



REPUBLIC OF KENYA



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**Kitua & another v Republic (Appeal E003 of 2023)
[2024] KEHC 9553 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEAL E003 OF 2023

F GIKONYO, J

JULY 19, 2024

BETWEEN

LEONARD KITUA 1ST APPELLANT

DAVID NDOLO NGILAI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Lawrence N. Mugambi, Chief Magistrate, (as he then was) and or P. Ooko Senior Principal Magistrate, in Milimani Magistrates Anticorruption Criminal Case No. 19 OF 2014, delivered on 4th August 2023)

JUDGMENT

1. The appellants were charged and convicted of the offence of conspiracy to defraud contrary to Section 317 of the Penal Code.
2. The appellants were sentenced to pay a fine of Kshs 5,000,000 in default imprisonment of two years.
3. The appellants have appealed to this court through two Petitions of Appeal; both dated 13th July 2023 but filed on different dates, namely 14th July 2023 and 18th July 2023. Both Petitions of Appeal were filed within the statutory period and raise similar grounds. The only difference between the two is that the latter sought to rectify the date of the conviction, which is, 4th July 2023 as opposed to 4th August 2023.
4. The appellant has cited the following 20 grounds of appeal;
 - i. The learned magistrate erred in both law and facts in arriving at the conclusion that the prosecution had established the offence of conspiracy under Section 393 of the Penal Code.



- ii. The learned magistrate erred in law in holding that the appellants had conspired to steal without any evidence at all.
- iii. The learned magistrate erred in law and fact in relying on insufficient and doubtful evidence and conjecture to substantiate an offence of conspiracy in the absence of any of the ingredients of the offence.
- iv. In the totality of the evidence and circumstances of the alleged offences, having acquitted the appellants on all other counts, it was an error of fact and law for the learned magistrate to find a conviction in respect of the offence of conspiracy.
- v. The learned magistrate erred in law and fact in finding a conviction on suspicion, assumptions and rhetoric questions.
- vi. The learned magistrate erred in law and fact in his failure to observe and find that there were critical evidential gaps in the prosecution case which made it absolutely impossible to link (complete chain) the appellants to the offence of conspiracy.
- vii. The learned magistrate erred in law and facts by holding that there was conspiracy despite the absence of a meeting of minds between alleged conspirators.
- viii. The learned magistrate erred in law and facts in holding that there was conspiracy despite the absence of evidence on the actus reus of agreement or consent aimed at committing a criminal act or for an apparent criminal purpose.
- ix. The learned magistrate erred in law and in fact in forming and holding opinions and stating facts that were not supported by any evidence.
- x. The learned magistrate erred in law in reliance on disjointed circumstantial and or uncorroborated evidence which was unsafe to do. Accordingly, the magistrate erred in concluding that the prosecution had proved its case beyond reasonable doubt.
- xi. The learned magistrate erred in law and fact in his failure to grant the appellants the benefit of doubt after having established they were not involved at the initial stage of the alleged conspiracy.
- xii. The learned magistrate erred in fact and law by relying on third party omissions and commissions to attribute guilt on the part of the appellants.
- xiii. The learned magistrate erred in law and fact in wrongly applying the law on procurement of goods and services.
- xiv. The learned magistrate erred in law and fact in improperly admitting and acting on inadmissible evidence.
- xv. The learned magistrate erred in law and fact in shifting the burden of proof to the appellants.
- xvi. The learned magistrate erred in law and facts in holding that the sale of a portion of parcel of land, L.R No.9918/3 was irregular and or unauthorized.
- xvii. The learned magistrate erred in law and facts in taking into consideration and or acting on extraneous and irrelevant evidence/material; applying wrong principles and ignoring relevant evidence.
- xviii. The learned magistrate erred in law and facts in disregarding the defense by the appellants.



- xix. There was a miscarriage of justice, procedural and substantive justice, and an illegality by virtue of fact that the proceedings were conducted by a judge and a magistrate.
- xx. In the totality of the circumstances of this case, the sentence is manifestly excessive and that in exercise of its discretion in sentencing the court acted on wrong principles.

Background of the case

5. The present charge sheet is an amended one. The original charge sheet in which the plea was taken on 5/9/2014 had nine accused persons. The names of some of the people in the original charge sheet continued to feature in the testimonies of various witnesses during the hearing of this case despite them having successfully challenged their prosecution in the Superior Courts and obtaining the orders against their prosecution.
6. The original charge sheet had the following names of nine individuals: Julius Kilonzo Maweu, David Ndolo Ngilai, James Kituku Munguti, Leonard Kyania Kitua, Julius Mbau Nzyuko, Johnstone Nduya Muthama, Bitange Ndemo, Zablon Agwata Mabea and Leonard Leposo Musengi.
7. Along the way, the High Court terminated the prosecution of the five, namely: -Leonard Leposo Musengi whose name was dropped pursuant to Constitutional Petition No. 436/2014. Julius Maweu Kilonzo's case was terminated vide High Court Miscellaneous Criminal Appeal Number 189/2015. Dr. Bitange Ndemo's exemption from prosecution came through High Misc. Application Number 192 of 2016. Zablon Agwata Mabea secured an order of prohibition against prosecution on 27/2/2017. Equally, Johnstone Nduya Muthama successfully obtained the orders barring his prosecution. The trial court received a total of five orders at different times in the course of the trial.
8. Plea in the present charge sheet was eventually taken by the four accused on 31/3/2017.
9. The Appellants are and were directors of a public company known as Malili Ranch Limited.
10. The appellants were charged with six (6) counts;
11. Count I: Conspiracy to defraud contrary to Section 317 of the Penal Code Cap 63 Laws of Kenya
12. The charge was against the 1st, and 2nd appellants and 4th accused since the prosecution of the 2nd accused abated by reason of his death in the course of the trial.
13. The particulars are that between 2nd February 2009 and 11th January 2010 at Makueni/Machakos/ Nairobi Counties within the Republic of Kenya, jointly with others not before the Court conspired to defraud Malili Ranch Limited by fraudulently causing L.R. 9918/3, the property of Malili Ranch Limited to be sold at one billion (Kshs. 1,000,000,000) to the Government of Kenya (Ministry of Information) without the shareholders resolution.
14. Count II: Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code.
15. The charge was against the 1st, and 2nd appellants and 4th accused following the death of the 2nd accused in the course of this trial.
16. The particulars are that between 25th June, 2009 and 19th March, 2010 at Nairobi/Machakos Counties within the Republic of Kenya, jointly with others not before the Court, stole a sum of Kshs. 553,831.731.15 being the sale proceeds of 5,000 acres of land L.R. No. 9918/3 that was sold to the Government of Kenya (Ministry of Information & Communication), the property of Malili Ranch Limited.



17. Count III: Breach of Trust Against the Public Contrary to Section 127 of the Penal Code Cap 63 of the Laws of Kenya
18. This charge was against the 2nd appellant.
19. The particulars are that between 2nd February, 2009 and 19th March, 2010 at Makueni/Machakos/ Nairobi Counties within the Republic of Kenya, being an officer employed in the public service to wit a Director of Malili Ranch Limited, and in breach of trust bestowed on his office agreed to sell L.R.No.9918/3, the property of Malili Ranch Limited without the shareholders resolution, an act that was not in the best interests of the said Malili Ranch Limited and its shareholders.
20. Count IV: Breach of trust against the public contrary to Section 127 of the Penal Code Cap 63 of the Laws of Kenya
21. The charge was against the 2nd accused-James Kituku Munguti (deceased) hence is no longer valid as it automatically terminated upon his death.
22. Count V: Breach of trust against the public contrary to Section 127 of the Penal Code Cap 63 of the Laws of Kenya
23. This charge was against the 1st appellant- Leonard Kyania Kitua.
24. The particulars being that between 2nd February, 2009 and 19th March, 2010 at Makueni/Machakos/ Nairobi Counties within the Republic of Kenya, being an officer employed in the public service to wit a Director of Malili Ranch Limited, and in breach of trust bestowed on his office agreed to sell L.R. 9918/3, the property of Malili Ranch Limited without the shareholders' resolution, an act that was not in the best interests of the said Malili Ranch Limited and its shareholders.
25. Count VI: Breach of trust against the public contrary to Section 127 of the Penal Code Cap 63 of the Laws of Kenya
26. The charge was against the 4th accused -Julius Mbao Nzyuko.
27. The particulars being that between 2nd February, 2009 and 19th March, 2010 at Makueni/Machakos/ Nairobi Counties within the Republic of Kenya, being an officer employed in the public service to wit a Director of Malili Ranch Limited, and in breach of trust bestowed on his office agreed to sell L.R. 9918/3 the property of Malili Ranch Limited without the shareholders' resolution, an act that was not in the best interests of the said Malili Ranch Limited and its shareholders.

Evidence before the trial court

28. The prosecution called a total of 30 witnesses.
29. Henry Mungasia (PW 1) PW 1 had been two months in retirement when he was summoned to testify in court. He retired on 2/7/2017. He was a former employee of the Ministry of Information, Communication & Technology where he had retired in the position of Director of Administration.
30. In 2008, he was working as the Deputy Secretary in the Ministry- principally assisting the then Permanent Secretary Dr. Bitange Ndemo. Among his other responsibilities at the time was chairing the Ministerial Tender Committee. He was also an AIE Holder - (Authority to Incur Expenditure) and therefore performed the role of authorizing the expenditure of voted funds attached to his department by signing the payment vouchers.
31. He recalled how in early in December 2008; the Permanent Secretary, Dr. Bitange Ndemo called him and informed him about a Cabinet decision to set up an ICT Park whereby the Ministry was required



- to look for 3000 acres of land for that project. The PS thus instructed him together with the Chief Procurement Officer, Mr. Mandaji (PW 5), to advertise for the land in the newspaper for land owners willing to sell the land to the Government to come forward. An advertisement was thus put in the Standard Newspaper on January, 21st, 2009 pursuant to the instructions of the Permanent Secretary- (P Exh 1). It required submission of bids to be completed by 3rd February, 2009 at 10.00 a.m.
32. Three responses were received following that advertisement. They were: i) Hon. Justice Kasanga Mulwa in respect of Lukenya Hills Farm L.R. 8857. He had offered 3000 acres at Kshs.300,000/= hence the total cost of Kshs.900,000,000/= The bid was dated 2.2.2009- (P. Exh 2). ii) Samuel Njenga on behalf of Samsure Enterprises Limited dated 29.1.2009. It was in relation to Lukenya Ranch within Mavoko town- that is Mavoko Municipality Block 3/4. He offered 3000 acres offered at a price of Kshs.400,000/= per acre. The bid was- P.Exh 3. iii) Eric K. Mutua Advocates offering 3000 acres at Kshs. 298,000 per acre on behalf of Malili Ranch Limited. The bid was dated 3.2.2009. It was P. Exh 4.
 33. The three bids were then put together with a covering letter of the Permanent Secretary Dr. Bitange Ndemo dated 4/2/2009 (P. Exh 5) and sent to the Permanent Secretary Ministry of Lands requesting that the three pieces of land be valued and seeking advice on which land to procure.
 34. The Permanent Secretary in the Ministry of Land Dorothy Angote responded through the of letter of 9.2.2009- P. Exh 6. The Ministry of Lands advised that land be visited and inspected.
 35. The visit took place and a report of each parcel was compiled. The letter to the Permanent Secretary Dr. Bitange Ndemo dated 17/2/2009 -(P. Exh 7) included the report of the findings made for each of the three parcels. The report on Justice Kasanga Mulwa's land-LR 8857 (P. Exh 8) showed that the inspection team was not given access to the land when it visited on 11/2/2009 thus no valuation report was compiled. It was signed by Mrs. M.W. Wanjohi-Assistant Commissioner of Lands, Valuation.
 36. The second report was for Mavoko Municipality Block 3/4, Lukenya Ranch. This land comprised various plots under the Mavoko Municipality Block 3. Formerly known as 'Lukenya Ranch' it was subdivided into plots of 40 acres with each having an individual title. It was inspected on 11.2.2009. It was approximately 37 Kilometers southeast of Nairobi City and approximately 12 Km off Mombasa Road turn-off at Kenya Meat Commission along a Marrum Road to Kinamie EPZ sewerage work and Kamulu. The area on offer was about 5 Km from Kenarie and to the East of the Sewerage area.
 37. The valuation report dated 11/2/2009 estimated the open market value for the land to be Kshs.150,000/= per acre. It was signed by Mrs. M.W. Wanjohi and C. Moemi, an Assistant Commissioner of Lands [Valuation]. It was produced in evidence as P. Exh 9.
 38. The third report also dated 11/2/2009 was for LR 9918/3Malili Ranch in Machakos. The registered owner was Malili Ranch Limited. It noted that there was a sub-division plan of 7/8-acre plots although individual titles had not been issued. It was situated about 65 Km from Nairobi City along Mombasa Road 16 Km South of Machakos in Machakos District. It began from the Junction of Mombasa Road and the dry weather road to Konza shops and Railway Station. Valuation- the valuers gave it a fair open market value of Kshs.200,000/=per acre. It was signed by Mrs. M.W. Wanjohi and C. Moemi, an Assistant Commissioner of Land [Valuation]. The Report &Valuation of Malili Ranch LR No.9918/3 was produced later in evidence as P. Exh10.
 39. Upon receipt of these valuation reports from the Ministry of Lands, the same was tabled before the Ministerial Tender Committee chaired by PW 1 for deliberation and award. He produced the Minutes for the 1st Special Ministerial Tender Committee Meeting as P.Exh 11.In attendance - Judith Nyadimo (PW 2) a Procurement Officer from Secretariat who was taking the minutes.Min. No.3 of [P. Exh 11]



was the Purchase of land in the Kitengela/Athi River area for the proposed ICT park-Tender-No. MIC 2/2008-2009.

40. Background information given during the meeting was the intention to purchase of land was advertised in two local dailies, - Nation Newspaper and Standard Newspaper, and that the tender was opened on 3.2.2009 at 10.00 am as per tender opening minutes (P. Exh 12). The Tender Opening register dated 3.2.2009 and indicating those who attended the tender opening meeting was also availed (P. Exh 12-(a). According to the register, only one person attended the tender opening that is, Dominic Mwamusi representing Mutua & Co. Advocates. The rest of the bidders did not turn up.
41. After tender opening minutes - those bids were forwarded to the Ministry of Lands for valuation to inform on the market value of the land. This is how the reports on each parcel P.Exh 8,9 and 10 were generated.
42. The Ministerial Tender Committee apart from considering valuation reports (P. Exh 8,9 &10) also considered the Secretariat comments which were rendered. Having reviewed the above, the Ministerial Tender Committee pronounced itself on the award in its minutes of 5/3/2009.
43. PW 1 was asked to clarify the variance between what Malili Ranch Limited had offered in its bid being 3000 acres and what was awarded by the Ministerial Tender Committee, that is, 5000 acres. The Chairman further said upon inquiry, he learnt that there is a possibility that the Government might be interested in the purchase of more than 3000 acres. The Directors agreed to sell 3000 acres or more for any such above Kshs.200,000/= per acre”
44. He stated that he never met any of the Directors. The minutes were signed by two Directors, i.e. one Director and a Director/Secretary with no names. He also referred to a Special/Ordinary resolution P. Exh 13 (a).
45. A letter was written on 20/2/2009 (P. Exh 14) to E.K.Mutua & Co., Advocates referenced 'offer of purchase of land for the proposed ICT Park tender No. MIC 1/2008-2009' signed by George Mandaji Chief Procurement Officer communicating that their bid offering 5000 acres at Kshs.200,000/- per acre was successful. Letters of regrets to Justice Kasanga Mulwa and Samsure Enterprises were also dispatched on 20/2/2009-(P.exhibit 14a&b). E.K. Mutua & Co, Advocates through a letter dated 23.2.2009 addressed to Chief Procurement Officer, Ministry of Information & Communication, Nairobi communicated its acceptance of the offer to sell 5000 acres at a price of Kshs.200,000 per acre. An agreement for sale dated 17.6.2009 (P. exhibit 16) - between Malili Ranch Limited and the Permanent Secretary Treasury of Kenya on behalf of the Ministry of Information & Communication for the sale of 5000 acres from of LR 9918/3 was thus drawn and executed.
46. He testified that he authorized the payment of the first installment sum of Kshs. 400,000,000/- to E.K. Mutua & Co.Advocates through a payment voucher No.11172 of 16.6.2009 (P.Exh 17) to E.K. Mutua & Co. Advocates. The same was effected through cheque number 001040 dated 25/6/2009-P.Exh 18.
47. His testimony was that he did not play a role in the subsequent payment reflected in the control sheet number 36dated 5.3.10 (P. Exh 19) amounting to Kshs.600,000,000/= which was also paid to Eric Mutua & Co. Advocates.
48. The Ministry thereafter took possession of 5000 acres of land.
49. On cross-examination at the time he referred to the Minutes of Directors of 22/1/2009 - P.Exh 13 and confirmed they were signed by two Directors only but he could not tell who exactly they were. Equally, he confirmed that P. exhibit 13 (a) was signed by only two Directors.



50. It was also put to the witness that minutes of the Directors gave E.K Mutua the mandate to offer 3000 acres but the special resolution contradicted the Minutes and authorized the sale of 5000 of Malili Ranch Limited and in (P. exhibit 4 dated 3/2/2009) which E.K Mutua wrote after the said minutes and special resolution, he offered 3000 acres of Malili Ranch to which the witness conceded.
51. He also confirmed as per the Ministry of Land Report, Malili Ranch land had been subdivided into individual 7-8 acres.
52. Asked if individual shareholders were involved, he stated they took the minutes to be their consent. He testified that the entire purchase price was paid to E.K.Mutua & Co. Advocates.
53. Judith Nyandimo (PW 2) was a Procurement Officer in the Ministry of Information and Communication in the year 2008/2009. She participated in this tendering process. She took the minutes of the tender opening committee (P.exh 12-MIC/2/3/08-09) on 3/2/2009 which she produced in evidence. This meeting was attended by seven members, namely: Evans Mogusu, Dickson Nyandiya, Joseph Kimodele, Paul Macharia, Jokomia Midodo, George Madanji, and Herself. The Secretary was Mr. George Mandanji (Head of Procurement) who signed them on 5.2.2009.
54. She testified that the advertisement which appeared in the newspapers did not have a tender number a fact that she discovered during the tender opening.
55. She reiterated the evidence given by PW 1 that three bidders submitted their bids, the acreage they offered, and the price. She identified the tender opening register which was signed by all the tender opening committee members on 3/2/2009-P. exh12(a).
56. About the bid submitted by Malili Ranch Limited, she stated the price is Kshs.298,000/= per acre. They are saying they have 15,000/= acres and he offered 3000 acres of land @298,000/= per acre, it is signed by Eric K. Mutua. The bid has been signed by members of the tender opening committee.
57. She also identified copies of the titles that were attached to the bid which the members of the tender opening committee signed [P-exhibit 4[a], [b] and[c].
58. After the opening was completed, she forwarded the opening committee minutes to the Head of Procurement, Mr. George Madanji. Later, she attended the Ministerial Tender Committee which adjudicated on the tender as 'in attendance from the Secretariat' to take minutes of the meeting (P.exh 17). The Chairman was Henry Henry Munyasia (PW 1) and the Secretary was George Madanji. The award by the Ministerial Tender Committee was to Malili Ranch Limited represented by E.K. Mutua & Co. Advocates for 5000 acres at Kshs.200,000/= per acre based on Government Valuation that was done by the Ministry of Lands.
59. On cross-examination, she stated that there was no tender document generated by the Ministry except the newspaper advertisement. She was further hard-pressed to explain why there was no tender number indicated in the advertisement which she said was an oversight. She was further challenged to elaborate if there was any checklist against which received bids were subjected to which she responded there was that tender register where was recorded bids that were received. She also confirmed that evaluation was not done since the documents were taken to the Ministry of Lands.
60. Joshua Gichane Magare (PW 3) was a Senior Accountant in the Ministry of Information & Technology and besides being an alternate member to the Principal Accountant in the Ministerial Tender Committee, he was used to make payments at the Ministry. He would pay claims that were processed through procurement, examination, and vote-book control. A cheque would then be issued and signed by three mandated people who would include the Permanent Secretary, the Principal Account, and any other accountant and he would thus play that role. He testified that voucher number 11172 was



- processed and the first payment to the lowest bidder for Kshs. 400,000,000/-made to E.K Mutua & Co. Advocates as per P. exhibit 17. He authorized the payment on 17.6.2009 which was supported by the agreement of Sale and the documents from the state law office accompanying the payment voucher. The payment was effected through cheque number 001040- P-exhibit- 18 drawn in favour of E.K. Mutua & Co. Advocates. There were three signatories: Principal Accountant-MMrs.Ashivoko, Permanent Secretary Dr. Bitange Ndemo, and the witness (PW 3).
61. The second tranche of 600 million was processed through payment voucher number 4214- P. exhibit 19 to Eric Mutua & Co. Advocates and was paid on 20.1.2010 as reflected in control sheet number 36 since this payment was made electronically. He authorized that payment as well.
 62. Charity Njambi (PW 4) was a Legal Officer from the State Law Office based at the Ministry of Information, Communication & Technology. She testified that she received instructions to draw the sale agreement from the Permanent Secretary Dr. Bitange Ndemo who had forwarded the same to her as a note on a letter titled 'Sale LR 9918/3' that had been sent to the P.S from E. K. Mutua & Company Advocate (P. exhibit 20). The letter forwarded the Minutes of Directors Meeting of 22/1/2009- P. exhibit 13 and the resolution generated from the said minutes dated 26.3.2009- P. exhibit 13 (a). Consultations between the Ministry and AG's office on drafting of the sale agreement took place through letters P. exhibit 22 and 93. Eventually, the Solicitor General gave the go-ahead for the sale agreement (P. exhibit 16) to be executed by the respective parties-vendor and purchaser's representatives. On behalf of Malili Ranch Limited, a Director and Secretary executed in the presence of E.K. Mutua & Co. Advocates whereas, the P.S.Treasury signed for the Government while the witness, countersigned for the PS ICT.
 63. Transfer forms were executed (P. exhibit 25) on 15/12/2009 where those who executed on behalf of Malili Ranch provided their identity card numbers, photographs, PIN numbers, and signatures. The ID Numbers were 1805201, PIN A0020023XXX for the Director while that of the Secretary was ID NO. 0308XXXX, PIN A001169XXXX.
 64. Certificate of title was subsequently issued in the name of Permanent Secretary Treasury for the land measuring 2023.6Ha on 22/12/2009-P.exhibit 26 and the Ministry proceeded to take over possession.
 65. GeorgeObuyaMandanji (PW 5) was the Chief Procurement/Supplies Officer in the Ministry of Information & Communication between January, 2007 and January,2010 before being transferred to the Ministry of Interior &Coordination of National Government, State Department of Correctional Services. As the Head of Procurement function, he was the overall in charge of all procurement matters and the Secretary of the Ministerial Tender Committee.
 66. He described how in January, 2009 the then Permanent Secretary, Dr. Bitange Ndemo called him and told of plans by the Ministry to acquire land for ICT Park within 30 minutes-drive from JKIA and thus wanted him to place an advert in the newspaper. According to PW 5, the Permanent Secretary already had the advert ready hence he handed him the hard copy of the same. According to Advert, bidders were to comply with a set of conditions. Their Department did not have any input – they did not change anything from what was received from Dr.Bitenge Ndemo.
 67. He explained that procedurally, a tender evaluation committee was required to be set up for every tender by the Accounting Officer but this was not the case here. He stated that the Ministerial Tender Committee made an award of 5000 acres which was different from the advert and the bid submitted by the lowest bidder as it was 3000 acres. He confirmed that he authored the letter dated 20/2/2009(P. exhibit 14 a) to E.K Mutua & Company Advocates informing him that Malili Ranch Limited had won the tender to sell 5000 acres at Kshs. 200,000/- per acre to the Government way before the minutes of the meeting had been signed as they were signed on 5/3/2009.He explained the reason for his action.



The other two letters were regret letters he wrote to the two bidders which he produced as P. exhibit 14 b & c.

68. Charles Maemi (PW 6) was a Government Valuer. He told the Court that he together with Mary Wanjohi and James Mureithi all from the Ministry of Lands were called by the Chief Valuer, Mr. Antony Itui on 10/2/2009 and informed that the Ministry of Information & Communication wanted three parcels of land valued. That afternoon they proceeded to the ICT Ministry and found the Personal Assistant to Dr. Bitange Ndemo who went ahead and called the people whose parcels were to be valued and they agreed to visit and carry out the valuation the following day-11/2/2009.
69. In regard to Malili land which is the subject matter of this case, he stated that they proceeded to Malili at junction to Mombasa road to Machakos, they met the group of Malili. Concerning the utility of the valuation report they compiled for the Ministry of Information and Telecommunication. He stated that after the visit his team compiled the findings and reduced them into three reports P. exhibit 8,9& 10. He reiterated the findings as had been attested to earlier by PW1. The reports were signed jointly by the witness (C. Moemi) and M.W. Wanjohi. He produced the three valuation reports in evidence.
70. Stephen Kingoo Mbutia (PW 7) a shareholder of Malili Ranch Limited testified that he was among the original shareholders of the Company. He provided a brief history and stated that Malili Ranch was formed by people from his community who came together to buy the huge tract of land from a white settler who was known as Major Joyce.
71. PW 7 was assigned member No.849 for which he paid Kshs.25000/= to become a shareholder. The registration was reflected in Malili Ranch Limited Master register as at 1.11.2004-P. exhibit 27 under the name Stephen King'oo Mbutia.
72. He testified that sometime in the year 2005, members were called for a General Meeting of the Company where it was resolved that the entire land be sub-divided to the members because the Company could not be sustained as a business. The entire land was sub-divided into 7.9 acres parcels for agricultural land and 80ft by 100ft commercial plots and balloted for by the members. He got agricultural plot number 860 and a commercial plot whose details he could not recollect at the time of his testimony. Members were then shown their respective parcels and allotment letters were issued by the Company pending processing of title deeds by the Directors. Afterwards, some members moved in and occupied their agricultural land but others did not.
73. He stated although his piece of land was not affected, the 5000 acres of land sold to the Ministry of Information, Communication & Technology was land that had already been allocated to members yet members' approval was not sought before their land was sold to the Government insisting that no Annual General Meeting was convened for that purpose. He said all they heard was that the land had been sold.
74. Titus Ndambuki Kitabu (PW 8) was shareholder number 934 according to the Master Register- P. exhibit 27. He testified the Company land was sub-divided and balloted for by the members in the year 2005/2006 and he got his 7.8 acres of agricultural land plot number 2121 as per the agricultural plots' allocation register (s/no.70)-P.exhibit 28. He also got a commercial plot but could not recall the plot number.
75. A year after allocation of the respective plots and receiving allotments from the Company, there was information that the Government had acquired the land.
76. He testified that he was issued with two cheques, one of Kshs.900,000/= and another Kshs.200,000/=, a total of Kshs. 1.1 million by Eric Mutua. He stated he was not satisfied because he came to know the Government had paid Kshs. 1.560,000/= per 7.8 acres parcel.



77. On cross-examination he said his grievance was that he was not paid the entire amount paid by Government and that he also did not know who sold his land.
78. PW 9, Joseph Nzila Matui was shareholder number 1368 in Master Register-P. exhibit 27 and after the sub-division, he was allocated agricultural plot number 2103 and a commercial plot number 2535. On 7/8/2009, he sold his agricultural plot to one of the leaders, Kilonzo Maweu for Kshs. 600,000/- but was actually paid Kshs. 545,000/-. Asked if he sold willingly, he stated he had declined but he boxed me into it by use of words. Hewas told me if he refused to sell the plot will be confiscated by Government to build a City and I will be left with nothing. Later on, is when he realized they sold the land without their knowledge and he was using trickery to give me little money so that he can reap more. We went to CID and made our complaint. He discovered later, he had already sold it. The land had been sold already to the Government. he learnt later the plot was being bought at 1.4 Million.
79. On cross-examination, he stated that his complaint was against Kilonzo Maweu who was however not among the accused persons.
80. Patrick Kato Wambua (PW 17) testified that he was prayed on by the said Kilonzo Maweu, who was a Director of Malili Ranch to sell his land to him in 2009 only to realize that the land had in fact been sold to the Government at a higher amount.
81. Peter Musau Nzioka (PW 10) testimony was that he became a member by buying shares from original members and was thus member number 2645. When land was sub-divided by the Company, he got two plots- agricultural plot comprising 7.8 acres- number 2154 as per allotment letter-P.exhibit 30and commercial plot number 1014 and fenced them off. Later is when he learnt the same had been sold when he was asked to go and collect money which came to a total of Kshs. 1.1million. He concluded he was not satisfied with what he got. He concluded that Malili Ranch Company had stolen his land and sold it without his knowledge.
82. On cross-examination, he said he decided to collect what was offered because he felt he had no ability to challenge what had been done.
83. PW 11- John Kimeu Mutunga, was shareholder number 1717 and owner of agricultural plot number 2439 as per the allotment letter (P. exhibit) and allotment register (P.exhibit 28). His testimony was similar to others, that his land was sold without being consulted and then paid 1.1. million shillings against expectations for he came to know a higher amount had been paid for the said parcel by the Government.
84. Similar evidence was given by Kivuva Kavoo (PW 12) who was member number 1100 and holder of agricultural plot number 2495 plus commercial plot number 1487 s well as David Kioko Mwela (PW 13), member number 0899 who owned agricultural plot number 2438 and commercial plot number 1744. The same case also applied to Stephen Mutuku Masaku (PW 14) who testified that he had been allocated agricultural plot number 2472 and a commercial plot number 662 which were also sold without any consultation and paid Kshs. 1.1 million which he accepted because he was left without any choice.
85. Similar evidence was attested to by the following witnesses in respect of their parcels of land that were sold by Malili Ranch Limited to the Government-Beatrice Mbithe King'oo (PW 15); Jackson Kivyuvi Matavi (PW 16), Simon Mutisya Musyimi (PW 17), Pristina Ndururu Mutona (PW 20), Monica Kanini Wambua (PW 21), PW 23-Daniel Krisant Mwanza Muinde,
86. PW 19- Wambua Mutisya Muthoka told Court he was member number 1264 and his plots were agricultural plot number 2328 and commercial plot number 1388 for which he received a payment



- of Kshs. 1.4 million and a further sum of Kshs. 60,000/- which he demanded because he had fenced off the land. He nevertheless said he was not consulted before the sale and was also not paid the whole amount that he was entitled.
87. PW 22 Agnes Nduru Mwema was member number 1180. She had been allocated an agricultural and commercial plot per P.exhibit 41 where she used to grow maize and beans. At one point she sent her son to build a grains store but was informed he could not do so because the land been sold to the Government which took both her and her son by surprise.
88. Stephen Mutuku Ndugwa (PW 25) testified that his agricultural plot number 1979 was partially developed and despite seeking to be compensated for that, he was only paid 1.1 through Eric Mutua & Company Advocates.
89. PW 24 - Constatine Mutua Mwangangi's evidence was somewhat different as his complaint was somewhat unrelated to the rest of the testimonies. His evidence was that he had bought shares for himself and his wife but this was never entered in Malili Ranch Company records despite following up severally with the Directors. He learnt the land had been sold to the Government before that matter could be resolved.
90. PW 26 - Philip Muli Munyaka testified his workers were chased from his land by National Youth Service Personnel on the basis that the Government had bought the land. He further testified that despite his agricultural plot number 2315 falling inside what the Government bought, he has never been paid anything after disagreed on what should have been paid to him as he insisted on being paid Kshs. 1.56million, not the Kshs. 1.1 million which was being paid out through E.K. Mutua & Company Advocates. He said he followed up with Eric Mutua Advocate who confirmed that indeed his land was part of what the Government had bought but he declined to pay him on the pretext that there was a pending court case and cunningly telling him that there was even a possibility that he could even be paid much more later on.
91. David Gichuki (PW 27) testimony was that he was a professional Surveyor and a Registered Physical Planner. On 1/7/2004, Malili Ranch Limited retained him to compile a sub-division scheme and survey of its 22,600 acres of land situated along Mombasa Road. He did the job and submitted the plan to the County Government of Makueni and obtained approval for the sub-division scheme where each member was to get 7.8 acres of agricultural land and a 50x100 (1/8) commercial plot. Afterward, beacons were placed and balloting which he attended was done and the allocated plots to the respective members. He explained that he was present when balloting took place. Nonetheless, in 2009, the Directors retained him to amalgamate 5000 acres into one block.
92. On cross-examination, he was asked to name the Directors he dealt the first time he did the sub-division scheme as well as the 2nd time when he was called to carry out the amalgamation of the parcels.
92. Professor George Ngugi Njuguna (PW 28) told this Court that he is a Professional valuer registered with Survey of Kenya, Valuation Chapter. In 2010, he was temporarily working for Liberty Real Estate Limited when he was assigned a file that came from Eric Mutua & Company Advocates to carry out valuation work on land parcel 9918/3 Athi River to ascertain the market value and report back to Eric Mutua & Co. Advocates. No individual titles were provided but there was a file containing list of members. He proceeded to the land and carried out an inspection but the initial impression was that the land had been demarcated and there was evidence of structures which had been demolished. He thus approached Mr. Eric Mutua to inquire on how he was to go about this particular issue and was advised to treat each parcel as bare land. According to the witness, the value he assigned per parcel was Kshs.762,000/-.



93. On cross-examination after being referred to his statement, he confirmed that the Kshs. 762,000/- was the compassionate sum only and according to the Government valuation, each parcel was Kshs.1560,000/-.
94. Jacob Oduor (PW 31) was a Forensic Government examiner with 15 years of experience at the time of giving his evidence. He testified that he was pursuant to the exhibit memo form (P. exhibit 69), given various documents together with the specimen signatures to analyze. Documents for which his report was required were: minutes of Directors Meeting, Malili Ranch held on 30.6.2009-P.exhibit-70, Minutes of Directors Meeting held on 19.3.2010-P.exhibit 71, Minutes of Directors Meeting dated 15.1.2010 P.exhibit-72, Minutes of Directors Meeting held on 8.12.2009-P.exhibit-73, Minutes of Directors Meeting held on 8.12.2009-P.exhibit-74, Minutes of Directors Meetings held on 12.12.2009 P.exhibit-75, Minutes of Directors Meeting held on 9.12.2010-P.exhibit 76, minutes of Directors Meeting dated 4.1.2010 Pexhibit-77, Minutes of Directors Meeting dated 14.12.2009-exhibit 78
95. Specimen signatures provided were: Leonard Gitua - P. exhibit-79, Julius Maweu - P.Exhibit-80, Julius Mbau-P.exhibit-81, David Ngilai -P.exhibit-82 and James Munguti-P.exhibit-83
96. The findings were as follows: The signature of the Chairman in P. exhibit 70 was in different style when compared with his known signatures hence was made by a different author. The writing of dates and signature were made by one person/author. When the signature on P. exhibits 70,71, 72,73,74,75,76& 77 was compared with specimen signatures of Julius Maweu (P. exhibit 80) as well as his known signatures (P. exhibit 84 b); they were found to be made by the same author. When P. exhibits 70-77 was subjected to examination against the specimen signatures of David Ngilai (P.exhibit 82) as well as his known signatures (P. exhibit 87)they were found similar and made by the same author. The signatures on P. exhibit 70-77 were subjected to examination against the known signatures of James Munguti (P. exhibit 83) and were found similar and made by one author.
97. The document examiner also found that the specimen signatures of Julius Mbau Nzyuko (P. exhibit 81) were similar to those in the questioned documents submitted for analysis. The same finding was returned in respect of signatures in the documents - P. exhibit 70-77 when compared to specimen signatures of Leonard Kitua and Peter Mutua Kanyi.
98. PW 29-Abraham Kiprono Kuto, an Investigator with EACC stepped in to produce the documents which were collected in the course of investigations and referred to by witnesses in the proceedings following the death of the initial investigator from the EACC, Abdi Salaat Ali. He exhibited the statement of the late investigator- P. exhibit 68 (a) and produced other documents namely, the newspaper advertisement for the tender dated 21/1/2009- P. exhibit 1; letter of offer by Justice Kasanga Mulwa dated 2.2.2009-P.exhibit -2; letter of offer by Samsure Enterprises dated 29/1/2009- P.exhibit 3; letter of offer by E.Mutua & Co. Advocates dated 3/2/2009- P. exhibit 3, Copy of title deed 1R67738 in the name of Frank De Vere Joyce- P. exhibit 4 (a), Grant IR 19973for 958 years to Patrick Lancllot Haligan Jolly & Hilda Marie Halligan-P. exhibit 4b. Certificate of title IR No. 21717 dated 30/4/1967- P. exhibit 4 (c). He produced various other documents among them the Ministerial Opening Committee Minutes MIC/2/08-09- P. exhibit 12, Malili Directors minutes of 22.1.2009- P. exhibit 13 and the ordinary resolution- P. exhibit 13 & 13 (a), the agreement for sale of 5000 acres from LR 9918/3- P. exhibit 16; Certificate of Change from Joyce Ltd to Malili Ranch Ltd C76/76-P.exhibit 20 (a); Transfer form dated 15/12/2009-P. exhibit 25 and the Certificate of title IR 121004- dated 27/12/2009- P.exhibit 26.
99. Sergeant Joseph Kiragu was the 30th prosecution witness (PW 30). He testified that investigations were commenced by the Directorate of Criminal Investigations following numerous complaints since 2009 concerning misappropriation of the Kshs. 1 billion that the Government had paid to acquire 5000 acres



of Malili Ranch to set up the ICT Metropolis at Konza. The Directorate of Criminal Investigations set up the team that comprised him and three other officers, namely: Senior Assistant Commissioner Kamwende, SSP Kimutwa and Inspector Fatuma to undertake an in depth investigation. According to Sergeant Joseph Kiragu (PW 30), the complainants were led by one Stephen Buti. The nature of their complaint was that the 5000 acres that was sold had been sub-divided, balloted and allocated to the members in 2006 and most of them had taken possession and were thus waiting for individual titles after submission for their processing was made to the Commissioner of Lands for processing in the year 2006. However, without members' authority, knowledge or information, the said land was sold by 3 out of the 7 Directors. According to the Investigating Officers, the implicated 3 Directors worked in collusion with Advocate Eric Kyalo Mutua. The three Directors that were implicated were: Josiah Munuka-Chairman, Peter Mutua Kanyi-Vice Chairman and Julius Maweu Kilonzo. It was his evidence that the members only became aware of the sale in November, 2009 when they were forcibly removed by the National Youth Service and informed that the Government had compulsorily acquired the land. He said of the remaining four directors that he stated did not take part.

100. He said that one of the documents gathered during the investigations was the Memorandum & Articles of Association (P.exhibit 90) which provided that the affairs of Malili Ranch were to be conducted through resolutions of the Shareholders at the Annual General Meetings and extra-ordinary meetings yet no resolution had been passed by the members approving the sale their land in 2009. The only resolution that members had passed was that of 2005 marked P. exhibit-54 where members resolved to sub-divide the land, ballot for the same and to be allocated the parcels.
101. PW 30 further stated that investigations established that it is after the death of Chairman, Josiah Munuka that information came out that the land had been sold and Kshs. 400,000,000million had already been paid to Eric Mutua & Co Advocates. Following this revelation, the following chain of events transpired that The Four Directors Leonard Kitua, James Munguti, David Ndolo and Julius Mbau together with other shareholders were summoned by area political leaders to a meeting that took place in the Malili farm on 29.11.2009 which was also attended by two Directors who had been involved in the sale, Mr. Kanyi and Mr. Maweu who informed members and political leadership that they had sold the land and Kshs.400,000,000/=paid to Eric Mutua. The Four Directors, Munguti, Ndolo, Mbau and Kitua together with members immediately passed resolution to withdraw instructions from Eric Mutua for acting for the Company and resolved that he prepares account on how he spent Kshs.400,000,000/=and release balance to the Company. It also resolved that Government be stopped from releasing pending balances of Kshs.600,000,000/= Million. It also resolved to replace Mr. Kanyi who had assumed leadership as Chairman and Secretary of the Company immediately. Mr. David Ndolo was appointed as the Chairman instead of Kanyi who was acting. The minutes of that resolution of 29.11.2009.
102. On the same day these resolutions of the members on 30.11.2000 were presented to Registrar of Companies and changes were effected by Registrar called Joseph Gikonyo and issued a CR 12 that confirmed the same changes..."
103. The Investigator took the Court through the genesis of the bid by Malili Ranch Limited which he explained that when the advert by the Ministry of ICT on 21/1/2009 was placed in the newspapers, a Company called Gateway Logistics picked it up and approached the Chairman of Malili Ranch, Mr. Josiah Munuka who then approached Mr. Eric Mutua and requested that they put a bid knowing too well that the land was no longer available as a block as it had been subdivided to the members.
104. Tenders were opened on 3.2.2009 and Ministry awarded the tender to Malili Ranch and on 2.3.2009 and the tender documents were sent to Ministry of Lands for official search and Valuation. The



- Ministry determined that land Malili was offering was valued at Kshs.200,000/= per acre and not Kshs.298,000/=.
105. The Investigations established there was fault on the part of the Ministry of ICT for ignoring the due diligence that was done by the valuation team when it inspected the land and discovered that it had been subdivided into portions of 7.8acres and, further acceptance of the offer was done on 20.2.2009, prior to receiving the search results which came later from Commissioner of Lands on 20/3/2009 listing three encumbrances- (P. exhibit 100).
 106. According to PW 30, Investigations further revealed that upon execution of the sale agreement, the Government of Kenya paid Kshs. 400,000,000 on 25.6.2009 vide payment voucher No.025 - cheque No.001040 to the account client a/c of E.K.Mutua & Co.Advocate at Barclays Bank of Kenya Queensway Branch. A review of how the said money was spent was undertaken and the following was unearthed:When we reviewed the deposit, we found when 400,000,000/= was paid, Mr. Mutua irregularly disbursed Kshs.40,000,000/= to Gateway Brokers. He also released Kshs.18,000,000/= to Josiah Munuka Kshs.16,000,000/= each to Peter Kanyi and Julius Kilonzo respectively from money of shareholders which was to be intact until transfer was done and which was to be released to Bank Account of the Company for disbursement. On 8.7.2009, a sum of Kshs.280,000,000/= was transferred from this account at Barclays Bank at Queens way and transferred to his clients account at KCB - University Way A/c No.110419762 where he put it in a fixed deposit A/c for 3 months between 9.7.2009 - 9.10.2009 earning an interest of Kshs.6,213,150.70/=. When Munuke died, and members resolved to remove Mutua and changed Directorship. We discovered that payment that both Munuka, Kanyi and Kilonzo had been paid of Kshs.18,000,000/=, 16,000,000/= and each had already been done through postdated cheques dated 18.6.2009 even before the Government had released a deposit of Kshs.400,000,000/= to Erick Mutua on 25.6.2009 so they were getting those cheques as though they knew payment was to come.
 107. The cheques were numbers:103741 Barclays Bank of Kenya dated 19.6.2009 for Kshs.16,000,000/= to Julius Kilonzo.Cheque No.1037339 to Josiah Munike for Kshs.18,000,000/= dated same day Cheque No.10370 to Peter Kanyi for Kshs. 16,000,000/=. That was done even before Government released Kshs.400,000,000/= to Mr.Mutua.
 108. Upon receipt of Kshs.400,000,000/=: he issued another cheque of Kshs.100,000,000/= to Gateway Logistics Ltd cheque No. 03759 from Barclays Bank of Kenya Queensway purporting it to be a payment of Agency Fee of Kshs.21,000/=per acre of total 5000 acres that Government bought plus Kshs. Kshs.6,000,000 to lady who had accompanied Gateway called Ann Kimuyu.
 109. This cheque was stopped by Mr. Mutua and replaced by telegraphic money transfer of Kshs.40,000,000/= to
 110. Gateway Equity Bank Account. He further made a further payment to 3 Directors- Joseph Munika Kshs.1.5 Million on 1.7.2009; Kanti and Kilonzo, and a further Kshs.9,000,000/= to Josiah Munuke on 13.8.2009. So far,no other Directors had received any payment other than the three. In the Audit Report, it is enumerated that between 9.8.2009 and 23.11.2009 Audit Report by Auditor General shows that all the entire Kshs.400Million was not appropriated through payment only to three Directors - Munuka, kanyi and Kilonzo,Malili Ranch close family funds and members of family of three Directors as enumerated from appendix vii of Audit Report.
 111. Audit Report-PMFI-91Erick Mutua also paid himself a sum of Kshs.42,500,000/= from initial amount as per Forensic Audit Report-PMFI-91.



112. According to this Audit Report. Other people paid for this 400 Million were:[1]David Gichuki a Surveyor paid Kshs.10,920,000/=but no invoice, no contract and no fee note provided.[2]Waluto & C. Advocates, paid Kshs.136,585,000 no invoice, no fee note.[3]Sadia Enterprises an Auctioneer Kshs.15,000/=...”
113. The two Directors were arrested and charged in court for defrauding the Company a sum of Kshs.148,000,000/=vide Milimani Criminal case No.214/2009 but they were acquitted by the trial court which remarked that the 'prosecution was selective and a cover-up of the main player.
114. According to the Investigator, the matter took a different twist on 30/11/2009. He described the turn of events as follows:
- “ ... This matter had now taken political turn led by Hon.Muthama. He sent on 30.11.2009 a Mr. Muteti who was then Secretary General of URP Party and Chairman of Stadia Management to go to Machakos and look for the four other Directors, i.e. Danlod Ngilai, and Leonard Kitua,Julius Mbau and James Kituku Munguti and by then to his office in Nairobi. He then took them to office of Eric Mutua where an election was conducted by the Four and said David Ndolo was appointed Chairman and Leonard Katua was elected as Secretary on 30.11.2009in presence of Eric Mutua. Same day,the results of this election of Directors were taken to Registrar of Companies whereby Gikonyo registered the changes.
115. On 1.12.2009, following day, after they were confirmed and CR 12 issued there first business the following, that the following day, that the Four Director did was to sign a letter of instruction prepared by Eric Mutua to revoke the resolution that Mutua had been discharged by shareholders. On 29.11.2009 they gave his instruction back. They appointed Mutua to continue acting as Company Secretary of Malili. What was clear to investigators was that these instructions were prepared by Mutua and to us it was a Scheme to give him a way of Managing the sale because there was Kshs.600,000,000/= which Government had not paid...”
116. He further stated that the investigations also established another occurrence on 14/9/2009 which he described thus:
- “ ... On 14.11.2009 the Four Directors because the two were still in court were summoned by Muthama and Mutua to a house in Gilad where they found an already been pre-prepared Board resolution dated 14.12.2009and were asked to sign as genuine and valid Boardroom resolution made in normal course of Company which was not. [How we find out] we took print out from office of Mr.Mutua plus specimen signatures to confirm that those resolution were actually prepared by computer of Mr.Mutua. In addition, Mr. Muthama, Mr. Muteti and Mr. Mutua in their statements confirmed this position and attributed it to the urgency and ignorance of the Four Directors. They said the ignorance is why they were left out on the first place...”
117. According to the Investigator, Mr. Kingoo Buti together with Joshua Kilonzo and six others filed Civil Case No.2/2010 on 8.1.2010 at Machakos High Court against Malili Ranch Ltd, the Permanent Secretary Ministry of Information &Communication and Attorney General. Justice Nambuye granted an order (P. exhibit 63) restraining 2nd respondent (Permanent Secretary ICT) from paying out the balance of outstanding purchase price. The Plaintiffs were represented by Alphonse Mutinda who instead of serving the Ministry of ICT with the order, he served Mr. Eric Mutua who was not a party in the suit. Mr. Eric Mutua then immediately wrote to Mr. Alphonse Mutinda asking if the order was meant to stop the transaction to which Mr. Alphonse Mutinda replied in the negative. As



- such, the Ministry did not know about the order and went ahead and released the balance of Kshs.600 Million on 11.1.2010 (three days after the court had issued orders restraining the Ministry from paying out the balance). The Investigator produced the letter that he wrote seeking supply of the Court Order from the Registrar High Court-P. exhibit 64.
118. The balance of Kshs. 600,000,000 was thus released at a time when the new Directors were the ones running the Company affairs. That is David Ngailai, Leonard Kitua, Julius Mbau and James Kituku Munguti. (the accused herein).
119. By October, 2009; the Government had taken over possession of the land yet despite that,the Investigations uncovered the following:
- “.... Through the letters done by my Mutua, they would sign these instructions to Mr. Mutua on how to pay such as the letter dated 5.1.2010 in which the Directors were appointing Advocate Kamotho Waiganjo and his sibling Chege Waiganjo who is a valuer practicing as Landmark Realtors Valuers instructing them to start now acting for Malili for purposes of future disbursement and in a letter to Kaimotho Waiganjo, he wrote instructing that their common client had instructed that he releases Kshs.44,999,999/= to Kaimotho Waiganjo for disbursement of shareholders where land was part of 5000 acres Government had bought. His brother Waiganjo was paid Kshs.15,000,000/= for Valuation to determine....members whose land had been acquired by Government & development thereof...However, by then, Government had taken over possession, and removed all members from the property and demolished their property and evicted shareholders.
120. The place had been fenced and secured by Youth Service by October, 2009. By January when he is giving instructions, Mr. Mutua knew the Government had already taken possession and cleared all the members.
121. The statement of Chege to Mr. Mutua he confirmed he could not even gain access when he went to the ground.
122. The issue of valuation and payment of Kshs.15,000,000/= was unjustifiable...”
123. Having collected and collated evidence of witnesses and document examiner, statements of the bank account of Mr. Mutua and reviewing all the transactions, the team of DCI Investigators drew a summary of their investigation and in the investigation report dated 14/3/2014 (P.exhibit 92)-they recommended the following people to be charged: Erick Mutua,Peter Mutua Kanyi, Julius Maweu Kilonzo, Johnson Muthama, Kamotho Waiganjo and Alphonse Mutinda. These were to face charges of conspiracy to defraud shareholders of Malili Ranch, obtaining money by false pretences, making document without authority, stealing and money laundering.
124. Others were Dr.Bitange Ndemo, James Waweru of AG's Office and Zablou Mabeya. These were to face charges of abuse of office as enumerated in the Auditor General's Report (P.exhibit 49).
125. He testified that the investigation established that the Government paid Kshs. 1,560,000/- per 7.8-acre parcel although what reached the allottees was far much less and varied.
126. The Investigator also pointed out that the audit report (P.exhibit 49) was clear as to which Directors were culpable which did not include those that now before court. He read the relevant portion of the audit report
127. The Investigating Officer produced various cheques that were recovered as exhibits before this court showing how the money was expended.



128. Other exhibits produced included: The Master Register of all members as at 1/11/2004- P. exhibit 30; Minutes of Malili Ranch Limited Special General Meeting held to decide on subdivision and balloting on 7/5/2005- P. exhibit 54; Payment Cheque of the initial Kshs. 400,000,000 by Government to Eric Mutua- P. exhibit 58 among others.

129. Producing the Minutes of Board of Directors dated 22/1/2009; he stated:

“...PMFI- 96 is the minutes of Board of Directors dated 22.1.2009 which I had explained was fraudulent minutes because it was intended to reply that all Directors attended this meeting and resolved to respond to tender on sale of 3000 acres to Ministry of Information and Communication and that they had resolved to ask E.K.Mutua to tender on behalf of Malli but was only signed by Chairman Josiah Munuka and Julius Kilonzo while the practice was that all Directors were to sign any resolution.

Other Directors, 4 in number who did not attend are: -

- (1) Richard Kitua
- (2) David Ngilai
- (3) Julius Mbau
- (4) James Munguti

They said they were not aware and did not attend and could not have passed it because the Company ought to transact such business through the entire shareholders.

It was the genesis of fraud...”

130. He also produced the search result dated 20.3.2009 (P.exhibit 100) from Commissioner of Lands signed by Mr. Mbau to Permanent Secretary ICT Bitange Ndemo giving results of search LR 9918/3 in reply to his letter- P. exhibit -99 clarifying that the property had encumbrances. Further-P.exhibit 101 -valuation report from Ministry of Lands by Assistant Commissioner of Lands [Valuation] Mr. Moemi giving valuation in response to exhibit 99 whereby he indicated in the general remarks column that property had been divided into 7.8 acres plot which belonged to different shareholders of Malili Ranch but titles had not been issued yet.

131. A total of 111 exhibits were produced in this case and having been referred to by various witnesses called by the Prosecution.

132. On cross-examination, the Investigation Officer was referred to the Memorandum and Articles of Association of Malili Ranch Limited-P.exhibit 90 and he confirmed that it required a resolution of the Company to be signed by all the Directors unlike the resolution of 26/1/2009 (P. exhibit 13 a) which purported that Malili had resolved to sell its land as it was only signed by the Chairman and Secretary; none of whom was any of the accused at the time.

133. Cross-examined on the specific offences preferred against the accused persons was also done but the Investigations Officer said he had nothing to do with those charges as he never recommended any charges against the accused that were before the court.

134. In regard to count 1 - the conspiracy charge, he responded:

“... I was clear in my evidence in charges, they did not participate in sale, they were unaware and did not receive any payment from initial deposit of 400 Million. They only became



aware in month of July when Chairman died and people learnt cause of death may have been related to that sale...”

135. In re-examination, the Investigation Officer testified that upon release of the 1st tranche of 400 million, no payment at all was made to the shareholders but payments were made in the second tranche of 600 million after the accused persons took over the management of the Company. He said that the accused before the court were thus to be treated as witnesses for 'if they continued as other people, the membership could not have got anything. They had to deal with 600 Million to reach so many people.'
136. The appellants were placed on their defence and elected to give sworn evidence in their defence.
137. David Ndolo Ngilai (DW1). He could not recall when he became a Director of Malili Ranch Limited but he was able to recall all the directors who served with him namely: Josiah Munuka-Chairman, Peter Mutua Kanyi-Vice Chairman, Julius Maweu Kilonzo- Secretary, James Munguti, John Mbau, Leonard Kitua and himself-David Ndolo Ngilai. Out of these seven, three have passed on, namely: Josiah Munuka, Peter Mutua Kanyi and James Munguti, leaving behind four that are still alive.
138. He denied that he attended the Special Meeting of 22/1/2009 which resolved to sell Malili Ranch Land (P. exhibit 13). He also denied knowledge of the Special Ordinary Resolution-P.exhibit 13 (a) which he said was signed by two people against the regulations of the Company that required all the directors to sign a resolution.
139. He stated that he did not play any part in the signing the agreement for sale for he was not even in the picture that the Company land was up for sale.
140. He explained that he took over the Chairmanship of the Company towards the end of December, 2009 long after the said sale agreement had been executed and the initial 400,000,000 million paid through Eric Mutua & Company Advocates. Other officials whom he took office together with him at the time were Julius Mbau Nzyuko- Vice Chairman and Leonard Kitua- Treasurer. The Secretary, James Kituku Munguti died in office and that position had not been filled at the time he testified. He stated how he became aware of the sale of Malili Ranch Land.
141. He confirmed that there was no general meeting in which members were asked if they wanted to sell their land. He further told Court they took over the leadership of the Company after the 400,000,000 had been paid and when only the balance of the Kshs. 600 million was outstanding.
142. He confirmed that he executed the transfer form dated 15/12/2009 (P. exhibit 25) together with James Kituku Munguti because at the time they happened to be in the office and the Government could not have released the outstanding sum of Kshs. 600 million if execution was not done.
143. He explained that all the payments were through Eric Mutua & Company Advocates and the office bearers merely played a facilitative role.
144. On cross-examination, he was shown the letter that communicated the change of office bearers (P. exhibit 105) and agreed that he came to office pursuant to the letter of 30/11/2009 which was done in Eric Mutua's Office after an election by the other Directors.
145. He also confirmed that he signed off the transfer form on 15/1/2009 to effect the transfer of the Malili Ranch land without a shareholders' resolution and together with his new leadership gave additional instructions to Eric Mutua in connection with payments out the Kshs. 600 million that was subsequently paid which included the following as per the minutes of 14/12/2009-P. exhibit 78-that Eric Mutua shall continue paying members with plots within 5000 acres purchased by Government at 1.1 million per member; they also authorized the payment of Kshs. 28 million to Eric Mutua &



Company Advocates and per P. exhibit 72-authorized the appointment of Ms. Kamotho and Mary Mbuthia Advocates to administer compensation funds.

146. He nevertheless explained in re-examination that it was within the mandate of the Directors to make decisions on operational affairs on behalf of the Company.
147. Leonard Kyania Kitua (DW 2). He said he became a Director of Malili Ranch Limited in 2004 and besides that, an office bearer as the Treasurer of the Company. Like DW 1, he said he became aware of the sale of the Company land during the burial of the former Chairman, Josiah Munuka on 4/10/2009.
148. He also denied attending the meeting of 21/1/2009 (P.exhibit 13) although his name was reflected as one of the Directors who attended to deliberate on the sale of the 5000 acres of Malili Ranch land. He also insisted that he was also unaware of the ensuing resolution -P. exhibit 13 (a). He testified that a resolution of such magnitude required to be signed by all the Directors according to memorandum and articles of association of the Company which was not the case in respect of P. exhibit 13 (a) which had been signed by only the former Chairman- Josiah Munuka and the Secretary-Julius Maweu Kilonzo.
149. He said they only took over after the initial official bearers were kicked out by members on 29/11/2009 and by that time, 400 million had already been paid out and some members had been partly paid hence majority of the membership was agitating for their payment to be completed instead of cancellation of the entire sale.
150. On cross-examination he was challenged why as the new officials being aware that the former officials had sold the land without prior consultation with the members, they also proceeded to transfer the entire land to the Government without seeking the members' resolution on the matter.
151. The 4th Accused, Julius Mbau Nzyuko changed his earlier election to give sworn evidence and opted to give an unsworn statement instead. He denied the conspiracy charges stating that he was aware that land was sold to the Government but did not conspire. He further denied any stealing saying he was only paid committee allowances hence he did not breach the trust by selling land without the members' consent.

Directions of the court

152. The appeal was canvassed by way of written submissions.

The appellants' submissions.

153. The appellants submitted that the court was in error in answering an issue of fact which was not subject of the charge. The appellants contend that even assuming that the trial court was answering the question whether there was a shareholders' resolution, it was an error in law to hold that the act amounted to an unlawful action on account of want of such a resolution. The question whether or not a shareholders' resolution was necessary in a sale of the company property cannot be answered without interrogating the relevant company law. The company herein is a public company. It has over 5000 shareholders. In respect of public companies as opposed to a private company, the involvement of shareholders in management and affairs of the company is minimal. that a proper interpretation of the law is that the appellants were empowered to resolve, as a Board, to sell any property of the company since under the Articles or the Act such business was not reserved for the general meeting. Further, the Articles of Association do not confer power to the general meeting to pass resolutions for purposes of sale of properties of the company. The appellants were not charged with any offence under the Company Act. The appellants relied on the case of *Eveready East Africa Limited V. Energizer Middle East and Africa Limited & another* [2017] eKLR, Section 9 and 22 (1) of the [Companies Act](#),



Chapter 486 (repealed), Quantum Capital Limited & 2 others V. Strategic Work Place Limited & 4 others [2007] eKLR, Pan Africa Insurance Holdings Limited & another V. Dickson Ngatia Gachuhe [2021] eKLR.

154. The appellants submitted that There was no evidence that a parcel of land L.R.No.9918/3 was sold at a sum of Kshs. 1 Billion. The Agreement for Sale (exhibit 16) is clear that only a portion of the property was sold, to wit,5000 acres thereof. In the premises, the documentary evidence in respect of the sale does not support the particulars as stated in the charge sheet.
155. The appellants submitted that the evidence adduced by the prosecution and which was relied upon by the trial court was to the effect that the parcel of land sold did not belong to Malili Ranch Limited but to specific identified shareholders by virtue of alleged allotment of land. the said evidence does not support the particulars of the charge. If indeed the land had been sub-divided and allocated to individual shareholders, then the company did not own the land in question.
156. The appellants submitted that that the finding that there was no evidence of such resolution or consent was not supported by evidence. The trial court failed to make a full analysis of the minutes of the general meeting held on 7th May 2005 (Exhibit 54). There was express and conspicuous resolution by members, it cannot be said that there was no shareholder resolution or consent to sell the property. The law of meetings provides that a decision by majority binds the minority. It was not necessary that each of the shareholders grant their consent for the sale. The appellants relied on Eveready case (supra)
157. The appellants submitted that the trial court's finding that the property had been sub-divided was not supported by any evidence. Any dealings in land whether by way of sale, sub-division, charge or transfer is regulated by statute and for good cause. A fact of sub-division ought to be supported by documentary evidence as provided for under the law. Contrary to the findings by the trial court, the legal registration status of land cannot be evinced through oral testimony without production of legal instruments or deeds. none of the three experts produced any sub-division plan or any approved plan The appellants relied on Section 30,32 of the Survey Act, Chapter 299, section 16,42 of the Land Registration Act.
158. The appellants submitted that there was no evidence whatsoever to support the conclusions arrived at by the trial court that there was "criminal enterprise" and that shareholders lost money. There was no evidence tendered by the state to demonstrate the; i) The total number of shareholders whose land was alleged to have been part of the land sold to the Government. In the premises, there was no basis whatsoever for the court to arrive at an imaginary figure of Kshs. 1,560,000/- as being the sums that each affected shareholder was entitled to. it is not possible that PW26's land No. 2315 was part of the property that was sold to the Government and at the same time, according to his testimony, the records show that it was allocated to a third party. Out of 18 shareholders who testified (PW 7,8,9,10,11,12,13,14,15,16,17,19,20,21,22,23,26 and 26) it is only PW26 who stated that he was never paid. The complaint by the said shareholders was that they were paid less than what they were entitled to. the said witnesses voluntarily surrendered their allotment letters so as to be paid. The act of surrendering their allotment letters demonstrates that they consented and or authorized sale of the portions of land. Peter Nkonge Gatundu V. Republic [2021] eKLR
159. The appellants submitted that that the mere act of proceeding to complete the sale cannot be evidence of a meeting of mind to commit a fraud or to defraud. A meeting of mind may only be present if there was evidence that the appellants intended to benefit or benefited from the unlawful act. No such evidence was adduced. The circumstances of the matter dictated that the transaction ought to proceed to conclusion. If the appellants had taken a different position to disown the transaction, then they would have exposed the company and shareholders to liability especially that a sum of Kshs. 400,000,000/- had been paid and disbursed. It would not have been in the best interest of the company



or even prudent for the appellants to disown and revoke the sale. The appellants contend that there was no evidence of intention whatsoever. the sale of the property was not unlawful. Firstly, under Company Law, a shareholders' resolution to sale was not a requirement. The above notwithstanding, a consent and or resolution by shareholders was passed in the general meeting of 7th May 2005(Exhibit 54. Further, PW4 a legal officer involved in the transaction produced a letter dated 26th May 2009 from the Attorney General (Exhibit 24. No single witness gave evidence pointing to fraud on the part of the appellants. There was no evidence that the appellants benefited from the sale of the property. The prosecution did not show any payment or fraudulent payment that was made to the appellants. We submit that there cannot be an intention unless it was shown that the appellants benefitted or intended to benefit from the sale. the element of intention to defraud cannot have been proved given that the evidence adduced by the prosecution on theft and fraud does not indict or implicate the appellants. the fact that there was a change on the size of land as advertised, being 3000 acres, and what was eventually purchased, being 5000 acres It was therefore an error on the part of the trial court to find that the change from 3000 acres to 5000 acres was irregular. the appellants cannot be said to have conspired to have the said changes effected. They did not sit in the tender committee of the ministry. Section 317 of the Penal Code, Black's Law Dictionary, 9th Edition at page 351, Evanson Mwangi Kihumba V. Republic [2022] eKLR, Kivunira v. Republic [2023] KEHC 23659 (KLR), High Court Constitutional Petition No.40 of 2020, Milimani, Eric Mutua v. The Inspector General of Police and others (Unreported),

160. The appellants submitted that Where a person or body proceeds to undertake a task without jurisdiction, the question whether or not there was prejudice occasioned to the subject does not arise. Such act amounts to an unlawful action and an illegality which is null and void. that writing of judgement is part of a trial. A judge cannot purport to write a judgement in respect of an offence which is triable by a subordinate court. No such jurisdiction has been donated to the High Court. It cannot be urged that the judge was exercising an original jurisdiction in this case given that such jurisdiction is expressly preserved for a different court. The Chief Justice cannot donate jurisdiction to a judicial officer and hence her directive was unlawful. if the court finds that the judgement was written without jurisdiction? One of the remedies available is for the High Court to declare a mistrial and remit the matter to the subordinate court for a fresh trial. However, such remedy is only resorted to where there is no prejudice and miscarriage of justice on the part of an accused person and where the analysis of the evidence by the appellate court discloses a possibility that an offence was committed. In this case, the analysis of the evidence does not point to commission of any offence. Secondly, a fresh trial will highly prejudice the appellants 'given that they stood trial from 29th August 2014 to 4th July 2023 a period of 9 years. Further, the alleged offence was alleged to have been committed in 2009 which is now over 15 years ago. The appellants relied on Article 169 (2) of *the Constitution*, Section 6 of the Magistrates Court Section 4 of the Criminal Procedure Code, Re Interim Independent Electoral Commission Supreme Court, Advisory Opinion, Constitutional Application No. 2 of 2011 [2011] eKLR, Samuel Kamau Macharia & Another V. Kenya Commercial Bank Limited & Others [2012] eKLR, Orange Democratic Movement V. Yusuf Ali Mohamed & 5Others [2018] eKLR, Jamal Salim V. Yusuf Abdulahi Abdi & Another [2018] eKLR, Hassan Jillo Mwanamaka & another V. Republic [2018] eKLR, the court cited with approval the case of Fatehali Manji v. Republic [1966]EA 343 and Mwangi V. Republic [1983] KLR 522, Mwangi v Republic [1983] KLR 522
161. The appellants submitted that there was no evidence or a finding of the appellants having defrauded any person of the sum of Kshs. 600,000,000/-. It was therefore a wrong consideration for the court to have based its sentencing on the said rationale or basis. It therefore exercised its discretion irregularly. A sum for Kshs. 5,000,000/- for the misdemeanor is manifestly excessive.
162. In the end the appellants submitted that the particulars of the charge are not supported by the evidence adduced by the prosecution. There was a serious misapprehension of the applicable law by the trial



court which led to erroneous conclusions and findings. The elements of the offence of conspiracy to defraud under Section 317 of the Penal Code were not established. The appellants urged the court to allow the appeal and set aside the conviction and sentence.

The respondent's submissions.

163. The respondent submitted that the directors of Malili Ranch Limited required a general meeting in accordance to the memorandum and articles of association (P Exh 90) with quorum of about 100 shareholders in order to make decisions involving the company in this case the sale of land. Evidence was led by the prosecution to demonstrate that the land had been allocated to the shareholders as agricultural land and as commercial plots. Some of the shareholders had in fact put up some structures. All the shareholders that were called to testify did confirm that there was no such notification of the sale of the subject property.
164. The respondent submitted that the prosecution did discharge its burden of proof as required by law in tendering evidence that supported the particulars of the charge of conspiracy. The respondent relied on Section 21 and 317 of the Penal Code.
165. The respondent submitted that the appellants conspired to defraud the shareholders of Malili Ranch by authorizing the sale of 5000 acres of land (LR NO. 9918/3). The prosecution through the government valuer (PW6) in his valuation reports stated that there was a proposal for subdivision into 7.8 acres each but the same had not reflected in the land registry. Some shareholders tendered evidence to the effect that they had not been consulted before the actual sale of the land was done. There was no resolution to show that members had passed a resolution to sell the land in accordance with the articles and memorandum of association (P Exh 90) an initial payment of Kshs. 400,000,000/- was made by the government through the firm of E.K. Mutua & Company advocates. The balance of Kshs.600,000/= was released after the appointment of new directors. The respondents contend that the appellants herein conspired to defraud shareholders of Malili Ranch limited by fraudulently causing LR 9918/3 to be sold at 1Billion Kenya shillings. The appellants were among the directors that held a meeting on 09/12/2009 to finalize the transaction involving the sale of the 5000acres of land. The appellants as directors reinstated the services of E.K. Mutua & Company advocates.
166. The respondent submitted that the sentence was not excessive considering the huge sum of money involved and the shareholders who according to the court record were never compensated. The trial court considered a set of principles before passing the sentence upon the appellants.
167. The respondent submitted that the trial court had jurisdiction to write the judgment after being promoted to be a judge as there are no express provisions of the law on the same. The respondent contends that as long as there were directions issued by the chief justice there is no error writing a judgment in which a magistrate prior to his promotion had substantively heard the case.
168. In the end, the respondent submitted that all the ingredients for the offence of conspiracy to defraud contrary to section 317 of the penal code were established during trial as the evidence was consistent, water tight and well corroborated. The respondent urged this court to uphold the trial court's conviction and sentence and dismiss the appellant's appeal as it lacks merit.

Analysis And Determination

169. The first appellate court re-evaluates the evidence adduced at the lower court and draw its own conclusions while bearing in mind that it did not have the advantage of seeing and hearing the witnesses first hand – See Okeno –V- Republic (1972) EA 32 and Kiilu & Another –Vs- Republic (2005) 1KLR 174.



Issues

170. Upon considering the grounds of appeal, the record of the lower court, and the submissions by the respective advocates for the parties, the issues for determination are: -
- i. Whether the proceedings were regular after being conducted by a magistrate and a judge.
 - ii. Whether the prosecution proved its case beyond reasonable doubt.
 - iii. Whether the sentence was manifestly excessive
- i. Whether the proceedings were regular after being conducted by a magistrate and judgment written by a judge.
171. The appellants take issue with the fact that whereas the Hon. Justice Mugambi conducted the trial when he was a magistrate (he heard and recorded the evidence), he wrote the judgement while in office as a judge of the High Court.
172. The request to write the judgment was conveyed through a letter by the Her Ladyship the Honourable the Chief Justice of the Republic of Kenya, because the judge had heard the entire criminal when he was the trial magistrate prior to his appointment as a judge of the High Court. Accordingly, it be assumed that the judgement was written in exercise of the lower court's jurisdiction exercise during trial, which does not limit the rights of any of parties to appeal whatsoever.

Whether the prosecution proved its case beyond reasonable doubt.

173. The appellants were charged and convicted of the offence of conspiracy to defraud contrary to Section 317 of the Penal Code.
174. Section 317 of the Penal Code sets out the offence of conspiracy to defraud as follows:
- “Any Person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of misdemeanor and is liable to imprisonment for three years.
175. The Black's Law Dictionary, 9th Edition at page 351 defines conspiracy to be:
- An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement's motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose.”
176. Essential elements of the offence of conspiracy to defraud are therefore: i) the existence of an agreement; and ii) the intention by deceit or any fraudulent means, to defraud.
177. Was there was an agreement to execute an unlawful act between the appellants?
178. An agreement may either be express or implied from the circumstances of the case. In this case, it was alleged in count one that both the appellants with the intent to defraud the complainant fraudulently caused L.R.9918/3 to be sold at One Billion (Kshs. 1,000,000,000) to the Government of Kenya (Ministry of Information and Communication) without the Shareholders' Resolution.



179. The unlawful purpose of the scheme was to deprive the shareholders of their respective shares represented by the portions of land in, and sanctioned by a resolution of the general meeting of the company.
180. There was a general consensus by both the defense and the Prosecution that, although the parcels in question did not have separate title deeds, they had been demarcated into and land parcels of 7.8 acres and commercial plots of 50x100 allocated to individual members as early as 2006. This was based on and as a result of the resolution by the shareholders at their Special General Meeting held on 7/5/2005 (P. exhibit 54) at Malili Farm where the members had agreed to have sub-division of the land carried out and thereafter balloting of the plots to be done.
181. This was corroborated further by the testimonies of the individual shareholders/members namely PW 7, Stephen Kingoo Mbutia, PW 8- Titus Ndambuki Kitabu, PW 9- Joseph Nzila Matui, PW 17- Patrick Kato Wambua, PW 10- Peter Musau Nzioka, PW 11- John Kimeu Mutinda, PW 12- Kivuva Kavoo, PW 13- David Kioko Mwela, PW 14- Stephen Mutuku Masaku, Beatrice Mbithe King'oo, Jackson Kivyuvi Matavi (PW 16), Simon Mutisya Musyimi (PW 20), Monica Kanini Wambua (PW 21), Daniel Krisant Mwanzia Muinde (PW 23), Wambua Mutisya (PW 19) and Agnes Nduru Mwema (PW 22) that; the land had been demarcated and each of the shareholder shown their portion of land on the ground and also issued with allotment number identifying the specific parcel in the Company records. The allotment register (P. exhibit 27) coupled with different allotment letters exhibited in these proceedings further ascertained this fact.
182. Consequently, some of the shareholders started cultivating the land and others such as PW 22- Agnes Nduru Mwema and Stephen Mutuku Ndungwa (PW 25) erected structures as they waited for the titles to be processed.
183. The evidence of settlement and demarcation was corroborated by other independent testimonies such of the Surveyor and Registered planner (PW 27- David Gichuki) who confirmed that it is him that Malili Ranch retained to draw the sub-division scheme of the land and further that when he completed, he was also invited when members balloted and he assisted in showing them their plots on the ground.
184. There was also Ministry of Land Valuers led by Mr. Charles Moemi (PW 6) who visited the said land for valuation purposes and noted that there was a sub-division scheme in place comprising of 7.8-acre parcels though individual titles had not been issued. Much later, Professor George Njuguna (PW 28) was in the year 2010 tasked by Liberty Real Estate Limited to also carry out a valuation on its behalf following instructions issued through the firm of Eric Mutua & Co Advocates and in his report, he also indicated that he had noticed that the land had been demarcated and there was evidence of structures that had been demolished.
185. From the above evidence, it is clear that demarcation and allotment of the individual parcels was done by the Company pursuant to the resolution of the members during their Special Annual General Meeting of 7/5/2005 (P. exhibit 54) whereby this resolution was implemented and actual sub-division and allocation thereof was done.
186. At the time the Directors Meeting of 21/11/2009- P. exhibit 13 was being held and resolving to offer 5000 acres for sale to the Government, the shareholders were already in occupation and each knew their respective portion of land.
187. There was no similar shareholders meeting that was called to reverse or review the earlier resolution passed on 7/5/2005 to demarcate and share out the land to shareholders.



188. The Directors minutes of 22/12/2009 (P. exhibit 13) and the ensuing resolution (P. exhibit 13 a) were signed by two Directors, who were the then Chairman Mr. Josiah Munuka and Secretary, Julius Kilonzo Maweu.
189. The accused persons before this Court disowned that meeting and asserted that they did not sign the said minutes or attend the said meeting. They entirely blame the late Chairman and the then Secretary Julius Kilonzo Maweu for the decision to sell Malili Ranch land without their involvement or that of the membership of the Company. They insisted that they only came to know what transpired during the burial of their then Chairman, Josiah Munuka on 4/10/2010. They thus insisted that they were not to blame for the decision to sell the land occupied by the shareholders without their prior consent or consultation.
190. As a matter of fact, given that the shareholders are the ones who passed a resolution to share the land in the Special General Meeting of 7/5/2005 -P. exhibit 84; of which was subsequently sub-divided and allotted with the full knowledge and under the stewardship of the Company Management, it was thus deceitful and fraudulent for the Directors of the Company to go behind their back and sell the land without their involvement or seeking their approval.
191. Does failure to participate in this initial meeting in which decision to sell the land was made or the failure to append their signature on the ensuing sale agreement (P. exhibit 16) exonerated them from the offence of conspiracy to defraud that has been preferred against them.
192. Following the revelation that the company land which comprised the parcels already allotted to individual shareholders had been sold, a meeting of Board of Directors was convened on 28/11/2009 and passed a resolution to dethrone Peter Mutua Kanyi and Julius Maweu Kilonzo from holding the Offices of Chairman and Secretary respectively and the accused persons were installed into office with the first accused David Ndolo Ngilai assuming the Chairmanship, 2nd accused (now deceased)-James Munguti- Secretary, Leonard Kyania Kitua remained as the Treasurer and 4th accused-Julius Mbau Nzyuko-became Vice-Chairman. This was communicated by way of a Notice to all members via P. exhibit 104. Flowing from that meeting, these changes appear to have been conveyed to the Registrar of Companies, who by his letter of 30.11.2009(P.exhibit 105) signed by W G Gikonyo wrote to E.K. Mutua &Co. Advocates confirming the accused persons as the new office bearers.
193. According to the accused persons, as at the time they were assuming office, the initial 400 million had already been paid; which indeed is the correct position as this payment had been made way back 17/6/2009 vide cheque (P. exhibit 18) in favour of Mutua & Co. Advocates. It was their testimony that they were not involved in the expenditure that was incurred using that deposit. To that extent, that is equally factual.
194. The illegal scheme is in the selling of the company land without a resolution of the company made by the shareholders in accordance with the law, and Memorandum and Articles of Association of the company. The sale of the said company land was done when by a resolution of the company, the land had been demarcated, balloted for and allocated to the individual shareholders-some of whom were tilling or built on their respective portions of land.
195. Within this context, there are other factors to be considered in determining their culpability or otherwise.
196. Whereas the appellants may have not participated in the initial meeting that unlawfully sold the company land, the appellants as the new office bearers being aware of the illegality, did commit illegal



- acts in furtherance of the said illegal scheme. They dealt with the balance of the purchase price, signed transfer and conveyancing documents, effectively completing the illegal sale.
197. Any person who joins a conspiracy at any stage, in furtherance of the conspiracy, is responsible in law for all the acts of the conspirators. (Stanley Musinga & others vs. R (1951), 18 EACA 211).
198. Further, under Section 10 of the *Evidence Act* it states that in establishing common intention, anything said or done or written by any person in reference to their common intention, after the time when such intention was entertained by anyone of them, is a relevant fact as against each of the persons believed to be so conspiring as well as for the purpose of showing that any such person was party to it.
199. Therefore, any person who, in furtherance of the conspiracy, does or omits to do something, is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it. Such is a principal offender under section 20 of the Penal code.
200. The evidence show that, in a meeting said to have been convened by political leaders on 29/11/2009; the appellants were installed into office of the company with the sole purpose of reversing the letter by the former office bearers dated the same day, 29/11/2009 (P.exhibit 103) to Eric Mutua; withdrawing instructions to act for Malili Ranch Limited in respect of the sale of 5000 acres and by copy of the letter instructing the Permanent Secretary to the Treasury not to release the balance of purchase price to Eric Mutua & Co Advocates.
201. The new team led by the appellants, in a meeting held on 9/12/2009 (P.exhibit 76) which was attended by six directors being David Ndolo Ngilai-Chairman, James M. Munguti-Secretary, Julius Mbau Nzyuko-Vice Chairman, Leonard Kitua Treasurer, Peter Mutua Kanyi-Director and Julius Kilonzo Maweu-Director- who appended their signatures as confirmed by the Forensic Document Examination Report and Minute DM1/09 (2)- 'passed a resolution' that reads:
- 'All Directors shall henceforth act in harmony and jointly with a view to finalizing the transaction involving the sale of the 5000 acres to the Government'.
202. The foregoing was a decision of the directors affirming to complete the transaction of sale of 5000 acres to the Government. There was no evidence of any resolution by the shareholders in a general or special general meeting duly convened to make such affirmation or revoke the resolution for demarcation of the company land and allocation to the individual shareholders.
203. Further, in a letter signed by the accused persons and written to E.K. Mutua & Co. Advocates dated 1/12/2009 and copied to Permanent Secretary Ministry of Information & Communications- (P. exhibit 106) which was signed by David Ndolo Ngilai-Chairman, James M. Munguti-Secretary, Julius Mbau Nzyuko-Vice Chairman, Leonard Kitua- Treasurer, they even rubbished the validity of the meeting of 29/11/2009 by asserting that it was constituted without the requisite notice. They stated at paragraph (c) of the said letter- 'The purported Special General Meeting was illegal for want of notice and quorum'.
204. It is therefore, pretentious for the appellants to claim that they were authorized by shareholders in some meeting which was not competent to deliberate such business of sale of company assets.
205. Although the appellants denied knowledge of how the sale was initiated, evidence adduced before this court has shown that their subsequent actions after taking office was in furtherance of, contributed to and aided the conspiracy.
206. The directors of the company who signed the original agreement as well as those who signed transfer instruments or conveyance documents and participated in furtherance of the unlawful agreement and



purpose of selling the land in question, with the knowledge of the illegality in the transaction, are principal offenders. In furthering the transaction- illegality of which they were aware- and without seeking any lawful mandate to do so, the appellants as office bearers of the company, were part of the agreement to defraud.

207. This court, therefore, finds that the prosecution proved the charge of conspiracy to defraud beyond reasonable doubt. The appellants were properly convicted. Consequently, the appeal on conviction fails.

Whether the sentence was manifestly excessive

208. The appellants were sentenced to a fine of Kshs.5,000,000/-and in default to serve 2 years' imprisonment.

209. Section 317 of the Penal Code provides that persons convicted for the offence of conspiracy to defraud are guilty of misdemeanors and liable to three years imprisonment.

210. From the record, the court exercised its discretion properly and fined the appellant an amount of Ksh5,000,000/= under Section 28 of the Penal code.

211. There is nothing which may warrant interference with the sentence.

212. The sentence is upheld.

213. In the upshot, the appeal is dismissed. Right of appeal has been explained.

214. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19TH DAY OF JULY, 2024

.....

F. GIKONYO M

JUDGE

In the presence of: -

1. Mwaseru for DPP
2. Ndeto for Musyoki for appellants
3. Raymond C/A

