



Aero Dispenser Valves Limited & 2 others v Republic (Criminal Appeal E002, E003 & E004 of 2025 (Consolidated)) [2025] KEHC 10827 (KLR) (Anti-Corruption and Economic Crimes) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10827 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CRIMINAL APPEAL E002, E003 & E004 OF 2025 (CONSOLIDATED)**

**LM NJUGUNA, J
JULY 23, 2025**

BETWEEN

**AERO DISPENSER VALVES LIMITED 1ST APPELLANT
FRANCIS OMONDI OBURE 2ND APPELLANT
BERYL ALUOCH KHASINA 3RD APPELLANT**

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. The appellants herein filed separate appeal Nos. E002 of 2025, E003 of 2025 and E004 of 2025 which were all consolidated on the 8th April, 2025 with Criminal Appeal No. E002 of 2025 as the lead file.
2. They are part of the eighteen named in the initial charge sheet that was filed on the 11th December, 2018. On the 22nd August, 2019 the names of one Jim Yukes and his company ‘Allied’ were removed by an amendment to the charge sheet and on the 7th October, 2020, the case of the 8th accused person was withdrawn under Section 87(a) of the *Criminal Procedure Code*.
3. In a ruling delivered on the 7th June, 2024, the 1st – 7th, and the 9th, 10th, and 12th Accused persons were acquitted under Section 210 of the *Criminal Procedure Code*, in counts 1 and 5 after the trial court found that no case had been sufficiently established against them.
4. Following that ruling, the appellants herein were placed on their defence and they all gave sworn statements with only the 11th Accused person calling one witness namely Charles Maitai, who was the 9th accused person but he was acquitted.



5. In the judgment delivered on the 24th January, 2025, the 1st, 2nd and 3rd appellants were convicted with the offence of Engaging in a fraudulent practice in a procurement contrary to Section 41(1) and (4) as read with Section 137 (1) of the Public Procurement and Disposal Act 2005.
6. The appellants being dissatisfied with the judgment by the trial court filed three separate appeals with the same grounds of appeal as follows;
 1. The learned Trial Magistrate erred in his appreciation of the law applicable and the evidence adduced against the Appellant in the circumstances of the case.
 2. The learned Trial Magistrate erred in Law in ignoring a cardinal principal in criminal law and procedure that the burden of prove lies on the prosecution and that they must prove each and every ingredient of the charge beyond reasonable doubt.
 3. The learned Trial Magistrate erred in Law and fact in holding the prosecution had proved the case beyond reasonable doubt against the appellant while deciding the case against the weight of evidence.
 4. The learned Trial Magistrate erred in Law in failing to consider the defense case adequately and failed therefore in making a finding in favor of the Appellant thereof.
 5. The learned Trial Magistrate erred in Law and fact in failing to believe the appellant's defense and further found no reason for not believing the Appellant and failed in giving proper or any reasonable grounds for rejecting the appellant defense from evidence adduced which defense covered facts which were weighty and cogent.
 6. The learned Trial Magistrate erred in Law and fact in failing to give due regards to the material contradictions, discrepancies and inconsistencies in the prosecution case thereby reaching a wrong decision and resulting in miscarriage of Justice.
 7. The learned Trial Magistrate failed to make a finding that there existed some doubt in the prosecution's case, and further failed to make finding thereof that the benefit aforesaid was to be given to the Appellant and erred in law in failing to acquit the appellant as a result thereof.
 8. The Trial Magistrate went into error in relying on untruthful and unreliable prosecution evidence.
 9. The Trial Magistrate misdirected himself gravely by failing to consider the evidence as a whole before making a guilt finding against the appellant.
 10. The learned Trial Magistrate gravely misdirected himself in basis the Appellant convicted on mere speculation and conjecture by making a farfetched inference on the guilt of the Appellant.
 11. The learned Trial Magistrate gravely misdirected himself and erred in abdicating his role as the Trial court and acted as a prosecution witness, putting forward a fanciful theory and a reasoning and thereby wrongly convicted the Appellant.
 12. The Learned Magistrate wrongly approached the principle on failure to produce certain evidence inclusive of that of key witnesses thereby wrongly failing to make the presumption that the withheld evidence would have been unfavorable to the prosecution.
 13. The learned Trial Magistrate erred in framing and determining the issues in the matter and in his general approach to the whole case thereby arriving at a wrong verdict.



14. The conclusions of the Trial- Magistrate on the evidence were improper and therefore to be interfered with by the High Court.
7. The respondent filed Grounds of Opposition dated the 7th day of April, 2025 as follows;
 1. The appeals are misconceived, untenable, and the same amounts to an abuse of due process of the court.
 2. The appellants were properly tried and convicted before the trial court, suffice it to say that all procedural safeguards were duly observed by the court during the trial.
 3. The prosecution/respondent duly discharged its onus of proof as required by the law, without shifting the burden of proof at any stage to the appellant.
 4. The appellants' defences were duly considered by the trial court as required by the provision of Section 169 of the Criminal Procedure Act Cap 75 Laws of Kenya.
 5. The case against the appellants was proved beyond reasonable doubt based on credible evidence adduced by the prosecution witnesses.
 6. That pursuant to the above cited grounds, the appellants' appeals lack merit and the same should be dismissed entirely.
8. When the appeals came up for hearing, the court gave directions on filing of submissions and the parties complied with the said directions.

Appellants' Submissions.

9. The appellants submitted on the various grounds of appeal under the following sub heads
 - a. Error in framing and determining of issues and the general approach
10. The appellants faulted the trial court for taking the wrong approach when determining issues for determination and thus arriving at the wrong conclusion. They submitted that instead of addressing his mind on the charges facing the appellants while framing the issues for determination, the trial Magistrate wrongly took into account evidence to the exclusion of the charge thereby failing to frame proper ingredients of the charge, and by dint of the wrong approach, he properly failed to apply his mind on the definition of a "fraudulent practice " as set out in Section 2 of the Public Procurement and Disposal Act (PPDA).
11. They submitted on the ingredients of the charge of Engaging in a fraudulent practice in a procurement contrary to Section 41(1) & (4) as read with Section 137 (1) of the PPDA as
 - a. Whether the 2nd and 3rd appellants were Directors of the 1st appellant in the month of January, 2015
 - b. Whether or not the alleged fake CR12 was submitted by the appellants
 - c. Whether or not the same document influenced the award of the tender bid to the 1st appellant.
12. In this regard, the appellants relied on the following cases;
 1. Criminal appeal No. E001 of 2020 (Douglas Nyangaya Mokuia Vs Republic (2021)
 2. Republic vs Joseph Kioko Muthoka (2022) eKLR which are on failing to adequately consider the defence case and/or reasons for rejecting it



13. The Appellants submitted that it was a misdirection on the part of the trial court for failing to adequately consider the defence case and failed therefore to give cogent reasons for rejecting their case. Reliance was placed on the case Republic vs James Nyanamba (1983) eKLR and that of Peter Kinyua Mwai (2016) eKLR on the duty of the trial court to consider an accused person's defence. It was their contention that in their defence they testified that they were not directors at the time of incorporation of the 1st appellant and only came on board vide form 203A (Notice of Change of Directors) lodged on the 17th June, 2015. It was also their case that they were not Directors at the time of the award of the tender as the same was awarded in the 2014 and they were not in office by then.

Failure to appreciate the discrepancies and inconsistencies in the prosecution's case and failing to accord the appellants the benefit of doubt thereof

14. It was the appellants' submission that there existed discrepancies and contradictions that are material and that affected the substance of the charge. That the trial court made a finding that there are contradictions and discrepancies regarding the change of Directorship of the 1st appellant and the documents regarding its incorporation, yet, the Learned Magistrate proceeded to conclude that the 2nd and 3rd appellants were Directors of the 1st appellant.
15. It was further submitted that the trial court ought to have considered whether or not the alleged false certificate of incorporation and CR12 were submitted by the 1st appellant and whether the 2nd and 3rd appellants were Directors of the 1st appellant as at the date the offence was committed. That since there were both genuine and purportedly fake documents in existence at the KPC, the trial court ought to have resolved the doubt in favour of the appellants.
16. The appellants made reference to the following cases;
- a. Dickson Elai Nsamba Shapwata & Another Vs Republic, CR APP. NO 92 of 2007 (Court of Appeal of Tanzania)
 - b. Richard Munene V Republic (2018) eKLR
 - c. AG vs Republic (criminal appeal E008 of 2022 KEHC 11299 (KLR) (7th June 2022) (JUDGMENT)
- Which are on contradictions and discrepancies in evidence of a witness and that for such evidence to be fatal, it must relate to material facts and must be substantial.
17. Further, that in evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.

Deciding the case on mere speculation, conjecture and trial Magistrate's own theory thereby wrongly convicting the appellants

18. The appellants contended that the trial Magistrate openly subscribed to a conviction based on speculation, conjecture, attractive reasoning and fanciful theories regarding the charge in question. The basis of this submission was the Learned Magistrates conclusion on whether the 2nd and 3rd appellants were Directors of the 1st appellant on the material date, and the reasoning on CR 12 which was not a mandatory document and therefore, not taken into account in the award of the tender which he opined was a necessary document and convicted the appellants based on it.



Failure to produce certain evidence inclusive that of key witnesses thereby wrongly failing to make the presumption that the withheld evidence would have been unfavorable to the prosecution

19. In this regard, the appellants took issue with the prosecution's failure to call a witness namely; Michael Opundo even after the Learned Magistrate's finding that he was the Director who participated during the tender process and he dropped the tender documents for the subject tender. They averred that the said person was a vital witness in establishing who the Directors of the 1st appellant were in January, 2015, if there was doubt cast on the documents presented to the Registrar of Companies and urged the court to make an adverse inference on the prosecution's case since he was a vital witness in determining one of the ingredients of the charge.

Failure to prove the case beyond reasonable doubt

20. It was the appellants' submission that the trial court was in error in arriving at the conclusion that the prosecution had proved all the elements of the offence (for which the appellants were convicted), beyond reasonable doubt as this was against the weight of evidence. Further, that the burden of proof in criminal cases rest throughout the trial with the prosecution and cited the case of Republic Vs Ismail Hussein Ibrahim (2018) eKLR.
21. In this regard, it was also submitted that the prosecution did not prove the ingredients of the charge of engaging in a fraudulent practice to the required standard, and hence the trial court should have granted the appellants the benefit of doubt. They contended that no forensic examination evidence was tendered regarding the making, signing and execution of the documents to wit; the CR12 and Certificate of incorporation. Reliance was placed on the case of Alice Wachuka Kinyanjui Vs Republic (2016) eKLR and that of Republic Vs Rashid Mathobe Malim (2017) eKLR on the ingredients of the subject offence.
22. That the Learned Magistrate misapprehended the law on the making of, and uttering a false document as the certificate of incorporation did not form an ingredient of the charge and therefore reliance on the same vitiated the verdict. That there is also no reference in the charge to the certificate of incorporation and CR12 that are alleged to be fake or forged, yet, the trial Magistrate addressed his mind in the judgment on the alleged certificate.
23. That in any case, there was no nexus between the alleged fake documents and the 2nd and 3rd appellants and any purported fraudulent practice, and in particular, it was never proved that they are the ones who submitted the alleged false documents and that the same influenced the award of the tender. It was contended that the trial court failed to consider the evidence of PW16, a clerical officer at the Companies Registry who testified that CR12 forms dated 3rd May, 2013 and 18th June, 2015 were both genuine and were both issued by his office. That the court ought to have distinguished between the two documents to ascertain which one was present at the tender evaluation stage which would have tilted the benefit of doubt in favour of the appellant.

Respondent's Submissions

24. The respondent submitted under various sub heads; to wit
- a. On the applicable law
 - b. Burden of proof
 - c. Proof beyond reasonable doubt



- d. Consideration of defence
 - e. Contradictions
 - f. Failure to call key witness
25. They averred that there is no variance between the particulars of the charge in all the counts under which the appellants were charged and the evidence adduced by the prosecution witnesses, and that the appellants, were charged under the relevant laws. That it has not been demonstrated by the appellants in what material sense, the law under which they were charged is inapplicable to the offence.
 26. On the burden of proof, it was submitted that the prosecution discharged its burden of proof as required by the law and at no time was it shifted to the appellants and that the appellants were not able to successfully rebut or dislodge otherwise credible evidence adduced against them. It cited Section 107 of the *Evidence Act* and the exception to the requirement of that Section as envisaged Under Section 111 (1) which provides that there are instances when the burden of proof may lie upon an accused person to prove existence of facts.
 27. That there were no material contradictions whatsoever in terms of the evidence adduced by the prosecution witnesses; there was material corroboration and above all, there was systematic, consistent, and credible evidence as to leave no doubt in the mind of the trial court that indeed the appellants committed the offences they were charged with. That the Learned Magistrate carefully weighed the prosecution evidence against that adduced by the defence and found that it was incapable of dislodging otherwise credible evidence adduced by the prosecution and therefore, the conviction was sound.
 28. On the consideration of the defence by the appellants, the respondent has submitted that the same was considered and findings and reasons for such findings made as required by the relevant provisions of the law. That all the prosecution witnesses were cross- examined by the defence advocates at length, and the ultimate conclusion of the learned trial Magistrate comprised of the evidence given by both the prosecution and the defence. That the learned Magistrate in his judgment considered the nature and the extent of the evidence tendered in the defence case and made a determination on each and every issue and the reasons for his findings.
 29. On contradictions, the respondent submitted that there were no material contradictions in the prosecution's case whatsoever as alleged, and if any, but which is denied, the same were minor and did not go to the core of the prosecution's case. That the appellants have not demonstrated with precision specific contradictions alleged and in what material sense they were contradictory.
 30. It was the respondent's further submission that the prosecution's evidence was not based on speculation and conjecture, but rather, there is specific material evidence adduced in support of the prosecution's case. On failure to call key witnesses, it was contended that the prosecution is not bound to call a superfluity number of witnesses in order to prove its case against an accused person beyond reasonable doubt. That the prosecution has the liberty to call those witnesses deemed sufficient and appropriate to prove its case.
 31. On the framing of issues by the learned Magistrate, the respondent urged the court to find that the same were properly framed based on the content of the charge sheet and the evidence that was adduced. That the issues were relevant to the subject matter of the case and hence were properly framed unless the contrary is proved. Reliance was placed on the case of Francis Zuriels Vs Republic (civil appeal Number E001 of 2022) before the Anti –Corruption and Economic Crimes Division.
 32. The respondent isolated the following issues for determination;



1. Whether the prosecution discharged its burden of proof
2. Whether the charges on which the appellants were convicted were proved to the required standard of beyond reasonable doubt.
3. Whether there was sufficient evidence on record to sustain the convictions on the two counts
4. Whether the sentences the trial court imposed on the appellants were proper
5. Whether this court should in this appeal interfere with the said convictions and sentence.

Analysis And Determination

33. The court has considered the grounds of appeal, the submissions of the parties and has re-evaluated the evidence that was adduced before the trial court. In my considered view, the issues for determination in this appeal are ;
 - a. Whether the charge on which the appellants were convicted was proved to the required standard of beyond reasonable doubt.
 - b. Whether the prosecution discharged its burden of proof
 - c. Whether there was sufficient evidence on record to sustain the conviction on count 3.
34. This being a first appeal, the court is guided by the principles set out in the case of *Okeno vs The Republic* (1972) EA 32 on the duty of the first appellate court 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 (*Pandya vs Republic*) 336 and the appellant’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal vs M. Rawala vs R* (1957) EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own finding 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 Post* (1958) EA 424.
35. Similarly, in the case of *Kiilu & Another vs Republic* (2005) 1 KLR, the Court of appeal Stated;

“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. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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; 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.
36. Further in the case of *David Njuguna Wairimu vs Republic* (2010) in which the court of appeal stated;

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate



court may, depending on the facts and the circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence to satisfy itself on the correctness of the decisions.”

37. As the court had stated earlier in this judgment, the appellants herein had been charged together with other fifteen accused persons with various counts. Only the counts relating to the three appellants are listed hereunder:-

Count I - Conspiracy to defraud contrary to Section 317 of the *Penal Code*.

Count III – Engaging in a fraudulent practice in a procurement contrary to Section 41(1) and (4) as read with Section 137(1) of the Public Procurement and Disposal Act, 2005;

Particulars to the offence

13. Aero Dispense Valves Limited

15. Francis Omondi Obure

16. Beryl Khasinah

In the month of January, 2015, within Nairobi City County in the Republic of Kenya, being limited Liability Company and the Directors of Aero Dispenser Valves Ltd respectively, you jointly engaged in a fraudulent procurement practice by submitting to Kenya Pipeline company Limited a false document, to wit, a CR 12 form dated 9th March, 2008 purporting to have been issued from the companies Registry in support of the bid documents in respect of Kenya Pipeline Company Limited Tender No. SU/QT/3264F/14 for the supply of Cla Val Model 352GF Hydrant Pit Valves Complete with Under Hydrant Valves and two years Maintenance spares.

Count IV- Engaging in a fraudulent practice in a procurement contrary to section 41(1) and (4) as read with Section 137(1) of the Public Procurement and Disposal Act, 2005.

Count VI – unlawful acquisition of public property contrary to Section 45(a) As read with Section 48 of the *Anti-Corruption and Economic Crimes Act*, 2003

Count VII – unlawful failure to pay taxes payable to the Kenya Revenue Authority contrary to Section 45(1)(d) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act*, 2003.

38. At the end of the trial, the three appellants were convicted in count 3 and were acquitted in all the other counts they were charged with. In addition, to the appellants the 11th accused was convicted in count 2 but he did not prefer any appeal against the conviction. It is worth noting that the state did also not appeal against the acquittal of all the other accused persons and the matter having been heard by a court of competent jurisdiction, and the state having exercised an option of not appealing against the judgment of the trial court, the finding on the acquittal of the other accused persons is final and it would be superfluous for this court to re-evaluate the evidence relating to those accused persons as this court has not been moved to do so. In that regard, the court’s analysis of the evidence and the issues for determination will be limited to the appellants in this appeal. I say no more on that!
39. Having said that, the appellants herein were found guilty of count 3. The charge is as follows;

Engaging in a fraudulent practice in a procurement contrary to Section 41 (1) and (4) as read with Section 137 (1) of the Public Procurement and Disposal Act, 2005. The particulars of the offence were that;



In the month of January ,2015, within Nairobi City County in the Republic of Kenya , being a limited liability company and the Directors of Aero Dispenser valves limited respectively ; they jointly engaged in a fraudulent procurement practice by submitting to Kenya Pipeline Company Limited a false document ,to wit a CR12 form dated the 9th day of March, 2008 purporting to have been issued from the Companies Registry in support of the bid documents in respect of Kenya Pipeline Company Tender No.SU 3264f for the supply of Cla- Val Model 352Gf Hydrant pit Valves complete with under Hydrant valves and two years Maintenance spares.

40. The genesis of the charges is a Public Procurement undertaken by Kenya Pipeline Corporation (Herein ‘KPC’), from the month of October, 2014. The 1st appellant is a locally registered company in which the 2nd and 3rd appellants were charged as Directors. It all started with a memo dated the 13th October, 2014 addressed to the Managing Director of KPC, by Charles Maitai who was one of the accused person but was quitted under Section 210 of the *Criminal Procedure Code*.
41. The subject of the memo was the replacement of non –compliant Hydrant pit valves for Embakasi public Station Tender No. SU/QT/3264/14. In the said memo which was produced as exhibit 1, he requested the management’s consideration to enhance replacement of non –compliant hydrant pit valves in accordance with the Third Edition of APT 584, JIG/IATA requirements. According to the memo, there were two justifications for it;
 - a. Provision of under hydrant valve (UHV) to isolate the fuel flow from the hydrant system in case a pit valve fails. It would also allow removal and servicing of the whole valve assembly.
 - b. The valves with only lanyard operated pilot valve for manual on/off should be upgraded to Dual Air/Lanyard operated pilot valves for deaden control as required by the JIG Guidelines (Section) 3.5.1 which requires that all new hydrant systems should be equipped with air and lanyard operated dual pilot valves.
42. The tender was initiated by the user of the Tender items, Senior Engineering Mechanical, Charles Maitai and the Tenderer was a foreign company namely Cla-val that was from USA or Canada and who was the original manufacturer of the equipment. The Tender was approved by the Procurement Manager and the procurement process commenced, with Mr. Fred Oganga seeking for direct procurement vide a memo dated the 2nd December, 2014. The said memo was addressed to the Tender committee through the procurement manager and his request was approved by the tender committee
43. The Procurement was allowed to get a tender document from Messrs Cla-Val Limited and the tender document was prepared by the user department headed by Engineer Elias Karua, the Chief technical manager. I need to point out here that, the prima facie evidence is that Cla-Val appointed Messrs Allied Inspection to bid, but Messrs Allied did not bid but instead, appointed Messrs Aero Dispensers to bid the tender and though the tender was approved to Cla-val it was awarded to Aero Dispensers vide a letter dated the 19th February, 2015 by the managing Director at the material time namely Charles Tanui, and the same was addressed to the Managing Director, Aero Dispensers Valves, Nairobi.
44. The tender committee negotiated the price from USD 6,441,740 to USD 6, 409, 491.89. A local purchase Order number 4500086963 dated the 9th March, 2015 was generated and was signed by the then Managing Director of KPC and it was acknowledged by a Mr. Micheal Orido of the 1st appellant vide a letter dated the 17th day of March, 2015.
45. According to the investigating officer, one Andrew Lenkempanish, the whole procurement was not above board and in his evidence he gave his reasons why he so believed, but like I had stated at the



beginning this court will only confine itself to the evidence relating to the three appellants before the court. Of importance, according to the investigating officer, that Aero Dispenser Valves limited, the 1st appellant herein, presented wrong documents to KPC which made them to win the tender, in that, the Certificate of incorporation dated the 9th March, 2005 and the CR 12 dated 27th February, 2014 were found to be false, yet, they were among the mandatory documents that were to be presented by the 1st appellant.

46. The other reasons were that;
- a. The tender committee procured the items from Messrs Cla-val and not any other company
 - b. Messrs Cla-val never received the tender documents in respect of this tender
 - c. Messrs Cla-val did not authorize Messrs Allied Inspection and Messrs Aero Dispenser Valves Limited to represent it in the tender.
 - d. The email that purportedly sent the tender documents to Messrs Cla-val was wrong
 - e. Officials of KPC conspired with Allied Inspection and Testing and Aero Dispenser Valve Limited to defraud KPC
 - f. Aero Dispenser Valves did not have capacity to engage in the tender.
 - g. Messrs Cla-val is not aware of Aero Dispenser Valves Limited.
47. Upon his findings, he submitted the file to the DPP and recommended several charges and the DPP concurred with their recommendations and approved the charges that the appellants were facing, and the officials of KPC, who were all acquitted of their respective charges.
48. The appellants herein were charged under Section 41(1) and (4) as read with Section 137 (1) of the Public Procurement and Disposal Act. The relevant Sections provides: -

41.

- (1) No person shall be involved in a fraudulent practice in any procurement proceeding
- (2) If a person contravenes subsection (1) the following shall apply
 - a) The person shall be disqualified from entering into a contract for the procurement; or
 - b) If a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity
- (3) The voiding of the contract by the procuring entity under subsection (2) (b) does not limit any other legal remedy the procuring entity may have
- (4) A person who contravenes subsection (1) shall be guilty of an offence

137

- (1) A person convicted of a offence under this Act for which no penalty is provided shall be liable –
 - a. If the person is an individual, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both
 - b. If the person is a body corporate, to a fine not exceeding ten million shillings



(2) In addition to the penalty under sub section (1), the public officer involved shall suffer disqualification from public office while the private individual shall be debarred.

49. Section 2 of the Public Procurement and Disposal Act (2005), hereinafter, PPDAs; defines a fraudulent practice as a misrepresentation of fact in order to influence a procurement or disposal process or the exercise of a contract to the detriment of the procuring entity.
50. The operative words in Section 2 above are misrepresentation in order to influence a procurement or a disposal process. The prosecution had to prove that there was misrepresentation and that the same influenced the procurement.
51. It is trite law that the prosecution bears the burden of proof and it must prove beyond reasonable doubt each and every ingredient of the offence. See the case of Republic vs Joseph Kioko Muthoka (2022) eKLR and that of *Douglas Nyangaya Mokuva vs Republic (Criminal appeal No. E001 of 2020)*.
52. The appellants herein are said to have engaged in a fraudulent procurement practice by submitting to Kenya Pipeline Company a false document, to wit a CR12 form dated the 9th March, 2008 purporting it to have been issued by Companies Registry in support of the bid documents. For the court to effectively deal with this issue, it is important to address the nature of the entity the 1st appellant is. The exhibits that have been produced before the court shows that it was a limited liability company and this is not in dispute. But, as rightly observed by the Learned Magistrate, its character and corporate entity appears mired by intrigue and impropriety as can be evidenced by its two memoranda and Articles of association dated 22nd April, 2013, and 23rd April, 2013, two Certificates of incorporation and two differing CR 12.
53. PW19, Peter Wandati Weru, an advocate of the High court, testified that the two sets of the Memoranda and Articles of association that were purportedly drawn by his firm of advocates were not drawn by his firm and that the two sets were different and the subscribers were different.
54. This court has gone through the evidence on record regarding the 1st appellant, and like the Learned Magistrate rightly observed, the Articles and Memorandum of association of the 1st appellant that were purportedly drawn by his firm of advocates were not drawn by him. Further, it was his evidence that he did not present the two forms 203A which were received at the company registry on the 17th June 2015, though it was allegedly presented by his firm of advocates. According to him, he has never acted for the 1st appellant and he has never met any of its directors and he only saw those documents in court.
55. The evidence of PW16 did not do much to assist the court in unravelling the mystery surrounding its incorporation and Directorship. It was his evidence that EACC wrote to them asking them to confirm if the two certificates of incorporation one dated 3rd March 2008 and the other dated 3rd May, 2013 and CR12 form dated the 8th June, 2015 originated from their offices or which ones originated from their offices. According to him, the current shareholders/Directors were appointed vide form 203A dated the 4th September, 2014 which was filed in their registry on the 17th June, 2015. He also confirmed that the certificate of incorporation dated CPR/2013/10XXX5 originated from their office, and therefore, was genuine and so was the list of Directors for CPR dated 18th June, 2015. However, the other attached certificates of Directors/shareholders number CPR/ 2008/10/1X5 and the list of directors for CR12 dated 27th February, 2014 were not genuine and did not emanate from their office.
56. In essence, the gist of his evidence was that the 1st appellant was incorporated on the 3rd May, 2013 and a change of Directors was made vide the form 203A dated the 4th September, 2014 and filed in their registry on 17th June, 2015 wherein Jackson Odero resigned from being a Director of the 1st appellant and transferred all his 400 shares to Beryl Khasina, Michael Opundo also resigned from being



a Director and transferred all his shares to Beryl Khasina. Willpard Otieno also resigned and transferred all his shares to Francis Omondi Obue and effectively Beryl Khasina and Francis Omondi Obue were appointed Directors of the 1st Appellant.

57. He went on and stated that there was no form of irregularity of the incorporated changes of Directorship or shareholding. All the returns were properly filed and so were the resolutions and the record of the 1st appellant was regular. It was his further evidence that the company did not exist in the year 2008 and therefore, CPR/2008/10XXX35 does not exist. He stated that change of shareholding and directorship is an internal function of the company, but they have to file the same at the company registry. His evidence is contradicted by that of PW19 who is on record as having stated that he did not prepare form 203A which PW16 says was received in their registry on the 17th June, 2015.
58. This court, just like the learned Magistrate, is curious how a document dated 4th September, 2014 took almost a year before it could be lodged for registration at the Company registry. But be that as it may, this court can only be guided by the evidence on record. The evidence of the prosecution through PW16 and PW19 was contradicting in material particulars, and though I concur with the learned Magistrate that the character and the corporate entity of the 1st appellant was mired in intrigue and impropriety, I beg to differ with his conclusion and finding that the 2nd and 3rd appellants were directors of the 1st appellant any time before the 17/06/2015, and therefore he ought to have given them the benefit of doubt and acquit them. The evidence of PW16 to the effect that the change of Directors is an internal and administrative affair by a company remains just that, and for our purpose we can only be guided by the records held at the Company registry and nothing more, nothing less. Anything else can only be suspicion and suspicion no matter how strong cannot form the basis of a conviction.
59. Even if this court disregarded the evidence of PW16 and PW19 with all the contradictions, the prosecution has not placed any evidence before the court to link the 2nd and 3rd appellants to the fake CR12 with which they are being accused of presenting to Kenya Pipeline Company. In their own evidence by their prosecution witnesses, it is one Mr. Michael Opundo who presented the said document to Kenya Pipeline Company. The prosecution did not call him as a witness and their evidence is silent on his whereabouts and why he was not called as a witness. The prosecution also ought to have told the court why they did not charge the said person, yet, he is the one who presented the impugned documents to Kenya Pipeline. Yes, the said document may not have been genuine, but is it the 2nd and the 3rd appellants who presented it to KPC? this is the million-dollar question that the prosecution failed to give the court an answer for, if their case was to succeed.
60. In the case of the 1st appellant, it was incorporated in 2013 according to the evidence of PW16 and therefore, in view of the impugned CR12 dated 9th March, 2008 and the contradictory evidence by the prosecution witnesses, the same cannot form the basis of conviction of the 1st appellant. Further, it was incumbent upon the prosecution to call Michael Opundo who presented the documents to the 1st appellant to shed some light on the capacity in which he presented them. Unfortunately, this was not done! To this extent, it was a misdirection on the part of the learned Magistrate to attribute the same to the 2nd and 3rd appellants.
61. In the end, I find that the appeals by the three appellants have merit and the same are allowed.
62. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF JULY 2025

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L.M. NJUGUNA



JUDGE

In the presence of:-

Miss Misiati holding brief for Prof. Tom Ojienda and appearing with Mr. Miiri for the Appellants

Mr. Mong'are for the Respondent

Court assistant – Adan

