **Naen Rech Limited,** which was not the registered owner. The registered owner of the suit property L.R. 14759 was **Henry Musyoki Kilonzi**. He testified in this matter as PW3. His evidence is that through Alfonse Mutinda advocates he sold 120 acres out of 141 acres in parcel No. L.R. 14749 to **Naen Rech Limited** and not N.C.C. The purchase price was Kshs 110,000,000 and not Kshs 283,000,000/-.

12. Some of the persons introduced to him by Mr. Mutinda were Mr. Chege and Mr Mwaura (who he identified in court as the 2nd appellant) who were representatives of Naen Rech Limited. He identified the signature on the sale agreement with Naen Rech Ltd **(EXB11).** He denied having signed the alleged agreement between him and N.C.C **(EXB12).** He denied having dealt with anybody at N.C.C over this matter. He also denied appointing Naen Rech Ltd as his agent for purposes of sale of his land. He therefore disowned the letter by Mr. Alfonce Mutinda

advocate written to the Town clerk N.C.C and dated 7th October 2008 (**EXB13)** since he never gave him such instructions.

13. He denied signing the transfer document **(EXB14**) to N.C.C. He said he paid Mr. A. Mutinda Kshs 2,000,000/- as legal fees which he deducted from the purchase price. He also denied being a director in Naen Rech Ltd as shown on **EXB 14.**

14. **PW6 Anthony Mathenge Ithuhi** is a senior deputy commissioner of Lands and the Chief adviser on evaluation matters. He is in fact the chief valuer in the Ministry of Lands. He referred to a letter dated 7th August 2008 from City hall regarding purchase of land. He said he became aware of it on 22nd September 2008. The letter was done by N.W. Otindo requesting for valuation services for a parcel of land in Mavoko. A copy of the title deed and deed plan **(EXB17 a & b)** were annexed.

15. No action was taken until September 2008 when he asked M/s Wanjohi to call City hall to find out if they were still in need of the valuation. M/S Wanjohi called M/s Ngethe (PW21) of City hall and she was told they were no longer interested. He advised M/S Wanjohi to write back to City hall and capture that conversation. The said letter was produced as **EXB 18.**

16. Another letter dated 4th November 2008 (**EXB 19**) written by M.N.Ngethe director legal affairs at N.C.C was received by PW6. The contents are the same as those of the earlier letter dated 7th August 2008. He did a reply asking for certain requirements (**EXB20)** and one Julius Ngasu who had brought **EXB19** took back the response. He proceeded on leave and nothing was ever done. In January 2009 when he reported back his eyes caught an item in the newspaper about the cemetery land having been bought.

17. Later in March 2009 the office received communication seeking their comments on a valuation report purportedly done by them in respect to the cemetery land. The letters were from Kenya National Audit, CID and KACC. In their response **(EXB22)** they said the valuation report ref no 156708 was a forgery. The valuation report **(EXB6)** is dated 10th November 2008 whereas PW6 received the City hall's letter dated 4th November 2008 on 13th November 2008. There is therefore a disconnect in the chain of events. He said his office did not do any valuation report for N.C.C. The purported signatory to **EXB6** (Mr. A. Otieno) was not a staff in their division. **EXB6** put the value of the suit property at Kshs 325,150,000/-.

18. **PW17 Edward Omoti** is an advocate of the High Court of Kenya practicing in the name and style of E.N. Omolo & Co advocates. He testified that he was in the panel of external advocates for the N.C.C. He was instructed by the said council to represent it in the purchase of the suit property title no. L.R. 14759. Attached to it was the notification of award dated 13th November 2008 to Naen Reck Ltd, **(EXB45 a & b).** He got a certified copy of search **(EXB46)** and eventually prepared a sale agreement. He confirmed that the land was in the name of Henry Musyoki Kilonzi. He gave the purchase price as Kshs 283,200,000/-.

19. The amount was to be deposited in a joint account pending completion of the transaction. The advocates were Odera Osiemo advocates, P.C. Onduso advocates and Alfonse Mutinda advocates (for seller) while the buyers advocates were E.N. Omoti. He sent the sale agreement to the sellers lawyers and it was signed. It was also signed by the Mayor Geoffrey Majiwa and Deputy Town clerk Nelson Otindo**(EXB12).** Thereafter the purchase price was deposited with his firm in two cheques. The first one forwarded was for Kshs 175,000,000 ( **EXB47 & 47a)**, while the second one forwarded was for Kshs 108,000,000/- **(EXB48 & 48a).**

20. A transfer was done and the new parcel became 14759/2. A grant No 115561 was issued upon receipt of the original title **(EXB50)** from Mutinda advocates. On 11th February 2009 he forwarded a bankers cheque for Kshs 281,300,000/- NO 030300 in favour of Odero Osiemo & co advocates, P.C. Onduso & co advocates and Alphonse Mutinda & co advocates **(EXB51& 51A)**. He explained that Kshs 1.7 Million had been collected by the vendors lawyers on a professional undertaking while Kshs 200,000/- was not paid to them by the buyers. He was paid Kshs 2,030,000/- as his fees and the stamp duty of Kshs 5,664,000 was paid by the buyers.

21. **PW7 Pius Nyange Maithya** a valuer by profession and working with the then KACC did a valuation of the suit property and placed its value at Kshs 30,000,000/- 39,000,000/- saying that this was agricultural land. He came to this conclusion after carrying out various tests. He produced his report, with annextures as **EXB 23.**

22. **PW 20 Antiphas Nyanjwa** is the document examiner who examined various documents presented to him by the investigating officer. His evidence was that when he examined the specimen and known signatures of **PW3 Henry Musyoka Kilonzo** and what appeared in the questioned document **(EXB 67)** he found them not to be in agreement.

23. **PW 21 Mary Ngechi Ngethe** is an advocate of the High Court of Kenya and was the director legal affairs at N.C.C. She chaired the EC for the purchase of the suit property. She confirmed that the award went to Naen Rech Ltd after the EC made a recommendation to the TC.

24. This witness was not able to answer a few crucial questions given that she is an accused person in a related matter. She said she knew both appellants but did not know whether the 2nd appellant played any role in the said transaction. In respect to the 1st appellant she said he worked at the Ministry of Local government but had no role in the tendering process.

25. **PW10 Samuel Kariuki Mungai** from Bank of Africa Nairobi branch confirmed that an account No 01019110006 was opened at their branch on 11th February 2009 in the name of **Mutinda, Onduso & Osiemo & Co Advocates.** The application was made by Mr. Alfonse Munene Mutinda, Paul Chapia Onduso and David Odero Osiemo who were also the signatories. The account was active between 12th February 2009-16th February 2009. The significant action on it was the deposit of cheque No. 0030300 for Kshs 281,300,000/-. The 2nd transaction was Real Time Gross Service (RTGS) swift transfer of Kshs 117,000,000/- to National Bank of Kenya Harambee avenue branch with no account given.

26. He gave several other transactions of transfers to various Law firms but of relevance to this appeal is:

(i) Kshs 9,300,000/- in favour of Cephas Kamande Mwaura (2nd appellant) to account No. 003010037691 – Stanbic Bank on 16th February 2009 (**EXB30**). The account which had been opened on 11th Feb 2009 was finaly closed on 18th March 2009.

27. **PW11 Joseph Muchemi Mbuiki** from Stanbic Bank confirmed that Cephas Kamande Mwaura (2nd appellant) had an active account with the said bank. It was account no. 0010037691. Wired to that account on 17th February 2009 was Kshs 9,300,000/- from Bank of Africa.

28. **PW12 Majorie Muthoni Nyanga** worked with National bank of Kenya. She confirmed that Odero Osiemo & Co advocates had opened a current account No. 0102009945900 with the said bank. On 23rd February 2009 there was a debit of Kshs 3,800,000 through a personal cheque to be paid to several accounts. The account was eventually closed.

**PW14 Peterson Onyiengo Gichana** testified that the 1st appellant is his nephew and good friend. During the first week of February 2009 he was called by the 1st appellant who told him he had done some transaction and was expecting payment. He was therefore requesting if that money could be paid into **(PW14's)** account.

29. The witness gave him his personal account No 1001621 Barclays Bank of Kenya Plaza Premier banking. He didn't know what the transaction was about or the cash involved but he knew the amount was substantial.

30. The money Kshs. 10,000,000/- came into the account on 23rd February 2009 and the 1st appellant called him and asked him to withdraw the money the next day. He met him and was able to withdraw Kshs 5,000,000/- at Barclays Bank Kenya Plaza which he gave to him. The 1st appellant had come with a friend of his called Chabera, whom he gave the cash. The next day they again met at Barclays Bank Kenya Plaza for the final withdrawal. The manager referred them to another branch in Westgate as the float was not sufficient at the said branch.

31. He was able to withdraw Kshs 5,000,000/- by cheque while in a room.Chabera had carried a big bag for carrying the cash as directed by the 1st appellant the previous day. The money was carried away after PW14 had been given Kshs 100,000/- as his lunch by the 1st appellant. In October 2009 he was called by the investigating officer (PW22) and asked to shade light on the Kshs 10,000,000/- transaction. He learnt from the bank that the money was from Odero Osiemo advocate whom he did not know. The 1st appellant had explained to him that since he works for the Government such an amount of money in his account would attract attention and suspicion and that is why he used PW14's bank account to receive the money.

32. **PW22 Lwanga Taabu** was the investigating officer. He took the court through all that he gathered as evidence during the investigations as presented by the witnesses PW1-PW21. He referred to several bank transactions and money transfers by Odero Osiemo and Co advocates on 23rd February 2009. One was transfer of Kshs 10,000,000/- in favour of Peterson Gichana **(PW14)** at Barclays Bank Kenya Plaza **EXB 96(h)**. All this money had originated from Bank of Africa. Another beneficiary was Cephas Kamande Mwaura (2nd appellant) who received Kshs 9,300,000/- **EXB114.**

33. He came to the following conclusions

(i) Naem Rech had no land to sell and so was not eligible to tender.

(ii) The tender process was flawed. No bidder qualified and Naem Rech was irregularly awarded the tender

(iii) The valuation report of Kshs 325,150,000/- which informed the tender award decision did not originate from the valuation department of the Ministry of lands.

(iv) The suit land was valued at Kshs 30,000,000/- by the Commissioner's valuers yet it had been sold for Kshs 283,200,000 causing a loss of Kshs 253,000,000.

(v) PW3 was only paid Kshs 110,000,000/- while the balance of Kshs 173,000,000/- was shared out to various parties. He gave out some details on how the money changed hands.

34. When placed on their defence the appellants elected to make sworn statements of defence. The 1st appellant filed a written statement which was adopted on oath and he was cross examined on it. In his statement he stated how he had worked well in various Ministries with a very clean record. Before his interdiction he worked with the defunct Ministry of Local Government. He wondered how he came to be connected with this matter. He denied that PW14 was his relative. He went further to explain how him and PW14 came to know each other in early 2000.

35. He further stated that he had known PW14 as a peddler of sorts who should not be believed by the court. There are incidents when they collided when PW114 wanted to get into his way of doing things correctly. He also took issue with the investigating officer (PW22) for not carrying out his work diligently. He stated that he had collided with PW22 over parking space in 2009 at the Ministry of Education.

36. The 2nd appellant testified that he is a land Surveyor by profession, and runs a firm known as Geo-Trip Services though he is not licensed. He was introduced to PW3 by his lawyer Alfonce Mutinda. PW3 had land for sale and wanted a buyer. He was to do the survey or get a buyer on a commission which is legitimate. He did the survey work given to him by PW3. He admitted being the Mwaura referred to by PW3 in his evidence but denied representing the Naen Rech Ltd or participating in the agreement between PW3 and Naen Rech Ltd. He further stated that Mr. Chege of Naen Rech Ltd had also told him about the advertisement and that he was looking for land to buy. He referred Mr. Chege to Mr. Alfonce Mutinda.

37. He also stated that he was to receive two payments:

(i) For survey work

(ii) Commission for linking the seller and buyer

He was paid by Mr. Mutinda the sum of Kshs 9,300,000 /-which was for survey work. He did not pursue the commission as he had been given the survey work.

38. When the appeal came for hearing Mr Ondieki for the appellants submitted that the case herein was a mistrial. He referred to the record where the 1st appellant gave a written statement of defence. He argued that this was a procedure that was unheard of and it rendered the whole process a nullity since article 2(4) of the Constitution and section 211 CPC were not complied with. He contended that the trial court violated Article 50(2)(i)(j)(k) and (l) by allowing the 1st appellant to produce incriminating statements. Also violated were articles 10, 25 and 50(4), he said.

39. Counsel told the court that count 5 and count 6 were defective as there was no evidence to support them. Further that the evidence showed that the appellants were not involved in the tendering or procurement process. To support this argument he referred to the cases of:

**(i) Okethi Okale & Others v republic [1965] E.A 555**

**(ii) James Mwangi v Republic Criminal Appela no 33 of 1983**

40. He submitted that the prosecution did not prove that the 2nd appellant had illicit money in his account, and/or that he received a benefit. That PW11 never produced any bank statements. He raised issue with **EXB39** which was not traced by the court and wondered how the court confirmed that to be the position. The failure to produce evidence from Safaricom and the CCTV affected the 1st appellant as PW14's evidence was not corroborated.

41. Mr Wandugi in his submissions exonerated the appellants from any blame. He argued that fraud was not proved as was held in the case of **Joseph Leboi ole Toroki Criminal Appeal No 204 of 1987 (C.A)** . He further argued that there was no evidence showing that the money complained about came from the N.C.C. He argued that what was shown is that Mr. Omoti transferred Kshs 283,300,000/- into an escrow account. Payments were from this account and not N.C.C. He claimed not to have seen any sale agreement.

42. It was his submission that the trial court in its judgment was demanding for too much from the appellants and shifting the burden of proof. He contended that even the evidence of PW3 confirmed that the 2nd appellant was a surveyor. Counsel further submitted that the appellants' defence had never been taken into account and section 111 Evidence Act was wrongly invoked by the court.

43. He further argued that section 200(3) CPC was not complied with, and it was an error for the court to order for written submissions to be filed. He wondered why only the appellants were targeted when several people received money. To him this was selective prosecution.

44. Mr Ondiek further submitted that there were critical witnesses who were not called to testify. Further that the court found PW21 to be a liar and yet relied on her evidence to convict.

45. In reply Mrs Aluda for the State gave a background of the case. She submitted that the N.C.C wanted to buy land for a cemetery. PW3 had land and his advocates approached him. The 2nd appellant purported to be the agent of the selling company. The price was agreed at Kshs 110 million. The company purported to sell the same land for Kshs 283 million. The documents were then changed to show that PW3 was selling the same land at Kshs 283 million to N.C.C. Up for grabs was Kshs 173million which was shared among the various parties.

46. She contended that Kshs 10million was traced to the 1st appellant's account while Kshs 9.3million was traced to 2nd appellants' account. That the 2nd appellant had presented himself as both an agent and surveyor to PW3.

47. On the appeal she submitted that there had been no mistrial, as the 1st appellant voluntarily made a written statement on which he was cross examined. She said the document examiner had pointed out the fraud in the case. It was her case that once an accused has been placed on his defence, the prima facie case must be dislodged by him.

48. She contended that there was no explanation for delay in hearing the defence when the appellants were placed on their defence on 28 th August 2012 and were only heard on 23rd March 2017. That an application had been made to the high court for the matter to be re opened and Mbogholi J dismissed it. She agreed that written submissions were filed and parties were not orally heard.

49. On the issue raised by the appellants on **EXB 39**, she said this exhibit was meant to support evidence that had already been adduced. On the evidence of PW14 she submitted that his evidence had not been shaken in cross examination. That the bad blood raised in the 1st appellant's defence was never raised in cross examination. She further on PW21's evidence said her evidence did not dislodge the prosecution case. That the witness was testifying in two other similar cases. Counsel contended that there had been no miscarriage of justice.

50. Mr Ondieki contended that the Kshs 10million was never traced to the 1st appellant's account. All in all he urged that the appeal has merit and should be allowed.

51. This is a first appeal and this court has a duty to re -evaluate and reconsider the evidence adduced and arrive at its own conclusion. It has also to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This was the holding in the case of **Okeno vs Republic 1972 EA 32**

> **" An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R,)[1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] E.A 424."**

52. The Court of Appeal further in the case of **Patrick & Anor v Republic [2005] 2 KLR 162** held as follows:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions."**

53. I have considered the evidence on record, the grounds of appeal, the submissions by all counsels and the cited authorities. The appellants have raised total of 24 grounds of appeal. Upon considering all I have stated above I collapse the said grounds and reduce them into five(5) broad issues namely:

(i) Whether the charge was defective

(ii) Whether the case was a mistrial

(iii) Whether there were any Constitutional violations in respect of the appellants.

(iv) Whether the case against the appellants was proved to the required standard.

(v) If the answer to No. iv is YES, whether the sentence imposed is lawful.

**Issue No. (i) Whether the charge was defective.**

54. From the submissions made the only reason the appellants have given for this, is that the evidence adduced is at variance with the charge sheet. They add that since they were cleared of the conspiracy charge the other counts against them should also have been dismissed. Both counsel for the appellants never pointed out what was defective in the charge sheet. In the event the evidence did not support the charge it simply meant that the charge was not proved and not that the charge was defective.

55. The appellants have failed to show the defect in the charge. I have also not seen any such defect in the said counts 5 and 6 on which the appellants were convicted.

**Issue No. (ii) Whether the case was a mistrial.**

56. Mr Ondieki and Mr Wandugi raised two issues on this namely:

(i) That the 1st appellant should not have given a written statement of defence.

(ii) That section 200(3)(4) Criminal Procedure Code were not complied with Mrs Aluda in response opposed that submission saying the 1st appellant was cross examined on the statement and that the High court had directed that the appellants proceed with the defence.

57. The record shows that the appellants were placed on their defence by M/s Lucy Nyambura Senior Principal Magistrate (as she then was) on 23rd August 2012. Following her appointment as Judge of ELC the matter was taken over by Mrs. Mulekyo SPM (as she then was). On 31st January 2013, the appellants who were present in court and in the presence of Mr. Nyakundi for 1st appellant and holding brief for Mr. Amollo for 2nd appellant, told the court that they wanted the case to proceed from where the trial court left. They however wished to have all witnesses recalled for further cross examination and the court issued orders to that effect. A total of 22 witnesses were to be recalled according to that order.

58. The DPP was aggrieved by this order and moved to the High court to have the order reviewed. The said order was on 3rd July 2014 set aside vide a Ruling by Justice A. Mbogholi Msagha. He directed that the appellants defend themselves in line with the provisions of the CPC. In the said Ruling the Hon. Judge gave the reasons for arriving at that decision.

59. On 14th May 2015, Mr. Amollo acting for the 2nd appellant informed the court that they had filed an appeal in the Court of Appeal against the decision by Justice Mbogholi. On 4th August 2015 Mr. Amollo further informed the court that the Court of Appeal had confirmed

the appeal and called for the proceedings before the High court.

60. When the matter came for defence hearing on 31st march 2016 Mr. Githinji advocate informed the court that the 1st appellant would make a sworn statement. Mr Amollo also indicated that the 2nd appellant would give a sworn statement. There was no mention of the appeal filed at the Court of Appeal. Upto the time the defence case was heard and judgment delivered the court never heard about the appeal at the Court of Appeal. It's outcome is therefore unknown.

61. The appellants are now challenging the decision by Justice Mbogholi and saying section 200(3) CPC was not complied with and that section 200(4) CPC affected them.

First of all section 200(3) was complied with. It must be noted that the operative word in that section is MAY and not SHALL. The court is not therefore bound by the accused person's demand. It all depends on the circumstances of the case. The order by M/s Mulekyo (SPM) was challenged and was overturned. After the Ruling by the High Court in Nairobi Criminal Revision Application NO 112 of 2013, the appellants presented themselves before the trial court and directions were taken on how to proceed with the defence hearing.

62. Secondly, the Ruling by Justice Mbogholi directing that the appellants proceed to make their defence has never been annulled and/or varied and so stands. It cannot be challenged before this court. The appellants gave sworn testimony and called no witnesses for their defence. It has not been shown how this was a mistrial.

63. On the issue of the 1st appellant giving a written statement counsel does not say what happened thereafter. Led by counsel the 1st appellant adopted the written statement on oath and was cross examined on it. That's the choice he made. Secondly both the State and the 2nd appellant were given an opportunity to cross examine the 1st appellant. The State did cross examine him but Mr. Amollo for the 2nd appellant said he had no questions for him.

64. It is true that section 211(2) CPC does not mention witness statements save for a testimony on oath. The 1st appellant prepared a statement and served it on the State and co-accused in good time. He adopted it/owned it on oath and was cross examined on it. It may not have been the normal procedure but that is what he opted to do.

65. This is a very good example of an instance where article 159(2)(d) of the Constitution was applied. The said Article provides:

> **"In exercising judicial oath, the courts and tribunals shall be guided by the following principles:**
>
> **(d) Justice shall be administered without undue regard to procedural technicalities."**

66. None of the parties in this case was prejudiced by the decision of the trial court in allowing the 1st appellant to give a written statement. He can't then be allowed to turn around and complain about what he requested for. My finding on this is that there was no mistrial.

**Issue No (iii) Whether there were any Constitutional violations in respect to the appellants.**

67. The appellants have claimed that articles 10, 25(c), 50(1)(2) 159 of the Constitution were violated. Article 10, sets out the national values and principles of governance. Articles 25(c) 50(1)(2) talk of the right of a fair trial. Article 50(1)(2) is more detailed on what entails a fair hearing. Besides what has already been addressed under issue no (ii), there is no other violation in the name of fair trial that has been addressed by the appellants.

68. He who pleads a fact must prove it. It was upon the appellants to point out how their rights were violated by the trial court in respect to the provisions of the Constitution cited. They had all the time to prepare for their defence from 28th August 2012 when the court found that a prima facie case had been established against them. Their defence only came to be heard on 23rd March 2017 after a waiting period of four and half (4½) years.

69. Without placing blame on any one party I do find that the appellants had more than sufficient time to prepare for their defence. They have also not shown how Article 10 was violated by their prosecution. None of the principles and values stated in article 10 of the Constitution was shown to have been violated.

70. It was submitted that the 1st appellant was allowed by the court to give

self incriminating evidence and this violated Article 50(1)(2) Article 50(2) (l) provides:

> **" every accused person has the right to a fair trial, which includes the right— to refuse to give self-incriminating evidence.".**

The statement complained about was voluntarily made by the 1st appellant. Nobody forced him to make the statement.

71. He was ably represented by a counsel of his choice. His counsel

informed the court of the 1st appellant's desire to adopt his written statement on oath. He must have been guided by his advocate on this. He was thereafter cross examined on it and it's not clear where and when the violation occurred. It has also not been indicated which portions of

the statement are incriminating. Again I find this ground not to have been proved.

**Issue No. (iv) Whether the case against the appellants was proved to the required standard.**

72. The charges for which the appellants were convicted were both under

section 45(1) (a) as read section 48(1) of the ACECA, which provide as follows:

> **1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully—**
>
> **(a) acquires public property or a public service or benefit;**

Section 48 is the penalty provision.

73. The particulars state that the property in question which is money was public property belonging to the N.C.C. The established facts by the witnesses who testified herein confirmed the following:

> (i) The N.C.C was in need of land for a cemetery. The process of acquiring it took off through the establishment of the various committees.
>
> (ii) Adverts for bidders were put up in the newspapers. The 1st and 2nd adverts were not fruitful. The 3rd one had a number of bidders among them Naen Rech Ltd a company that did not own any land.
>
> (iii) Prior to that Henry Kilonzi Musyoki (PW3) had entered into a sale agreement with Naen Rech Ltd for sale of his 120 acres from L.R. 14759 at Kshs 110,000,000. A sale agreement was drawn by his lawyers Alfonce Mutinda & co advocates. All his particulars title deed, ID were taken for that purpose and he even signed the Agreement **(EXB11).**
>
> (iv) PW3 denied ever selling his land to the N.C.C. He also denied knowledge of the sale agreement **(EXB12)** showing he sold land to N.C.C.
>
> (v) The processes at the N.C.C. went on with the EC and TC approving the award to Naen Rech Ltd despite the issues raised by some of the committee members (PW4 and PW5). The issues were well captured in memos (**EXB's 8, 16**) .Had they been addressed, the mischief would have been avoided.
>
> (vi) A purported valuation report from the Commissioner of Lands which was found to have been a forgery was used in the approval **(EXB6).** It valued the land at Kshs 325,150,000/-. A letter purporting to appoint Naen Rech Ltd as an agent for PW3 was also used in the approval **(EXB72).** PW3 denied ever issuing such instructions to Mr. Mutinda.
>
> (vii) The document examiner **(PW20**) vide his forensic examination and his report **(EXB82**) confirmed that PW3's signatures in the sale agreement **(EXB12)** were a forgery.

74. Following the unlawful award of the tender to Naen Rech Ltd

everything moved so fast and finally the advocate for the N.C.C Mr. Edward Omoti (PW17) processed everything and the purchase price was released to an escrow account opened on 11th February 2009 in the names of three law firms namely Odero Osiemo & co advocates, P.C Onduso & co advocates and Alphonse Mutinda & co advocates.

75. The bankers cheque for Kshs 281,300,000/- is dated 12th February 2009 **(EXB51a)** while the forwarding letter is dated 11th February 2009 **(EXB51)**. It is clear that the escrow account was specifically opened for the purpose of receiving these funds and disbursing them. The account was opened on 11th February 2009, and was closed on 18th March 2009.

76. The above is the foundation of this case. PW3 sold his land for Kshs 110,000,000 to Naen Rech Ltd which is the mount that was paid to him by his advocate. Naen Rech Ltd had no capacity to bid for the sale of the land and it was never appointed to bid on behalf of PW3. After payment of the sum of Kshs 110,000,000/- there was a balance of Kshs 173,000,000/- which never went to PW3. Where did it go?

77. The appellants have submitted that they were not involved in the procurement process of the suit land by the N.C.C. They also state that they did not receive any money from the N.C.C. In fact the 1st appellant denies ever receiving any money while the 2nd appellant says he received Kshs 9,300,000/- from Mr. Mutinda for work done.

78. The 1st appellant was an employee of the then Ministry of Local Government under which the N.C.C fell. This is the Ministry that released to the N.C.C the total sum of Kshs 283,000,000/- in two batches for the purchase of the cemetery land. The forwarding letters are **EXBs 86 & 87.** Prior to his interdiction he served as the Chief supply chain management officer in the said Ministry.

79. The evidence touching on the 1st appellant was the evidence of PW14 whose account was used to receive Kshs 10,000,000/-. The records before the court show that this money was transferred from National Bank of Kenya Ltd (RTGS), account No. 2002945900 in the name of Odero Osiemo & Co advocates. PW14's account was no 0361001621 plaza branch of Barclays Bank.

80. The bank statements (**EXBS 57 & 63**) produced herein confirm the following:

(i) On 13th Feb 2009 a sum of Kshs 117,000,000/- was transferred from the joint account of Osiemo ,Onduso & Mutinda advocates by RTGS to National Bank of Kenya (NBK) Harambee avenue.

(ii) On 13th February 2009, a sum of Kshs 117,000,000/- was received in the account of Odero Osiemo & co advocates. Account No. 01020-029459-00 NBK Harambee Avenue.

(iii) Prior to the receipt of Kshs 117,000,000/- this account at NBK Harambee had a credit balance of Kshs 2,119,255/-. Later on there was only one credit payment of 6,000/- on 19/2/2009. The payment to PW14 was by transfer of funds vide cash cheque No 273 on 23rd February 2009.

It can therefore be safely concluded that the payment of Kshs 10,000,000/- into PW14's account was from the credit payment of Kshs 117,000,000/- which was part of the payment of Kshs. 281,300,000/- by the N.C.C to Osiemo, Onduso & Mutinda & Co advocates.

81. PW14's evidence was that he knows the 1st appellant very well as a relative and friend. He explained how the 1st appellant had requested to use his account for some successful transaction that had come his way. The money Kshs. 10,000,000/- was paid into his account on 23rd February 2009 and he withdrew it in 2 batches of Kshs 5,000,000/- each and handed it to the 1st appellant who was with Chabera a Finance Officer with Ministry of Local Government. He was given kshs 100,000/- as his "lunch". These withdrawals were confirmed by PW13 **Lilian Nyambura Kamau** a bank official.

82. PW14 added that the 1st appellant had explained that he could not put the good sum of money into his account for fear of raising eye brows as he was a Government officer.

83. In his defence the 1st appellant told the court that PW14 is not his relative and how there is bad blood between them and that he lied against him. In fact he portrayed PW14 as a very corrupt person, while he the 1st appellant is a man full of integrity and his records speak that of him. He castigated the investigating officer (PW 22) for having threated to fix him for claiming that a parking lot belonged to him. He also stated that CCTV footages of customer transactions he saw at Integrity Centre did not contain any of his pictures.

84. During cross examination of PW14 the 1st appellant who was represented by Mr. Nyakundi never asked the witness any question on the many allegations raised in his defence against him. He should have asked him related questions to discredit his evidence. There was no reason whatsoever given that would have made PW14 lie against the 1st appellant. His evidence was not shaken through the cross examination and so remained intact.

85. The 1st appellant testified that he had been shown CCTV footages at the integrity Centre. These were never produced in court. Nothing stopped him and his counsel from demanding that they be availed. The investigating officer had denied seeing any CCTV footages. Again the investigating officer was not asked any questions on the alleged threats to the 1st appellant after a disagreement on a parking. Had all these allegations been true, his Counsel could have put them to the witness to discredit him.

86. Contrary to his submissions that PW22 did not recommend that the 1st appellant be charged his evidence at pg. 462 of the record of appeal speaks to that. The investigating officer did his investigations, witnesses testified and documents were produced. The court has a duty to evaluate all this evidence independently and cannot be directed by the opinion of the investigating officer. Secondly it is the same investigating officer who charged the 1st appellant. If he found no evidence against him why then did he charge him?

87. The 1st appellant was not involved in the procurement but he worked in the supply chain management within procurement as the chief supplies Manager. He was aware of this transaction by virtue of his office since the N.C.C fell within the then Ministry of Local Government for which the 1st appellant worked in a strategic department. It is this Ministry that was making the payment. This was therefore a conspiracy involving persons within and outside N.C.C.

88. My finding is that indeed PW14's account was used to receive money for the 1st appellant. There is no reason shown that would have made PW14 fabricate this evidence against him. The way the money was withdrawn is confirmed by PW13 a bank official. There is no justification for the receipt of the Kshs 10,000,000/- by the 1st appellant.

89. Coming to the 2nd appellant he admits receiving kshs 9,300,000/- which he says was for survey work on PW3's land. He said the payment was from Mr. Mutinda who was PW3's lawyer. In his evidence in chief and cross examination PW3 testified that Mr Mutinda introduced him to two people i.e. Mr. Maina Chege and Mr. Mwaura. He identified the Mr. Mwaura as the 2nd appellant. The 2nd appellant did admit that. The two men represented the Naen Rech Ltd which was to buy his land. He negotiated with them and they agreed at a purchase price of Kshs 110,000,000. This last bit was denied by the 2nd appellant.

90. PW3 said he also knew the 2nd appellant as a surveyor and the one who did the survey work on his land. Yes, he may have done the survey work but is he a qualified surveyor? He said in his defence that he is a Land Surveyor by profession but he is not licensed. He further said he only belongs to the institutional surveyors where one does not require licensing to practice. He did not produce any documents to prove that. He also had an oral private arrangement with Mr Mutinda to pay his fees.

91. There was no invoice raised by him for payment of the said fees. He did not also find it necessary to call Mr. Mutinda to confirm why he was paying him the Kshs 9,300,000/-. Mr Wandugi submitted that the court below should not have demanded that the 2nd appellant produces

documents to prove that he was a surveyor. That such demand was asking for too much from him and amounted to shifting of the burden of proof.

92. First of all we are coming from a point where a fraudulent transaction involving PW3's land had taken place. The 2nd appellant was introduced to PW3 as a representative of the Naen Rech Ltd. The 2nd appellant, PW3 and Chege Maina negotiated the price and the deal was sealed. He again appears on the scene as the surveyor of the same land. The big question is why the 2nd appellant was being paid such a large sum of money by N.C.C and not Naen Rech Ltd which allegedly bought the land from PW3.

93. It is not Mr. Mutinda who paid him as he claims. The document of instructions (**EXB114)** for transfer of money dated 16th February 2009 and signed by the three firms of lawyers instructed the branch Manager Bank of Africa Nairobi branch as follows:

> **"1.sum of Kshs 9,300,000/- ( Kenya shillings nine million three hundred thousand) to Account of CEPHAS KAMANDE MWAURA Account No 0010037691 CFC Stanbic Bank, International Life House Branch."**

94**.** This instruction was complied with as is evidenced by the bank statement from Bank of Africa Kenya Account No. 01019110006 in the name of Osiemo, Onduso & Mutinda advocates **EXB57**. The amount of Kshs 9,300,000/- was transferred to the 2nd appellant on 16th Feb 2009. It was part of what the three Law firms had received from N.C.C. The 2nd appellant had all the time (4½) years to prepare for his defence. Had he indeed been a professional land surveyor as he claims there is nothing that prevented him from getting the relevant documents to present to the court. Furthermore he never sought the court's indulgence to have the documents presented at a later date.

95. There is no evidence that the 2nd appellant presented any invoice to Mr. Mutinda, Mr. Onduso or even Mr. Osiemo for payment for work allegedly done. It is not clear why these three law firms jointly released Kshs 9,300,000/- out of the Kshs 281,300,000 received from N.C.C to the 2nd appellant. He declined to call Mr. Mutinda as his witness to confirm what he was telling the court about payment for work done.

96. The 2nd appellant may have presented himself to PW3 and PW22 as a surveyor, but he has nothing to show for that. My finding is that the 2nd appellant is not a professional land surveyor and whatever he allegedly did on PW3's land in the absence of any documentation was part of the fraudulent scheme in the whole transaction.

97. On this issue I find that there is overwhelming evidence confirming that:

(i) The 1st appellant received Kshs 10,000,000/- through PW14's account, for unknown purposes. The 1st appellant and PW14 knew each other very well.

(ii) The 2nd appellant received Kshs 9,300,000/- under the pretext of being a representative of Naen Rech Ltd, and a Land surveyor.

(iii) The origin of both payments was N.C.C which was a public entity. The money was therefore public property.

(iv) **PW21 Mary Ngechi Ngethe** was an accomplice and her evidence was not of much value to the court. It was clear on which side she was leaning having actively participated in the whole transaction as chair of the evaluation committee.

**Issue No v. If the answer to No. iv is YES, whether the sentence imposed is lawful.**

98. Counsel for the appellants argued that the sentence imposed by the court was manifestly excessive, unreasonable and unjust because it violates articles 50(2)(n)(p) as read with article 25(1)(2)(3) of the Constitution. They argue that this was one transaction which attracted three penalties. What does the law provide?

99. Section 48 ACECA is the penalty section and it provides as follows: section 48(1)(a)

> **"1) A person convicted of an offence under this Part shall be liable to—**
>
> **(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and**
>
> **(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.**
>
> **(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—**
>
> **(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);**
>
> **(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss."**

100. From the record its shown that the appellants were each sentenced under section 48(1)(a) to serve two (2) years imprisonment without an option of a fine. Section 48(1)(a) of ACECA provides for three(3) modes of punishment one of them being payment of a fine of upto Kshs

one(1) Million. The learned trial Magistrate in his discretion opted for the prison term.

101. The notes on sentence by the trial court do not give any reasons as to why the court opted for the prison term. The appellants were said to be first offenders. Any refusal by the court to fine them should have been explained so that this court is satisfied that the trial court exercised its discretion judiciously.

102. In the case of **Farah Abdi v Republic Nrb Cr. Appeal No. 430 of 2006** on a similar matter Makhandia J (as he then was) stated thus:

> **"Sentencing is generally a matter for the discretion of the trial court. The discretion must however, be exercised judicially and not capriciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the Appellate Court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is illegal or is so harsh and excessive as to amount to a miscarriage of justice, and or that the court acted upon wrong principle, took into account irrelevant and extraneous factors and finally if the court exercised its discretion capriciously. See generally, OGALO S/O OWUORA VS REPUBLIC [1954] 19 EACA 270, JAMES VS REPUBLIC [1950] 10 EACA 147, NILSON VS REPUBLIC [1970] EA 599 and WANJEMA VS REPUBLIC [1971] EA 493**
>
> **The trial Court's notes on sentence in this matter are sketchy. In a case, as this one, where the trial Court has three options on sentence to impose i.e. a fine upto Kshs. 100,000/- and not Kshs. 30,000/- as submitted by Counsel or to imprisonment for a term not exceeding three years and not 6 months or to both, the trial Court is obliged to make detailed notes on the matters it took into account in arriving at the sentence imposed. Of course such detailed notes are not essential in cases where only one sentence is provided for by the Penal Provisions. In the instant case, the trial court did not give reasons why it preferred a custodial sentence to say, a fine. In my view, where the trial Court are faced with three options as regards the punishment to be meted out, the first port of call should be to impose a fine rather than a custodial sentence unless it is demonstrated that the appellant was habitual or serial Criminal."**

103. In the circumstances of this case, this court is not able to tell what factors and considerations the trial court took into account before sentencing. It is therefore not clear why he did not consider the option of a fine. This sentence is therefore set aside. I substitute it with a fine of Kshs. (1) Million in default one(1) year imprisonment.

104. On the mandatory additional fine the court found that the appellants had received a benefit while the NCC had suffered a loss. Applying section 48(2)(b) ACECA it calculated the mandatory fine as follows:

**1st appellant**

Benefit Kshs 10,000,000/-

Loss Kshs 10,000,000/-

**TOTAL** Kshs 20,000,000/-

2

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**Kshs 40,000,000/-**

**2nd appellant**

Benefit Kshs 9,300,000/-

Loss Kshs 9,300,000/-

**TOTAL** Kshs. 18,600,000/-

2

_____

**Kshs 37,200,000/-**

105. The learned trial Magistrate ordered that in default of payment of the mandatory fine each appellant to serve one year imprisonment. I find no misapprehension of the law in the calculation of the mandatory fine and the default sentence by the learned trial magistrate.

106. In conclusion, I find that the appeal against conviction lacks merit and is dismissed. However the appeal against sentence partially succeeds as stated at paragraph **103** above.

**ORDERS**

- Conviction is upheld.

- Each appellant is fined Kshs one(1) Million in default one(1) year imprisonment.

- The mandatory fines of Kshs 40,000,000/- and 37,200,000/- respectively and in default one year imprisonment are confirmed

**Orders accordingly.**

**Dated, signed and delivered this 27th day of June 2018 in open court at Nairobi.**

**……..**

**HEDWIG I. ONG'UDI**

**JUDGE**