



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC APPEAL NO. 8 OF 2018

IBRAHIM HAJI ISAAK.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Being an Appeal against the ruling and consequential orders of

Hon. L.N. Mugambi in Anti-Corruption Case No. 9 of 2015

delivered on 9th April 2018.)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

IBRAHIM HAJI ISAAK.....1ST ACCUSED

PATRICK SAU MUTEMI.....2ND ACCUSED

ESTHER NJERI NGARI.....3RD ACCUSED

FRANCIS MUSAU MUTUSE.....4TH ACCUSED

RUTH MUTHONI MWANGI.....5TH ACCUSED

EVANS NYAIYO BIKUNDO.....6TH ACCUSED

JUDGEMENT

BACKGROUND

1. This is an appeal arising from the ruling of Hon. L. Mugambi in Anti-Corruption Case no. 9/15 Milimani chief Magistrate's Court delivered on 9th April 2018. Through his petition dated 23rd April 2018 and filed on the 2nd May 2018, the petitioner sought the following reliefs:

1) That this appeal be allowed.

2) That the ruling and order of Hon. Mugambi dated 9th April 2018 be set aside in so far as it applies to the appellant.

3) That the appellant's application dated 1st April 2018 be allowed with costs.

2. The appellant listed seven grounds of appeal as follows:

1 The ruling delivered by the Learned Magistrate is contradictory to itself. The Learned magistrate acknowledged the duty of the DPP to produce all documents relating to the investigations and communication between the DPP and EACC but readily accepts the position of the DPP on when the decision to prosecute the Appellant was made without any evidence of further investigation from the DPP.

2 The learned Magistrate failed to properly evaluate the evidence before him. The magistrate ignored statements of fact in the letter of 9th October 2014 which point to insufficiency of evidence against the Appellant.

3 The Learned Magistrate erred in law in failing to apply the law equally to all the accused persons to the detriment of the Appellant. The Magistrate failed to grant the Appellant equal benefit of the law as his co-accused in similar circumstance. The Magistrate found the charges against the other accused to be defective and tainted by an illegality but refused to make similar finding for the Appellant whose circumstances are similar to that of his co-accused.

4 The Learned Magistrate misapplied the law in accepting the Director of Public Prosecution's argument on matters of fact and evidence while they did not file an affidavit in response to the Appellant's Application.

5 The Learned Magistrate failed to frame and determine the correct issues before him.

6 The Learned Magistrate completely ignored the authorities and precedents placed before him.

7 The Learned Magistrate misinterpreted Article 35(1)(a) of the Constitution to the Appellant's detriment.

3. Contemporaneously filed with the petition is a notice of motion dated 25th April 2018 seeking stay of the proceedings in Anti-Corruption Case no.9/15 pending hearing and determination of the appeal. In her ruling delivered on 28th June 2018, the Hon. Lady Justice H. Ong'udi stayed the proceedings pending the hearing and determination of the appeal.

4. The genesis of this appeal is a letter ref. No. EACC 6/27/2 Vol VI/(111) dated 21st August 2014 emanating from the office of the secretary Ethics and Anti-Corruption Commission addressed to Mr. Keriako Tobiko the then Director Public Prosecution forwarding an inquiry file recommending criminal prosecution of the appellant herein over allegations of irregular withdrawal of Kshs 11.5 million from the Kenya Meat Commission's fund's kitty.

5. In the said inquiry file, the commission recommended prosecution of the appellant citing two counts namely:

Count one: Unlawful acquisition of public property contrary to Section 45 (1)(a) of the Anti-Corruption and Economic Crimes Act 2003 in that on 30th day of April 2012 at Community bank, Westlands, within Nairobi City County, being the Managing Commissioner, Kenya Meat Commission, unlawfully acquired public property to wit, a sum of Kshs11.5 million the property of the said Kenya Meat Commission.

Count two: Abuse of office contrary to Section 46 of the Anti-Corruption and Economic Crimes Act 2003. Particulars states that, on 30th day of April 2012, at the Kenya Meat Commission offices, Athi River, within Machakos County, being the managing commissioner and the accounting officer of the Kenya Meat Commission used his office to improperly confer on himself a benefit of Kshs 11.5 million by withdrawing the said sum of money from the Commission's account and failed to account for it.

6. Upon acknowledging receipt of the inquiry file, the DPP through the senior assistant Director of Public prosecutions M/s Emily Kamau, vide the letter dated 9th October 2014 responded by concurring with the recommendation to prosecute the appellant but subject to addressing some gaps to strengthen their case. She returned the file directing for recording of further statements from more witnesses and submission of document examiner's report.

7. In particular, Ms Kamau directed as follows **"We concur with you that there is sufficient evidence of criminal culpability against E-1. However, there are gaps which must be addressed in order to reinforce the prosecution against E-1 and possibly other suspects who are implicated by the evidence herein. The areas are enumerated."** Ms Kamau further directed for re-submission of the file for further directions after addressing the gaps in question.

8. Consequently, the concerned areas or gaps pointed out were addressed by recording statements from more witnesses and document examiners' reports in respect to several other documents among them payment vouchers.

9. On 6th May 2015, Mr. Halake Waqo, the secretary to the EACC, wrote back to the Director of Public prosecutions confirming compliance to the Director's directions. It is through this file re-submission that Mr.Halake made further recommendations for a fresh and additional count against the appellant. In this additional charge referred to as conspiracy to commit an economic crime, Mr. Halake recommended for the appellant to be charged jointly with five others referred to as D2, D3, D4, D5 and D14.

10. Pursuant to this recommendation, the appellant together with five others were on 28th May 2015 arraigned before Nairobi Chief Magistrate Anti-Corruption court in criminal case number 9/15. In addition to the two counts originally recommended vide the commission's

letter dated 21st August 2014, the appellant together with Patrick Sau Isaac (accused 2), Esther Njeri Ngari (accused 3), Francis Musau Mutuse (accused 4), Ruth Muthoni Mwangi (accused 5) and Evans Nyaiyo Bikundo (accused 6), were jointly charged with conspiracy to commit an economic crime contrary to section 47A as read with section 48(1) of the Anti-corruption and economic crimes Act 2003 with an alternative of conspiracy to defraud contrary to Section 317 of the Penal Code. Particulars were that, between the 27th April 2012 and 10th May 2012, at Kenya Meat Commission, Athi River township within Machakos County, in the Republic of Kenya, being persons employed in the Public Service by Kenya Meat Commission, jointly conspired to commit an economic crime to wit fraudulent acquisition of property by withdrawing KShs 11.5 million from first community bank account 0999241892 Westlands branch operated by the Kenya Meat Commission.

11. During the pendency of the criminal proceedings, the Court of Appeal delivered a judgment on 14th July 2017 in **Michael Simitu Mwaura Kamau Vs Ethics and Anti-Corruption Commission and four others (2017) eKLR** wherein the court held that, criminal proceedings commenced against the appellant in that case were tainted with illegalities considering that the investigation and recommendation for his prosecution was conducted and done during the time when the commission was not fully and properly constituted i.e. between the period of 31st March 2015 and 12th May 2015.

12. Pursuant to that judgment, the appellant herein moved the trial court through a notice of motion dated 1st February 2018 and filed on 2nd February 2018 seeking stay of further proceedings pending hearing and determination of the application and that the charges against him be terminated and he be discharged and or acquitted of all charges on account that the recommendation to charge him together with five others was made when the commission was not properly constituted.

13. On 6th February 2018, the other five accused persons expressed interest and joined in supporting the appellant's application dated 1st February 2018 seeking to be acquitted or discharged on similar grounds as well. They argued that the recommendation to have them charged jointly with conspiracy to commit a crime was unconstitutional and made contrary to the aforesaid Court of Appeal judgment.

14. In response, the DPP (respondent) filed grounds of opposition dated 21st February 2018 stating that; the recommendation to prosecute the appellant (applicant) was made within the period when the commission was duly constituted; that the Court of Appeal in Engineer Kamau case did not affect the appellant's case as the commission was not fully constituted between 31st March and 12th May 2015; that investigations and recommendations to charge the appellant were done on 21st August 2014 by the commission when fully constituted and the inquiry file forwarded to the DPP pursuant to section 35 of ACECA; that the DPP in exercise of his authority under Article 157(10) of the Constitution concurred with the investigation and recommendation vide his letter dated 9th October 2014 save for the advise for the investigating officer to cover certain gaps.

15. After considering the application, various affidavits in support, grounds of opposition by the DPP, authorities and submissions by counsel, Hon. Mugambi discharged the rest of the accused persons under Section 89 (5) of the Criminal procedure Code save for the appellant herein. The learned magistrate found that, by 6th May 2015 when the secretary Anti-Corruption Commission recommended for the appellants' co-accused (accused 2, 3, 4, 5 and 6) to be charged jointly together with him, the commission was not fully constituted.

16. The Honorable magistrate further found that, unlike his co-accused, the recommendation to charge the appellant was sealed on 9th October 2014 when the DPP confirmed that there was sufficient evidence against him pursuant to the Commission's recommendations through their letter dated 21st August 2014 addressed to the DPP. Hon. Mugambi found that the decision to charge the appellant was arrived at by the DPP on 9th October 2014 which was within the period when the Commission was duly constituted and therefore directed the proceedings to continue against the appellant. The learned magistrate however discharged the appellant's co-accused under section 89(5) of the CPC as the recommendation to charge them was made on 6th May 2015 when the commission was not properly constituted.

17. The learned Magistrate further held that, the return of the file to the commission to cover certain salient areas to strengthen the prosecution case did not supersede or rescind the DPP's concurrence in the same letter that there was enough evidence to charge the Appellant. It was his conviction that there was no need for the commission to make a second recommendation.

18. When the matter came for hearing, Mr. Roble appearing for the appellant and M/S Nyauncho for the respondent highlighted on their respective submissions.

Appellant's submissions

19. The firm of Ibrahim, Issack and Company advocates appearing for the

appellant filed their submissions on 11th July 2018 basically reproducing the appellant's grounds of appeal. In his oral submissions canvassed on the 12th July 2018, Mr. Roble urged this court to find that the trial court applied the law selectively by discharging the appellant's co-accused. Further, learned counsel argued that the learned magistrate failed to consider that the respondent did not file any replying affidavit in opposition to the appellant's application dated 1st February 2018 which meant that the application was not opposed hence should have allowed it as an unopposed application. To support this position learned counsel referred the court to the case of **standard resource limited vs Attorney General and two others (2017) eKLR**.

Respondent's Submissions

20. Relying on her written submissions of even date filed on 11th July 2018, M/s Nyauncho submitted that the recommendation to charge the appellant was properly made when the EACC was properly constituted and that the Engineer Kamau's case did not affect the appellant as the court considered the period between 31st March 2015 and 12th May 2015 when the commission was not properly constituted. That the Chairperson of the EACC Mumo Matemu and the Commissioners Jane Onsongo and Irene Keino resigned on 12th May 2015, 31st March

2015 and 30th April 2015 respectively much later after the decision to charge the appellant had been made.

21. Counsel further submitted that the discharge of the other accused persons under sections 89(5) on the ground that no valid charges can be sustained by the DPP against them did not mean that the charge sheet does not hold water against the Appellant. She asserted that efforts are underway to arraign the other discharged accused persons in court in compliance with Engineer Kamau's Judgment. She urged the court not to interfere with the decision of the trial court. However, counsel did not make any reference to any authorities in support of her oral and written submissions.

Analysis and determination

22. 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.

23. In the case of Patrick & Ano v Republic [2005] 2 KLR 162 the Court of Appeal 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.”

24. Since this an appeal against a ruling arising out of an application and there were no witnesses called, this court in its appellate capacity will only interfere with the decision of the trial court if the appellant demonstrates that the court misdirected itself in some matter and as a result has arrived at a wrong decision, or is manifest that the judge (magistrate) was clearly wrong as a consequence of which an injustice would be occasioned. (see united India insurance co. Ltd & 2 others vs East Africa underwriters (Kenya)[1985] eKLR, Madan, JA,(as he then was) held that:-

“The court of Appeal will not interfere with a discretionally decision of the judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account of, or fifthly, that his decision, albeit a discretionally one, is plainly wrong”.

See also Mbogo & Ano vs Shah [1968] EA 93.

25. I have re-examined the petition of appeal herein, the grounds of appeal, submissions by both counsels and the cited authorities. The appellant has raised seven (7) grounds of appeal. Upon considering them, I find that three issues stand for determination namely:

(i) Whether the EACC was properly constituted at the time it made its report and recommendations to the DPP in respect of the Appellant for prosecution.

(ii) Whether the trial court discriminated against the appellant when he discharged the Appellant's co-accused in line with the Michael Sistu Kamau decision.

(iii) Whether the investigation report under section 35 of the ACECA forms part of evidence.

Issue No. (i)

Whether the EACC was properly constituted at the time it made its report and recommendations to the DPP to prosecute the Appellant.

26. The Ethics and Anti-corruption commission is a creature of the Constitution under Article 79 which gave rise to the enactment of Act no 2 of 2011 which outlines clearly the functions of the commission. Section 11(1) of the Ethics and Ant- corruption commission Act empowers the commission to investigate and recommend to the Director Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes. The bone of contention herein is the time the Anti-corruption commission recommended to the DPP over the prosecution of the appellant and whether at that time the commission was properly constituted.

27. It is not in dispute that the EACC chairman Mumo Matemu and Commissioners Jane Onsongo, and Irene Keino resigned on 12th May 2015, 31st March 2015 and 30th April 2015 respectively. The new Commissioners were sworn into office on 23rd January 2016. The initial investigation and recommendation to DPP by EACC recommending prosecution of the appellant was through its letter of 21st August 2014. In the recommendation section after setting out the relevant evidence it stated as follows:-

‘The Commission recommends that E1 be charged with the proposed offences. It is further recommended that the sum of Kshs. 11.5 million be recovered from E1 through civil process.’

28. At page 13 of the report, the identity of E1 is brought to light as Ibrahim Haji Isaak the Appellant herein, as the person recommended to be charged with two counts i.e unlawful acquisition of public property contrary to section 45(1) 9 (a) of ACECA and abuse of office contrary to section 46 of ACECA.

29. In response to the EACC's letter, the DPP vide his letter dated 9th October 2014 signed by Emily Kamau, Senior Assistant Director of Public Prosecution, at paragraph 3 of the letter, stated that:-

‘.....We concur with you that there is sufficient evidence of criminal culpability against E1. However, there are gaps which must be addressed in order to reinforce the prosecution against E1 and possibly other suspects who are implicated by evidence herein.....’

30. The import and ordinary reading and understanding of the above statement is that, the initial decision and recommendation to charge the Appellant was made by the commission by the 21st August 2014 and confirmed by the DPP on 9th October 2014. This was before the period considered in the Michael Sistu Mwaura Kamau case which was between 31st March 2015 and 12th May 2015. For avoidance of doubt, the court of appeal stated thus:-

‘.....two important facts are not in dispute. Firstly, the Chairperson of EACC Mumo Matemu and the Commissioners Jane Onsongo and Irene Keino resigned on 12th May 2015, 31st March 2015 and 30th April, 2015 respectively. Secondly, investigations touching on the Appellant that culminated in the charges against him were concluded after Commissioners of EACC had resigned.....’

31. In as much as the Commission's letter of 6th May 2015 resubmitting the file back to the DPP after covering the gaps as directed was made within the period the Commission was not properly constituted, it isolates the Appellant and indicates that already, it had submitted its recommendation concerning him in the earlier report where it states:-

‘.....From the foregoing, the commission reiterates that there is unequivocal evidence to prove the proposed charges against E1 as earlier indicated in our report marked j1 3(i)-(xv)’

32. Therefore, in my view, the recommendation to the DPP by EACC to prosecute the Appellant was made as early as 21st August 2014 and the DPP concurred through his letter dated 9th October 2014 which was within the period when the Commission was properly constituted. In a nut shell, the letter by the DPP dated 9th October 2014 returning the file to cover certain crucial points did not depict the DPP as disagreeing or rejecting the recommendation against the Appellant's prosecution. To the contrary, the DPP confirmed the sufficiency of evidence against him. The letter by the commission dated 6th May 2015 when the commission was not fully constituted returning the file to the DPP confirming covering the cited gaps did not amount to afresh recommendation relating to the two counts originally recommended in the commission's letter of 21st August 2014 and the DPP's letter to the commission dated 9th October 2014 concurring with the recommendations.

33. It was therefore not necessary for the commission to sit once again and make a second recommendation for the prosecution of the appellant based on the original two counts. Indeed, the Magistrate's analysis of facts and materials placed before him aptly set out issues for determination and considered relevant authorities before arriving at the conclusion that the decision to charge the appellant was a deal made and sealed on 21st August 2014 and 9th October 2014 by the commission and the DPP respectively. I am indeed in agreement and convinced that the interpretation of the law by the Magistrate in that aspect was sound and correct hence the inapplicability of Engineer Kamau's case in the instant case.

34. Regarding the relevance of engineer Kamau case, the court of appeal stated that the appeal had succeeded on a technicality and that the parties were at liberty to proceed as they may deem it fit when properly constituted. My understanding of that statement is that nothing could stop further investigation and recommendation of prosecution of the appellant in Kamau's case with any charges or similar charges as long it was/ is procedurally done when the commission is properly constituted.

35. It is my finding that the trial court correctly held that the appellant's co accused were only entitled to a discharge as they had not been put on their defense. By implication, there is no bar of the discharged accused persons from being charged of the same charges subject to compliance to the necessary procedures and legal framework.

36. The argument by Mr. Roble that the respondent having filed only grounds of opposition without a replying affidavit meant that the application was not opposed hence should have been allowed is yet another issue raised by the appellant. There is no rule that an application which is not challenged by way of a replying affidavit must automatically succeed. However, it is trite law that matters of facts can only be canvassed by adducing evidence. This can only be done by calling witnesses where appropriate or filing affidavits together with documentary proof if any (see **Wilfred Nyaundi konosi T/A Konosi and co. Advocates vs John Lokorio Nakuru HCC Appeal No. 105/2012** .

37. The issues in controversy in the application before the magistrate borders both on matters of fact and points of law hence the filing of grounds of opposition by the DPP was partly within the law and only to the extent of arguing legal issues and not matters of fact. For instance, the ground of opposition that the recommendation to charge the appellant was done in accordance with the law and that the decision of the court of appeal in engineer Kamau's case was not applicable is a point of law. I do agree with Mr. Roble's submission that, the DPP ought to have filed a replying affidavit to further contest matters of fact. Failure to file a replying affidavit would imply that the averments contained in the affidavit in support of the application were not opposed. That does not mean that the appellant's application would automatically succeed as the applicant was duty bound to prove those facts.

38. In the context of the issues raised in the application before the Magistrate, failure to file a replying affidavit did not affect the eventual determination of the issues in question on merit based on the actual legal principles. Contrary to the appellant's argument that the magistrate did not consider that aspect, the ruling at page 18 is a clear testimony that the court did consider the same and made a finding agreeing with the appellant's/applicant's position.

39. However, there is one contentious issue which Mr. Roble for the appellant seem to challenge and capitalize on in this appeal which is; Was the fresh and additional charge in which the commission recommended on 6th May 2015 for the appellant to be jointly charged with five others with the offence of conspiracy to defraud sanctioned by the commission when properly constituted? In considering this aspect, the learned magistrate found that by that time the commission was not fully constituted hence the reason for the discharge of the other five co-accused persons under section 89(5) of the CPC. That question then brings me to the next issue.

Issue No. (ii)

Whether the trial court discriminated against the appellant when it discharged the Appellant's co-accused in line with the Michael Sistu Kamau decision?

40. In as far as the Appellant's co-accused were concerned, in the initial report of EACC to the DPP, no specific recommendation was made touching on the other accused. Furthermore, in the DPP's letter to EACC dated 9th October 14, no open, direct or specific mention was made concerning any of them save for a comment reading:

‘possibly other suspects who are implicated by evidence herein...’

41. The Commission's letter of 6th May 2015 (which evidently falls within the period the Commission was not properly constituted) brings on board the Appellant's co-accused in the trial court and states:-

‘In addition, the Commission recommends the charges of conspiracy to commit economic crime against E21, E2, D2 D3, D4, D5 and D14.’

42. The Court of Appeal in the case of **Michael Sistu Mwaura Kamau** (supra) concluded that the appellant's prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to that effect and prohibited his prosecution **founded** on the report and recommendations of the improperly constituted EACC. The scenario prevailing in this matter on the Appellant's co-accused is not different. I do find that the trial court was right in finding that the prosecution of the Appellant's co-accused was **founded** on the report and recommendation of an improperly constituted EACC as at 6th May 2014.

43. However, in making decisions such as recommending or institution of criminal proceedings arising from similar circumstances against two or more persons, there is a legitimate expectation that common treatment be accorded to the affected persons. In the case of **Joshua Okungu and another vs the Chief Magistrate's Court, ACC Nairobi and another(2014) eKLR**, the court held that,

“where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminative and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process”

44. The appellant having been charged with five others in afresh charge which is conspiracy to commit an economic crime an offence that was recommended by the commission on 6th May 2015 when it was not fully constituted, the appellant should not have been charged of that offence.

45. The secretary to the commission had no powers to make his own recommendations by preferring more charges that were not recommended by the commission. To allow such a scenario would be counterproductive as the secretary to the commission would submit selective investigation reports to suit his personal interest. To that extent the appellant ought to have been discharged of that count just like the rest of the accused persons. In any event, it is inconceivable that the appellant would have conspired to himself (alone) to commit a crime. If the prosecution arraigns the discharged accused persons in court afresh, then they can determine the fate of the appellant as well. For those reasons, I do agree with Mr. Roble that the appellant was not given equal treatment when the learned magistrate discharged his co-accused of that charge thus offending Article 27 of the Constitution which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

46. In the case of **It R vs Attorney General Exparte applicant Kipng'eno Arap Ngeny H.C civil application no 406/2001** the court held that **“criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose”**. It is a fact that the charge of conspiracy to commit economic crime was recommended solely by the secretary to the commission while the commission was not properly constituted contrary to section 11(1) of the EACC Act No 2 of 2011. Legally that charge cannot stand against the appellant alone when the rest have been discharged. It is my considered opinion that the appellant ought to have been discharged together with the others in respect to the affected charge.

Issue No. (iii)

Whether the investigation report under section 35 of the ACECA forms part of evidence?

47. Section 35 (1) (2) of the ACECA provides.

(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.

48. From the above reading, the investigative report under section 35 in my humble opinion deals with communications between the EACC and DPP. No mention is made in the act about supply of the said investigative report to the Accused person. In any case, once the DPP forms an opinion to charge the accused, the accused under Article 50 shall be supplied with sufficient particulars for him to answer and understand the charges against him. The appellant was not in any way entitled to administrative correspondences between the DPP and EACC. There is no prejudice suffered by the appellant by not being supplied with some of the correspondences between the two institutions.

49. The upshot of it all is that, the appeal herein partly succeeds and partly fails and therefore makes the following orders.

1) The appellant herein be and is hereby discharged under section 89(5) of the CPC in respect to the charges of conspiracy to commit an economic crime contrary to section 47A as read out with section 48(1) of the ACECA 2003 together with the alternative count thereto for conspiracy to defraud contrary to section 317 of the penal code.

2) The trial court shall proceed with the two counts originally recommended for full trial.

3) That the prosecution shall amend and substitute the charges facing the appellant/ accused to reflect the original two accounts exclusive of the charges referred to in order no.1 above

DATED AND SIGNED AND DELIVERED AT NAIROBI THIS 21ST DECEMBER, 2018

J. N. ONYIEGO

JUDGE