



REPUBLIC OF KENYA



**Ngamau & another v Republic (Criminal Appeal E018 of 2021) [2023] KEHC 1065 (KLR)
(Anti-Corruption and Economic Crimes) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CRIMINAL APPEAL E018 OF 2021
EN MAINA, J
FEBRUARY 16, 2023**

BETWEEN

MUKURIA NGAMAU 1ST APPELLANT

QUORANDUM LIMITED 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against Judgment and sentence delivered on 30th September 2021 by
Hon. D.N. Ogoti C.M in Nairobi Chief Magistrates Anti-Corruption Case No. 13 of 2016)*

JUDGMENT

1. The Appellants were together with 5 others charged with corruption and economic related crimes under the [Anti-Corruption and Economic Crimes Act](#) (ACECA) Act and making false documents under the Penal Code in Nairobi Chief Magistrates Anti-Corruption Case No. 13 of 2016 Republic versus Catherine Namuye and 4 others.
2. However, two of the accused persons, accused 1 and 2 died and the proceedings against them were marked as abated and withdrawn. This left the Appellants and two others who are not parties to this appeal, to face the following charges: -
 1. Count 1- Conspiracy to commit an economic crime contrary to Section 47A (3) as read with section 48 (1) of the [Anti-corruption and Economic Crimes Act](#) No. 3 of 2003;
 1. CATHERINE AKELO NAMUYE
 2. BRUCE DOMINICK ODHIAMBO
 3. MUKURIA NGAMAU



4. DOREEN WAITHERA NGANGA

5. QUORANDUM LIMITED

PARTICULARS: Between 17/11/2014 and 4/5/2015 within Nairobi county in the Republic of Kenya, jointly conspired to commit an economic crime namely unlawful disposal of public property through unlawful payment of Kshs. 180,364, 789.00/= from Youth Enterprise Development Fund and Quorandum Ltd for services not rendered.

2. COUNT 2 – UNLAWFUL ACQUISITION OF PUBLIC PROPERTY CONTRARY TO SECTION 4-5(1)(a) AS READ WITH SECTION 48(1) OF ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

PARTICULARS 3. MUKURIA NGAMAU 4. DOREEN WAITHERA NGANGA 5. QUORANDUM LIMITED On 23/ 12/2015 within Nairobi County in the Republic of Kenya, being the Directors of Quorandum Limited and Quorandum Limited, a corporate body respectively jointly unlawfully received Ksh.115,710,000/= from Youth Enterprise Development Fund account number 005xxxxxxxxxx held at Chase Bank for services not rendered.

3. COUNT 3: UNLAWFUL ACQUISITION OF PUBLIC PROPERTY CONTRARY TO SECTION 45(1)(a) AS READ WITH SECTION 48(1) OF ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

PARTICULARS: 3. MUKURIA NGAMAU 4. DOREEN WAITHERA NGANGA 5. QUORANDUM LIMITED On 4/5/2015 within Nairobi County in the Republic of Kenya, being the Directors of Quorandum Limited and Quorandum Limited, a corporate body, respectively, jointly unlawfully received Ksh.64,654,789/= from the Youth Enterprise Development Fund account number 005xxxxxxxxxx held at Chase Bank for services not rendered.

4. COUNT 10: MAKING OF FALSE DOCUMENT CONTRARY TO SECTION 347 (a) AS READ TOGETHER WITH SECTION 349 OF THE PENAL CODE.

PARTICULARS: CATHERINE AKELLO NAMUYE 3. MUKURIA NGAMAU : on 17/11/2014 within Nairobi County in the Republic of Kenya, being the Acting Chief Executive Officer of Youth Enterprise Development Fund and Director of Quorandum Ltd respectively, jointly made a false document namely a contract between Quorandum Ltd and Youth Enterprise Development for contract sum of Kshs. 114,909,946.00/= for alleged provision of consultancy services on Design of Specifications for an Enterprise Resource Planning by Quorandum Ltd to the Youth Enterprise Development Fund, purporting it to be a genuine document.

5. COUNT 11

MAKING A FALSE DOCUMENT CONTRARY TO SECTION 347(a) AS READ TOGETHER WITH SECTION 349 OF THE PENAL CODE.

PARTICULARS: 1. CATHERINE AKELLO NAMUYE 3. MUKURIA NGAMAU : on 17/11/2014 within Nairobi County in the Republic of Kenya, being the Acting Chief Executive Officer of Youth Enterprise Development Fund and the Director of Quorandum Ltd respectively, jointly made a false document namely a contract between Quorandum Ltd and Youth Enterprise Development Fund for



contract sum of Kshs. 65,985,000/= for alleged provision of consultancy services on ICT Strategy Design by Quorum Ltd to the Youth Enterprise Development Fund purporting it to be a genuine document.”

3. Upon hearing and evaluating the evidence before it, the trial court, rendered a judgment and convicted the Appellants on all the five counts and sentenced them as follows:

- “1) In Count 1, 1st Appellant (3rd accused) was sentenced to serve 7 years imprisonment without an option of a fine.
2. In Count 2, the 1st Appellant (3rd accused) was sentenced to pay a mandatory fine of Kshs. 462,840,000 in default to serve 7 years imprisonment.
3. In Count 3, the 1st Appellant (3rd accused) was sentenced to a mandatory fine of Kshs.462,840,000/- in default to serve 7 years imprisonment and for the benefit received, an additional mandatory fine of Kshs.258,619,156/- in default to serve 7 years imprisonment.
4. In count 10, 1st Appellant (3rd accused) was sentenced to serve 3 years imprisonment.
5. In count 11, the 1st Appellant (3rd accused) was sentenced to serve 3 years imprisonment.
6. Additionally, the court ordered that pursuant to Section 54(a) of the ACECA, the 1st Appellant (3rd accused) pays or compensates the Youth Enterprise Development Fund Kshs. 189,364,789.00 being the amount that would fully compensate the Fund for the loss suffered”.

4. Aggrieved with the conviction and sentence, the Appellants preferred this Appeal through a petition dated 12th October 2021 later replaced with the Amended Petition of Appeal dated 6th June, 2022 and raising the following 23 grounds of appeal:

1. The learned Magistrate erred in law in finding that the prosecution had proved its case beyond reasonable doubt.
2. The learned Magistrate erred in law and in fact in his treatment of the 2nd Appellant’s contract with the Youth Enterprise Development Fund.
3. The learned Magistrate erred in law in failing to admit and to consider the evidence of the Appellants, being the evidence of the services rendered under the contract.
4. The learned Magistrate erred in law and in fact in finding that there was conspiracy to commit an offence in which the Appellants were involved in
5. The earned Magistrate erred in law in failing to apply the correct test to find and hold that the 1st Appellant had committed the offences of forgery.
6. The learned Magistrate erred in law and fact in failing to consider that the law allows for various modes of procurement.
7. The learned Magistrate erred in law and in fact in shifting the burden of proof from the prosecution to the Appellants



8. The learned Magistrate erred in failing to consider, sufficiently or at all the submissions of the Appellant before the trial court.
9. That the Judgment of the Learned Chief Magistrate is untenable for not being supported by the evidence.
10. That the Learned Chief Magistrate erred in law and in fact in convicting the appellants for the offense of conspiracy when there was no evidence whatsoever demonstrating “a meeting of minds” as required by the law.
11. That the Learned Trial Magistrate erred and grossly misdirected himself by his holding that the case against the 1st and the 2nd Accused had abated while still continuing the case against the two on counts.
12. That the Learned Trial Magistrate erred in law as a consequence of numerous mis-directions which render the judgment wholly untenable.
13. That the Learned Trial Magistrate erred in law and in fact by failing to consider, adequately or at all as to whether the defense by the Appellants was plausible or not.
14. That upon the Court having ruled that the case against the 1st and the 2nd accused, the Trial Magistrate erred in law and in fact and grossly misdirected himself with regard to counts 10 and 11 without more and in disregard of the demise of both accused 1 & 2, which action wholly vitiated the entire proceedings.
15. That the Learned Trial Magistrate erred in law and in fact in convicting the appellants for the charge of conspiracy and that the conviction failed to have regard to the abatement of the matter against Accused 1 & 2 and the same further failed to have any or all of the ingredients of the offense of conspiracy.
16. That further and in alternative to Para 15 above the Lower Court erred in law and fact in failing to have regard and to consider, adequately or at all the fact that after the demise and abatement of the case against the 1st and 2nd Accused the charge of conspiracy could no longer be sustained for the reason that the 1st appellant could not be said or held to conspire with the 2nd appellant which was his company. Indeed the offences of conspiracy could only be sustained with the participation of the deceased if at all.
17. That having due regard to the entire evidence adduced before the court there is not a shred of evidence demonstrating that there was a meeting of minds and therefore the conviction for the offense is unmaintainable.
18. That there were numerous and inexcusable infractions of law during the proceedings which render the said proceedings and judgment wholly untenable.
19. That the refusal by the Lower Court to admit and be guarded by evidence and documents introduced by the defence was grossly unfair, wrongful in law and demonstrated bias against the appellants in the case and the consequence was not only overly prejudicial but more so a grave denial and violation of the right for a fair trial.
20. That on numerous occasions the court shifted the burden of proof thereby violating cardinal principles of criminal jurisprudence and the presumption of innocence as a consequence whereof the appellants were deprived of their constitutional right for a fair trial. That this



ground even by itself is sufficient to justify this court to quash the conviction and to set aside the sentence.

21. That the courts application of Section 211 of the Criminal Procedure Code was erroneous as the circumstances did not so warrant and the action is a further demonstration of the shifting of the burden of proof to the prejudice of the appellants.
 22. That during the proceedings, the Learned Chief Magistrate grossly failed to comply with the mandatory provisions of Section 169 of the Criminal Procedure Code which failure renders the entire proceedings and judgment null.
 23. That the sentence meted out by the court is manifestly excessive and ought to be set aside”.
5. The appeal was canvassed by way of written submissions which learned counsel for the parties highlighted orally in court on 15th December 2022. I shall refer to those submissions in my analysis and determination of the issues and hence see no need to reproduce them here.

Issues and determination:-

6. I shall deal with the issues as framed by learned counsel for the Appellant, which are: -
1. Whether the offence of conspiracy was proved beyond reasonable doubt.
 2. Whether the evidence proved a case against the Appellants in respect to Counts 2 & 3 to the exclusion of all other accused persons?
 3. Whether the particulars of Count 10 and 11 as per the Charge Sheet vis a vis the evidence on record disclose any offences.
 4. Whether there was in existence binding contracts between the Appellants and Youth Enterprise Development Fund.
 5. Whether the Appellants did provide such services to warrant the payment.

Issue No. 1 - Whether the offence of conspiracy was proved beyond reasonable doubt?

7. As the first appellate court, this court’s duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny so as to make its own independent conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. (See the case of *Okeno v Republic* [1972] EA 32).
8. The charge of Conspiracy to commit an economic crime is provided for in Section 47A (3) which defines the offence as follows:
- “ 47A. Attempts, conspiracies, etc.
- “..... (3) A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.....”
9. The term conspiracy as it relates to criminal offences imputes a common intention between two or more co-conspirators. Ngenye J, (as she then was) stated as follows in the case of *Rebecca Mwikali Nabutola & 2 others v Republic* [2016] eKLR:

“ The Black’s Law Dictionary 9th Edition at page 351 defines conspiracy as:



‘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.’

In Archibold’s Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell), at pages 3025 and 3026, it is observed as follows:

‘The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be agreement...The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it.... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.’

In order to proof (sic) an offence of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud the public.’

10. To prove this offence there must be evidence, beyond reasonable doubt, of an agreement between two or more persons, the agreement must be to commit an unlawful act, there must be an intent to achieve the objective of that agreement and action or conduct that furthers that agreement.
11. Learned counsel for the Appellants submitted that the charge of conspiracy was not proved beyond reasonable doubt; that there were serious deficiencies in the evidence and that the convictions of the appellants were erroneous. Learned Counsel stated that the Appellants were charged jointly with the 1st and 2nd accused, Catherine Akelo Namuye and Bruce Odhiambo, (both deceased) but despite their death during the trial and the case against them having been withdrawn, the trial proceeded. Counsel submitted that the court noted the cases against those accused persons had abated. Counsel submitted that it was a violation of the rights of the Appellants under Article 50 of *the Constitution* to allow the charges to proceed against the appellants. That for a charge of conspiracy to succeed, there must be a meeting of minds and there must be more than two people; that there was no meeting of minds proved as the appellant cannot be said to have conspired with two dead people. Further, that the 1st appellant cannot be said to have conspired with the 2nd Appellant as that was his company. Counsel argued that the charge of conspiracy should have failed ab initio and faulted the trial court for convicting the appellants.
12. For the Respondent the appeal was opposed in its entirety. It was submitted that the prosecution discharged its burden of proof to the required standard. That in regard to the charge of conspiracy evidence was adduced through PW1 (the ICT officer in charge of the Fund) who testified that the Fund needed an ICT Strategy and Policy for the financial year 2012/2013; that being the user department he prepared the work plan which he forwarded to the procurement department and once that was done a tender was advertised in the local media; that all the procurement processes were then followed and a tender was then awarded to a company called Microflex Business Solutions Africa Ltd (MICROFLEX). That PW1 testified that a contract to that effect was then executed between the Fund and Microflex who proceeded to deliver the service at a sum of Ksh.5,985,600/= VAT included; that it was PW1’s evidence that it was not necessary after that for the Fund to have another ICT Strategy as there was one already in place; that PW1 disowned the agreements signed between the Fund and the 2nd Appellant. Learned counsel for the Respondent submitted that the evidence received corroboration from other witnesses and contended that the 1st Appellant Mukuria Ngamau conspired with his co-accused, Catherine Namuye (the then CEO of the Youth Enterprise Development Fund) to commit an economic crime, to wit, fraudulent acquisition of a sum of Kshs.180,364,789/-. Counsel averred



that Exhibit 41 and Exhibit 38, both bank statements from Chase bank belonging to Quorandum Limited and Youth Enterprise Development Fund (the Fund) evidenced the payment; that there were several meetings between the 1st Appellant and the CEO of the Fund which culminated into the signing of the contracts produced as PExh 8 and 9; that the same were agreements between the Fund and Quorandum Limited (the 2nd Appellant) for the provision of consultancy services and that it was the 1st accused who through letters PEXH 11 and PEXH12 instructed Chase Bank Officials to transfer of Kshs.115,710,000 and Kshs.65,184,946 to the 2nd Respondent's account.

13. From the definition of Conspiracy aforesaid, it is clear that the ingredients of the offence of Conspiracy to commit an economic crime requires an agreement of minds between 2 or more people. The Appellant was charged with conspiracy alongside four other persons but owing to the demise of the 1st and 2nd accused the charges against them were withdrawn. The other accused person, 4th accused, who was a co-director of the 2nd Appellant in the 1st Appellant's company was acquitted under Section 210 of the Criminal Procedure Code. In my view the conviction of the 1st Appellant and his company (2nd Appellant) for that offence gives the impression that the 1st Appellant conspired alone given that the 2nd Appellant is not a natural person. I agree with the submissions of Learned Counsel for the Appellants that once the charges against their co-accused were withdrawn and the other was acquitted the element of agreement between two or more people remained unproven and consequently, the prosecution did not prove the elements of the charge of conspiracy against the Appellants. Accordingly, I find that the conviction of the 1st and 2nd Appellants on Count 1 was unsafe and the appeal on this count is allowed and the conviction is quashed and sentence on that count set aside.

Issue No 2 – Whether the evidence proved a case against the Appellants in respect to Counts 2 & 3 to the exclusion of all other accused persons.

14. Counts 2 and 3 are both in respect of the charge of unlawful acquisition of public property Contrary to Section 45(1) (a) as read with Section 48 (1) of the *Anti-Corruption and Economic Crimes Act*. The funds alleged to have been acquired are Kshs. 115,710,000/= and Kshs. 64,654,789/=.

Section 45 (1) (a) states:

“ 45. Protection of public property and revenue, etc.

- (1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully—
- (a) acquires public property or a public service or benefit.”

15. It is not in dispute that the 2nd Appellant herein received a sum of Kshs. 115,710,000 and a sum of Ksh. 65,184,946 in its bank account no. 005xxxxxxxxxxx upon the instruction of the 1st accused (deceased) to Chase Bank. Those payments were supported by documents furnished to Chase Bank by the Appellants. The documents were produced as PExh 8 and PExh 9. The same were contracts for consultancy service. However, the Youth Enterprise Development Fund (the Fund) had awarded the tender to Microflex Limited but not to the 2nd Appellant. The Fund had already signed a contract (PExh 5) with Microflex Limited. There was evidence from PW1, PW2 and PW8 that Microflex had fully participated in the tender process from bidding, evaluation and award of tender and signing of the contract. On their part, the defence did not provide any evidence of compliance with the law in regard to procurement. The Fund mind you, is a public body which is bound by the provisions of the Public Procurement and Disposal of Assets Act and the *Public Finance Management Act*. There was no evidence from the 1st Appellant who also testified on behalf of the 2nd Appellant that they took



part in any tendering process whether restricted, direct or otherwise. A meeting with the Fund's Chief Executive Officer (1st accused, deceased) would not have sufficed and would in any case have been illegal as a meeting is not clearly one of the tender methods provided in the Act. That therefore was a private agreement between the Appellants and the Chief Executive Officer which could not be binding on the Fund. It is therefore my finding that there was no contract at all between the 2nd Appellant and the Fund.

16. Learned Counsel for the Applicant argued that the document relied upon by the Appellants were not false documents and hence the charges were not proved beyond reasonable doubt. This court has evaluated the evidence by both sides and it finds that the documents were indeed false. To begin with there was evidence from PW1, PW2 and PW8 that the Fund already had an ICT Strategy and Policy in place so it did not require any other. PW1 (the ICT manager) and PW8 (the then head of procurement) at the Fund were all emphatic that there was no work plan for provision of ICT Strategy and Policy in the 2014/2015 financial year. Secondly there was evidence from Miriam Boit (PW7), the then Ag. Company Secretary of the Fund disowning the contracts prepared in favour of the 2nd Appellant. PW7 testified that as the Company Secretary she was in charge of drafting contracts. She was however emphatic that she did not draft the contracts with the 2nd Respondent. She pointed out discrepancies between those contracts and those that emanated from the Fund and reiterated that the Fund did not in fact require an ICT strategy and policy as there was one already in place. It was also her evidence that unlike the contracts emanating from the Fund the contracts with the 2nd Appellant did not have the requisite original annexures. It was her evidence that she had never seen the alleged contracts between the Fund and the Appellants whereas it was she who had drafted the contract between the Fund and Microflex. It is instructive that a contract is the last step in a tender process and hence it cannot exist in the absence of a tender. (See Section 68 (1) of the Public Procurement and Disposal of Assets Act (2005).
17. This is more especially because Sections 27 and 29 of the Public Procurement and Disposal Act 2005 (repealed) which was the applicable law at the time set out the general procurement rules; as follows:
 - “27.Responsibility for complying with Act, etc.
 1. A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.
 2. The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1).
 3. Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.....”
 - 29Choice of procurement procedure
 1. For each procurement, the procuring entity shall use open tendering underpart V or an alternative procurement procedure under Part VI.
 2. A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI.
 3. A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity—
 - a. Obtains the written approval of its tender committee; and



- b. Records in writing the reasons for using the alternative procurement procedure.
 4. A procuring entity shall use such standard tender documents as may be prescribed.....”
18. All procurement by public entities, ought therefore to have complied with the Public Procurement & Disposal Act and I fully agree with the findings of the trial court that:-
- “ 1) The Fund followed the law and the lawful tender for supply of an ICT Strategy and ERP was awarded to Microflex Business Solutions Africa Ltd and Pexb-5 was prepared and executed as demonstrated by PW1 & PW3. There was no other such process found by the court.
 2. The Fund was not aware of both Pexb-8 & 9 and initials on both Pexb-8 & 9 were superimposed and there was no evidence that A5 ever made any request to the Fund.
 3. Pexb-11 & 12 the letters to Chase Bank were authored by Catherine Namuye instructing the bank to pay A5 Kshs. 115,710,000/- & Kshs. 64,654,889/-. A5 confirmed that the payments were made to his satisfaction.
 4. A5 acknowledged the payments and the court finds as that the payments were unusual.
 5. The scheme to pay A5 was orchestrated in such a manner that A3 and Catherine Namuye ensured nobody else got to get information about the payment.
 6. Catherine Namuye gave instructions to the bank (see Peb-60(a) & 60(b) and changed the instructions for withdrawal and made herself the sole signatory to the Fund’s accounts Nos 0017xxxxxxxxxxx & 001xxxxxxxxxxx held at Chase Bank (pexb-39(a)) & Pexb-23.
 7. On one side, A3 was actively involved in pursuing the payment in favour of A5 and on the other the deceased [A1] facilitated the payments to A5's Account No 005xxxxxxxxxxx through an internal transfer with either manipulated or forged supporting documents.
 8. A3 & A5 never participated in any lawful process in order to be entitled to the payments received.
 9. Both Pexb-33(a) & 33(b) were authored and executed by A3.
 10. All the actions and deeds that led to the payment were within the knowledge of A3 making his actions.”
19. The Appellants’ contention that several key officials of the Fund participated in the transaction by playing key roles but that the prosecution blamed the 1st Appellant entirely for the offence has no basis, Section 27 (4) of the Public Procurement and Disposal Act, 2005 (repealed) casts responsibility to comply with the Act on contractors, suppliers, & Consultants. That responsibility is in addition to but not in derogation of the responsibility placed upon the employees of the public entity under Section 27(3) of the Public Procurement and Disposal Act, 2005. The conduct of the Appellants proved that



they committed the offences charged and hence defrauded the Fund of the sum of Kshs. 180,364,789/ = and hence the charges against them are far from discriminatory. (Section 45 (1) (a) of the ACECA) is specific to a person who commits the offence but not to a group of persons).

20. The 1st Appellant does not deny that the 2nd Appellant received the sum of Ksh.180,364,789 from the Fund which sum was paid in two tranches of Kshs.115,710,000 and Kshs.65,184,946 upon the instructions of the 1st accused, now deceased. As I have already stated the meetings between the 1st Appellant and the 1st accused and the reports tendered could not have by any stretch of imagination culminated in a valid contract binding on the Fund. It was their private arrangement/agreement given that there was no compliance with the law. Consequently, any payments by the Fund flowing from such an arrangement was not only fraudulent but also illegal and the Appellants must bear the consequences. If indeed they participated in any tender restricted or otherwise it was upon them to prove it as that was a fact within their special knowledge. (See Section 111 of the *Evidence Act*). They did not do so. This court does not find the excuse that their documents were seized by the Ethics & Anti-Corruption Commission tenable. Looking at the evidence tendered by the 1st Applicant, nowhere did he make reference to a tender. It is my finding that in so far as there was no valid contract between the Appellants and the Fund, the 2nd Appellant was not entitled to the funds paid to it by the Fund.
21. Accordingly, it is my finding that the prosecution proved the charges of unlawful acquisition of public property beyond reasonable doubt and the conviction and sentence of the Appellants on both Counts 2 and 3 were safe are hereby upheld.
22. The above findings also sufficiently dispose issues number 4 and 5 above and I shall not therefore go back to the same.

Issue No. 3 - Whether the particulars of Count 10 and 11 as per the Charge Sheet vis a vis the evidence on record disclose any offences.

23. In Counts 10 and 11, the 1st Appellant was charged with the offence of making a false document contrary to Section 347 (a) as read with Section 349 of the Penal Code. The documents in issue are the contracts produced as PExh 33(a) and 33(b). Joseph Alumasa (PW1), the Officer then in Charge of the ICT department at the Fund compared the contract between the Fund and Microflex Business Solutions with the alleged contracts between the Fund and the 2nd Appellant and testified that the letters were falsified. The documents were also disowned by the then Ag. Company Secretary of the Fund (PW7) who was in charge of drafting contracts involving the Fund. PW8 who was the head of Procurement at the Fund also emphasized that there was no work plan for the ICT Strategy and Policy in the year 2014/2015 financial year. This too would have rendered the alleged contracts invalid.
24. PW23, a Document examiner, testified that the investigating officer obtained specimen handwriting and signatures of the accused persons and that all the documents were examined at the laboratory. In his report PExh 55, it was confirmed that the Appellants' signatures appeared on PExh 33 (a) and (b) which were the falsified contracts disowned by employees of the Fund but supplied to the bank by the Appellants for payment. Even though the 1st Appellant denied ownership of Exh 8 and 9 and instead acknowledged Exh 33(a) and (b) as the alleged contracts for the procurement, this denial alone was not sufficient rebuttal of the evidence of the prosecution that the Fund never entered into any contract with the Appellants and that the PExh 33 (a) and (b) were falsified documents that were similar to the contract signed by Microflex and the Fund in the financial year 2012/2013.
25. While in themselves the two alleged contracts were not forgeries within the strict meaning of the term, there was overwhelming evidence that they purported to be what they were not. This is because, as I have already stated, there was no award of a tender to the 2nd Appellant which would have culminated



in a contract between it and the Fund. Even for restricted tendering the conditions provided in Section 73 (2) of the Act had to be fulfilled which I find was not done with regard to the alleged contracts. For all intents and purposes therefore, the alleged contracts were false documents and it is my finding that Counts 10 and 11 of the charges were proved beyond reasonable doubt and the conviction thereon is hereby upheld.

26. The upshot is that the appeal partially succeeds. The 1st Appellant is acquitted on Count 1 (charge of conspiracy) and the conviction and sentence thereon are hereby set aside. The conviction and sentence of the 1st and 2nd Appellants on Counts 2, 3, 10 and 11 are however upheld. That is the judgment of this court.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 16TH DAY OF FEBRUARY, 2023.

E N MAINA

JUDGE

