



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
ACEC APPEAL NO. 22 OF 2019

JOHN FAUSTIN KINYUA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal against the conviction and Sentence of the Appellant by the Hon. Felix Kombo delivered on the 11th day of June, 2019 in ACC No. 35 of 2008)

J U D G M E N T

1. The Appellant herein (Accused III) was together with four others namely Johnson Jackson Githaka (Accused 1), Jane Florence Otieno (Accused II), Mary Njeri Njenga Kimingi (Accused IV) and Rockhound Properties Limited (Accused V) arraigned before Milimani Chief Magistrate's and Anti-Corruption Court on 29th October, 2008 facing various corruption related charges. The Appellant was charged with three counts as follows: **Count II:** Fraudulent acquisition of public property contrary to **section 45(1)(a)** as read with **section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003**. Particulars were that, on 8th December, 2005 in the city of Nairobi within Nairobi area in the Republic of Kenya, jointly and fraudulently acquired a public property to wit L.R. No. 1160/613 situated in Karen within the city of Nairobi belonging to Kenya Re-insurance Corporation.

2. **Count III:** conflict of interest contrary to **Section 42(3)** as read with **Section 48(1)** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**. Particulars were that on 8th December, 2005 in the City of Nairobi within Nairobi area in the Republic of Kenya being an agent of a public body, to wit the Director Finance and Corporate Services Kenya Re-insurance Corporation Limited, knowingly acquired interest in L.R. No. 1160/613 situated in Karen within the City of Nairobi belonging to Kenya Re-insurance Corporation Limited through a company known as Rockhound Properties Limited.

3. **Count IV:** He was charged with two others with the offence of fraudulent acquisition of public property contrary to **Section 45(1)(a)** as read with Section 48(1) of the Anti-Corruption and Economic Crimes **Act No. 3 of 2003**. Particulars were that on the 25th January 2006 in the city of Nairobi within Nairobi area in the Republic of Kenya jointly and fraudulently acquired public property to wit Kshs.132,504.00 the property of Kenya Re-insurance by fraudulently representing that it was a refund of excess payment on account of the sale of L.R. No. 1160/613 belonging to the said Re-insurance corporation Limited.

4. Upon entering a plea of not guilty, the accused was released on bond and trial commenced. It is worth noting that out of a total of five accused persons charged, charges were withdrawn against accused 2 through a nolle prosequi and accused 1 acquitted under **section 210** of **CPC**. After calling a total of 17 witnesses accused was put on defence wherein he gave unsworn testimony. On 11th June 2019 he was found guilty of all the three counts. Subsequently, on 14th June, 2019 he was sentenced to three years imprisonment for each count and sentences were to run concurrently.

5. Dissatisfied with the conviction and sentence, the Appellant filed a petition of appeal dated 21st June, 2019 and filed the same day citing 11 grounds of appeal particularized as hereunder:

1. That the learned magistrate erred in law and fact in holding that Kenya Re was a public body when there was no evidence tendered to support the said conclusion.

2. That the learned magistrate erred in law and fact in taking judicial notice of facts and law that were not definitive and/or adduced in court evidentially and whose nature offends the Evidence Act and flouts over contradicts the evidence placed before the court.

3. That the learned magistrate erred in law and fact when he concluded that the Appellant was part and parcel of persons

who conferred a benefit to the 5th Accused in the trial when such conclusion was not supported by any evidence from the prosecution witness and consequently arrived at the wrong decision.

4. That the learned magistrate erred in law and fact in shifting the burden of proof to the Appellant contrary to the established principles of law and the constitutional provisions as regards the presumption of innocence as provided in Article 50(2) of the Constitution hence arrived at the wrong decision.

5. That the learned magistrate erred in law and fact in holding that the Appellant allocated and caused to be transferred public property against the strength of the evidence tendered by the Prosecution which showed otherwise.

6. That the learned magistrate erred in law in failing to apply the law equally to all the accused persons to the detriment of the Appellant. The Magistrate failed to grant the Appellant equal benefit of the law as his co-accused in similar circumstance. The Appellant was sentenced to imprisonment for three (3) years for each three (3) counts while the co-accused was admitted on non-custodial sentence.

7. That the learned magistrate erred in law and fact in convicting the Appellant against the weight of the evidence tendered.

8. That the learned magistrate erred in law and fact by failing to appreciate that the offence the Appellant has been charged with had not been proved beyond reasonable doubt as against the Appellant.

9. That the learned magistrate erred in law by failing to consider the Appellant's defence.

10. That the learned magistrate erred in law and fact in failure to take into consideration the mitigation on record thus meting out maximum sentence.

11. That the learned magistrate erred in law by imposing a mandatory sentence which was excessive in the circumstances.

6. Contemporaneously filed with the petition is a notice motion of even date seeking release of the appellant on bail pending appeal. However, on 30th July, 2019 by consent the application was compromised in favour of the hearing of the main appeal. The Appellant's prayer therefore, is for the appeal to be allowed, the impugned judgment quashed and the Appellant acquitted.

APPELLANT'S SUBMISSIONS:

7. Mr. Opiyo counsel appearing for the Appellant argued the appeal relying on his written submissions filed on 9th August, 2019. He gave a brief analysis of the evidence before the lower court and then condensed the grounds of appeal into four which he canvassed as follows:

a) **Whether the charges against the appellant were proved to the required standard being proof beyond reasonable doubt.**

i) **Count II:** Fraudulent acquisition of public property contrary to Section 45(1) of ACECA No. 3 of 2003.

8. In respect to this ground, Mr. Opiyo submitted that none of the prosecution witnesses testified that the Appellant was the owner or had beneficial interest in L.R. 1160/613. That according to the evidence of **PW8**, as at 8th December, 2005 when the Appellant was charged with the offence in question the property in issue was registered in the name of Rockhound Property Limited.

9. Counsel further submitted that, **DW3** had told the court that the parcel of land in question was registered in her name a fact that was vindicated by the **High Court ruling in HCCC 776/2003**. Mr. Opiyo further contended that **PW16** did not get any evidence to show that the Appellant ever encashed the cheque in payment for the house nor was he a Director Rockhound Limited. Learned counsel opined that **PW16** did not lay any evidence connecting the Appellant with ownership of the house and that any indirect evidence to link him with the house was baseless. Counsel further relied on the testimony of **PW7** and **PW3** who reside in the subject house and who filed a suit in the High Court claiming lawful ownership thus confirming that the Appellant had no beneficial interest in the house.

10. Mr. Opiyo further relied on the testimony of **PW9** an advocate who attested a sale agreement drawn, signed and sealed between Kenya Re-insurance and Rockhound Properties Limited and that the transfer was effected in the name of Rockhound as the beneficiaries. In Mr. Opiyo's view, the Appellant did not commit the alleged offence as he was not in occupation of the property, never signed any of the conveyance documents in his favour nor did he issue any cheque as consideration.

11. According to Mr. Opiyo, the evidence that the prosecution evidence is purely based on suspicion which is not anchored on any facts. To support this proposition counsel relied on the decision in the case of **Chebichii Sawe vs Republic Criminal App. 2 of 2002** where the court stated that:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichura vs Republic (Criminal Appeal No. 17/1988 (UR), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

ii) **Count III:** Conflict of Interest contrary to Section 42(3) as read with Section 48(1) of the ACECA

12. Under this ground, Mr. Opiyo opined that from the testimony of **PW13** the companies' registry records had indicated that the Appellant was not a director of Rochhound hence he had no interest in the company which eventually acquired the house in question. That this fact was corroborated by the evidence of **PW16** and **PW17** and the trial court's finding in its judgment at page 38.

iii. Count IV: Fraudulent acquisition of public property contrary to Section 45(1)(a) as read with 48(1) of the ACECA.

13. It was Mr. Opiyo's submission that the allegation that the Appellant jointly and fraudulently acquired Kshs.132,504.00 the property of Kenya Re-insurance was not true. That the said amount was an overpayment of the purchase price by Rockhound which was refunded to its lawyers Muriu Mungai & Co. Advocates who are still holding the money to date hence no element of fraud committed.

b. Whether the trial magistrate failed to consider the Appellant's defence:

14. It was Mr. Opiyo's submission that **DW1** (the Appellant) never collected any cheque from Alexander Forbes neither had he been to that office nor the office of Muriu & Mungai who prepared the conveyancing documents. That the Appellant having denied that he had any beneficial interest in the property the court should have considered that fact which raised reasonable doubt thus exonerating him from the charges. To fortify this proposition counsel referred the court to the decision in the case of **Joseph Ndung'u Kagiri vs Republic (2016) eKRL** where the court held that:

“a criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant fact which may lead to discovery of the facts in issue and obtain proof of such facts at which the prosecution and the accused have arrived at by their pleadings; the controlling question being the guilty or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which must be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.”

c. Whether the trial magistrate was biased when he passed different sentences to the Appellant and the fourth accused yet both accused persons were charged with the same offences.

15. Learned counsel asserted that the Appellant and accused 4 having been charged of similar charges, similar sentence ought to have been imposed.

d. Whether the trial magistrate erred in failing to put in consideration the mitigation advanced by the Appellant thereby imposing a maximum penalty against the Appellant.

16. Mr. Opiyo contended that the trial did not consider the Appellant's mitigation which is a constitutional requirement. To buttress this contention, counsel referred to the decision in the case of **Joseph Kaberia Kahinga & 11 others vs Attorney General (2016) KLR**. Counsel further submitted that the trial court meted out a harsh sentence without an option of fine yet the section under which he was charged being **Section 48(1) of ACECA** provides for a fine as an option. That being a first offender he was entitled to a lesser penalty and not the maximum in compliance to **section 26** of the **Penal Code**.

17. Learned counsel invited the court to consider circumstances under which the High Court can interfere with a magistrate's discretion in sentencing as; where the sentencing court fails to consider sound legal principles; it is manifestly harsh or excessive; the court exercised its discretion wrongly and capriciously. In support of this position, counsel referred to the holding in the case of **Janet Muthoni Thiaka vs Republic (2016) eKLR**.

RESPONDENT'S SUBMISSIONS:

18. In response, Miss Sigei counsel appearing for the State relied on her submissions filed on 18th September, 2019 arguing that the prosecution had tendered sufficient evidence to find the appellant guilty of the charges convicted of and that the sentence meted out was lawful. Miss Sigei submitted that L.R. 1160/613 was public property being registered land in the name of Kenya Re-insurance at the material time. That the court should take judicial notice that under **Section 60(1)(a)** of the **Evidence Act** the property belonged to a public body being Kenya Re-insurance a body created under the Kenya Re-insurance Corporation Act No. 7 of 1997 with the Government of Kenya controlling the majority shareholding. In her view, **Section 45(3) of ACECA** under which the Appellant was charged is applicable by virtue of the fact that the Appellant was an employee of Kenya Re and therefore a public officer.

19. Learned counsel submitted that their case was purely based on circumstantial evidence. She therefore urged the court to be guided by the principles governing reliance of circumstantial evidence as outlined in the case of **Republic vs Michael Muriuki Munyuri (2014) eKLR** in which the court quoted from the case of **Rabanga alias Onyango vs Republic Cr. Appeal No. 32 of 1990 (UR)** where the said court set out the principles of circumstantial evidence. Miss Sigei further submitted that the two cheques marked exhibit 2 and 6 drawn in favour of Kenya Re-insurance by Alexander Forbes and United Insurance respectively were not for purposes of purchase of the house in question.

20. Counsel asserted that, of the two cheques, exhibit 2 was drawn and signed by PW2 and PW3 on behalf of Eagle East Africa Insurance Brokers formerly Alexander Forbes being payment for insurance premiums collected for and due to the Kenya Re for the period of 1998 to 29th October, 2002. That the cheque marked exhibit 6 worth Kshs11,002,461 was for payment of compulsory cessation and treaty payable to Kenya Re-insurance Corporation. Counsel further submitted that the two cheques were deposited by the appellant then working with Kenya Re as Director Finance Department and who communicated a different intention to cash office personnel that the two cheques were meant to settle payment for the purchase of a house in Karen being L.R. No. 1160/613 contrary to the evidence of **PW1, PW2, PW3, and PW4** who stated the opposite.

21. Miss Sigei contended that by the Appellant depositing the cheques marked exhibit 2 worth 1,070,043 and exh. 6 worth 11,002,461 and then presenting the deposit slips (exh. 8) to PW6 purporting them to be money paid for the purchase of the house, while fully aware that the two cheques were paid for different purposes meant that the Appellant did perpetuate a fraud and that he was part of the scheme which defrauded Kenya Re his employer the amount reflected in the two cheques.

22. Learned counsel further submitted that PW7 the General Manager in charge investments Kenya Re-Insurance was kept in the darkness over the sale and purchase of the house by Rockhound. She contended that the High Court case no.776/03 only affected the original purchaser one Dr. Ngok who had defaulted in the mortgage and then rushed to court to get an injunction to stop any further sale of the house to another purchaser. It was counsel's further submission that the appellant having intimated to **PW7, PW9 PW11** that he had a stake in Rockhound Company is clear testimony that he had a beneficial interest in the company yet went ahead to defraud the employer hence conflict of interest.

23. Concerning the claim by the appellant that the court did not consider the appellant's defence and mitigation, Miss Sigei dismissed the allegation stating that the court properly addressed itself to the appellant's defence and mitigation. Touching on sentence, counsel was of the view that the offence committed was serious and that the court properly exercised its discretion. Lastly, Miss Sigei submitted that the appellant was not a first offender as he was convicted in ACC No. 20 of 2014.

24. This being a first appeal, this court is duty bound to independently evaluate, re-assess and re-analyse the evidence tendered before the lower court and arrive at an independent conclusion bearing in mind that it did not have the advantage of listening to the witnesses as well as assessing their general demeanor (see **Okeno vs Republic 1972 EA 32**).

Case before the trial Court:

25. In its endeavor to prove its case, prosecution called 17 witnesses and closed its case. PW1 Samuel Cheeri an insurance broker working for Eagle Africa insurance brokers formerly known as Alexander Forbes told the court that their company relationship with Kenya Re was to collect premiums on behalf of Kenya Re and pass the same to them. He confirmed that on 7th April 2005, Alexander Forbes raised cheque requisition (exh.1) for a cheque (Exh.2) in favour of Kenya Re-insurance for reinsurance premiums. He further stated that the requisition was raised by Mr. Tom Ashiono (PW3) their financial accountant and then authorized by Francis Karuiru their financial Director (pw2). That on the same day, the said cheque No. 005319(ex.2) was presented to him for signature for onward payment to Kenya Re for a sum of 1,070,043. He identified their company statement of account in respect of account No. 1-20000016 held at NIC Bank (Exh, 3) confirming that their account was debited with the same amount in favour of Kenya Re.

26. PW2 Francis Njuguna Karuiru financial Director Eagle insurance broker corroborated pw1's testimony. He confirmed signing the payment voucher (cheque requisition form) (exh. 1) in favour of Kenya Re as well as cheque marked exh. 2.

27. PW3 Tom Ashiono a chief Accountant then working for Alexander Forbes further corroborated the testimony of PW1 and PW2 by confirming that he was the one who raised the cheque requisition form (exh. 1) leading to the issuance of cheque No. 005319 for a sum of Kshs.1,070,043 payable to Kenya Re. He further stated that while preparing the requisition document and the cheque in question, he was informed that one Kinyua the Appellant herein was waiting for the cheque in the Managing Director's office. That after the MD signed the cheque his personal secretary handed over to him (PW3) back the requisition form minus the cheque itself hence assumed that the cheque had been handed over to Kinyua who was waiting for it. He identified a cash payment printout generated in the office (exh.5) showing that the said amount had been paid to Kenya Re.

28. PW4 Rose Muthoni the General Manager Operations to United Insurance Company between the period 2003 -2005 confirmed appending her signature on cheque No. 003300 dated 9th December, 2004 for a sum of Kshs.11,062,461 (exh.6) payable to Kenya Re-Insurance for payment of compulsory cessation of premium and treaty. That this was a debt owed to Kenya Re by United Insurance over the years. She further confirmed that the cheque was also signed by the Managing Director and therefore identified his signature on the cheque.

29. PW5 Wallace Kamau Kanywera a pastor then working for United Insurance as a chief accountant also confirmed that he verified documents for preparation of cheque marked exh.6 which was raised in favour of Kenya Re in satisfaction of ceded premiums both compulsory and treaty.

30. PW6 Isaack Kiprop Tugumo was an accounts assistant in charge of cash office at Kenya Re at the material time. Among his duties was; to do receipting of Kenya Re's money'; do banking; writing cash books among others. He informed the court that on 26th April 2005 while in the office, he received a banking slip from Kinyua (the Appellant) then a financial Director indicating that it was in respect of monies for purchase of Karen house from Kenya Re. He confirmed that the banking slip (exh.8) presented by the Appellant was in respect of a cheque No. 005319 (exh.2) drawn from NIC bank account for a sum of 1,070,043 and as a result he issued the Appellant receipt No. 10203115 dated the same day (exh.7).

31. According to the testimony of Kiprop, the Appellant told him the money had been paid by Rockhound Properties in furtherance of payment of purchase of the said house. He confirmed that the banking slip on the face of it reflected the person who banked it as the Appellant.

32. He further stated that, on 31st December, 2004, the Appellant again presented to him a banking slip from National Bank of Kenya dated 22nd December, 2004 (exh.9) in respect of cheque no. 003300 worth Kshs.11,062,461. That the Appellant again told him that the money was in further payment of the purchase price for Karen house by Rockhound Properties. Consequently, he generated a receipt No. 20100782 dated 31st December, 2004 (exh.10). On cross examination, he admitted the instructions given by Kinyua regarding the purchase of the house by Rockhound were verbal.

33. PW7 Michael Njeyi Mbeshe a General Manager in charge of property and investment Kenya Re told the court that in 1994 Kenya Re

engaged in development of 7 executive houses in Karen. That the houses were being sold at Kshs.12 million each and that house No. 8 was offered for sale to one Dr. Joseph Arap Ng'ok vide a letter of offer dated 16th March 1995 (exh. 12) which was signed by Dr. Ng'ok and returned to Kenya Re on 22nd March, 1998. Subsequently, a sale agreement was prepared (exh.13) and the buyer made some down payments culminating to the issuance of a mortgage letter dated 29th April, 1996 (exh.14). That Dr. Ng'ok did not honour full payment despite taking possession of the house.

34. Subsequently, Kenya Re filed HCCC No. 776/03 seeking to evict Dr. Ngok from the house for breach of contract. That via internal memo written by the Ag. Corporation Secretary one Jane Otieno (Accused 2) acting on a legal opinion from Muriu Mungai their external lawyers advised that the house be sold immediately. He further confirmed that the MD one Githaka (accused 1) also endorsed the internal memo thus authorizing Jane Otieno to move with speed and sell the property.

35. That Jane Otieno indicated on the said internal memo a note to the effect that she had spoken to Mr. Mbeshe and that the interested purchasers were to see them the following day. PW7 denied ever meeting and discussing with Ms Otieno and the purported purchaser Rockhound Limited over the purchase of the said house. The witnesses identified a letter drawn by Muriu Mungai & Co. Advocates dated 22nd April 2005 addressed to the Property Manager Kenya Re one Constolata Kihara. The said letter was referenced L.R. 1160/613/Karen with the purchaser as Rockhound Properties Limited. That the said letter purported to forward a cheque No. 005319 for Kshs.1,070,043 in further payment of purchase price. To his surprise the letter was written by the law firm that had advised Kenya Re to sell the house.

36. He further stated that the said letter was received by Mr. Kinyua the Appellant as the Director finance who directed via a written note to one Tugumo to receipt the letter and return the same with the receipt to him. That Mr. Kinyua made a note to him directing for a preparation of a draft sale agreement. He confirmed making a note on the said letter on 27th April 2005 forwarding it to Jane Otieno (Accused 2) the Corporation Secretary to prepare a draft sale agreement. As a follow up, Jane Otieno allegedly wrote a letter (exh.17) addressed to Muli Mwaniki Kiruti and Wamiti Advocates requesting their firm to liaise with the firm of Muriu Mungai for preparation of a sale agreement and transfer documents for the Corporation and further action with the prospective purchase being Rockhound Properties who had allegedly deposited a sum of Kshs. 12,132,504 shillings against the purchase price of 12 million.

37. It was further his evidence that on 11th May 2005 Jane wrote a memo (exh.18) with the subject being property sale of L.R. 1160/613 Karen Ndege to Rockhound Properties Limited forwarding a draft sale agreement for his comments. The same memo was copied to the Director Financial and Corporate Services. In response, he did a memo dated 11th May 2005 (exh.11) addressed to the Ag. Corporation secretary advising for amendments in pages 1 and 2. Via a letter dated 10th June 2005 (exh.20) the Corporate Secretary wrote to Mari Mwaniki Advocate advising them to engross the sale agreement with Kenya Re as the vendor and Rockhound as the purchaser. That via an internal memo, the Deputy Property Manager wrote to Dr. Arap Ngok the original buyer and defaulter for clearance or payments of rates of Kshs.113,793,070(exh.1).

38. On 2nd December, 2005 Jane Otieno wrote a letter (exh.22) addressed to Kiruti advocates enclosing the original grants for I.R. 77064 L.R. No. 1160/613 for further necessary action and that a refund of an over payment of the purchase price to the tune of Kshs.132,504.00 was to be addressed in due course. He further confirmed that, via a letter dated 4th January 2007 (exh.24) drawn by Jane Otieno addressed to the Director Finance and Corporate he was advised to meet with their lawyer for a pre-trial conference in respect of HCCC No. 776/03 in preparation for the hearing scheduled on 15th and 16th January, 2007 Milimani Commercial Court.

39. On cross examination, he stated that Rockhound Properties never took physical possession of the house as there was an injunction by Dr. Ngok the original purchaser. On further cross examination he identified the minutes of 19th May 2005 at minute No. 60 where the Board Kenya Re allegedly resolved for the sale of the said house.

40. PW8 Fredrick Lidoko Lubulello the Registrar of titles Ministry of Lands made reference to the grant No. IP77064 in respect of L.R. No. 1160/613(exh.25) registered in the name Kenya Re but which was later at entry No. 4 transferred to Rockhound Properties as the registered owner on 8th December, 2005. He confirmed that he is the one who did the transfer and registration relying on transfer documents dated 6th December, 2005 (exh.74) with all parties having duly signed their respective parts.

41. PW9 Njoroge Nani Mungai an Advocate also a partner in the firm of Muriu Mungai told the court that around March to April 2005, Mr. Kinyua (Appellant) who was well known to him before visited his office indicating that he (Appellant) wanted to buy a property located in Karen which was being sold by his employer Kenya Re and that he wanted him to act on his behalf. That Kinyua informed him that the property was being sold at 12 million and that he had a cheque dated 7th April 2005 issued in the name of Kenya Re for a sum of Kshs.1,070,043 drawn on NIC Bank. He identified the cheque drawn by Alexander Forbes Insurance Brokers.

42. That the Appellant informed him that he wanted the property registered in the name of a liability company known as Rockhound Properties Limited which was in the process of acquisition. Following that request, he did a letter enclosing a cheque of Kshs.1,070,043 to Kenya Re as Kinyua had indicated that he was to be making payment directly to Kenya Re. Consequently, he (PW9) instructed one Esther Omulele (PW11) a lawyer in their law firm to prepare conveyance documents. Later he got a letter dated 4th May 2005 (exh. 28) from Kenya Re advising that Kenya Re had appointed Muli Mwaniki advocates to act on their behalf. The letter also confirmed the corporation had received a total of Kshs.12,132,504 on account of the purchase of the house.

43. Later, via a letter dated 17th May 2005 (exh.19) they received a draft sale agreement of the property which they later returned with amendments and a copy of the letter to Rockhound Limited which copy Kinyua had directed that he was to pick personally. Subsequently, the Corporation secretary (Accused 2) returned to them a duly executed sale agreement together with a specimen of board meeting minutes. That they received a final sale agreement from Muli Mwaniki which they handed over to Kinyua personally who in turn took it away for execution by Rockhound Directors. That Kinyua later returned a duly executed agreement.

44. He further stated that, when the firm of Muli Mwaniki called for Rockhound incorporation certificate, Memorandum and Articles of

Association, they called Kinyua (Appellant) who promised to deliver them later. That after delivering the documents on behalf of Rockhound he prepared the transfer documents which he forwarded to Muli Advocates for execution vide a letter dated 23rd September, 2005 (Exh.9).

45. He indicated to the court that after concluding the transfer process they wrote to Kenya Re to clear outstanding water bills (rates and rent clearance). As a response, they received a cheque of Kshs.132,504 being a refund of excess payment vide a letter dated 26th January 2006 (exh.42). He confirmed concluding the transfer of the property in favour of Rockhound and had the title deed with him by the time EACC officers went recording a statement from him. He clarified that every time they wanted documents signed by Rockhound, Mr. Kinyua would pick them for execution elsewhere before returning them for action.

46. On cross examination by Mr. Opiyo for the Appellant, the witness stated that, instructions to represent Rockhound in the conveyance were given by Kinyua in person. He further stated that, he never knew nor saw any director to Rockhound sign any of the conveyance documents.

47. PW10 Francis Kinyua an IT Manager working with United Insurance was merely tasked to retrieve a payment voucher No. GV9127 dated 21st December 2004 (exh.44) for payment of a cheque No. 003300 for 11,002,461 which he did.

48. PW11 Esther Njiru Omulele an advocate of Muriu Mungai & Co. Advocate is the one who did the conveyance on the property in question upon receiving instructions from PW9. She basically corroborated the evidence of PW9 thus confirming that she never saw the directors of Rockhound Company for whom they were acting through instructions given by Kinyua the Appellant. On cross examination by Mr. Kinyanyui, she admitted that the conveyance documents were never signed in her presence by Rockhound Directors.

49. PW12 Michael Kiruti an advocate practicing in the firm of Kiruti & Company Advocates but previously working with Mari Kiruti & Wamiti Advocate stated that sometimes in the year 2005, he received instructions from Kenya Re Corporation secretary Jane Otieno requesting their firm to act for Kenya Re as a vendor for the sale of L.R. 1160/613 Rockhound Company Limited. That he prepared a draft sale agreement which he forwarded to the purchaser's law firm (Muriu Mungai & Co. Advocates). He identified several correspondence letters between the Kenya Re and the firm of Muriu & Mungai Advocates. He further identified the sale agreement, transfer documents and the final grant issued in the name of Rockhound. He further confirmed preparing Rockhound Board resolution specimen which he requested the purchaser's advocates to forward their clients to sign.

50. He basically corroborated the evidence of PW9 confirming that he had been informed by his clients that full consideration had been made in the purchase of the house. On cross examination by Mr. Owino Opiyo, he admitted that the board resolutions he prepared did not reflect the time and place it was made and who attended the board meeting. He admitted preparing the board resolutions on his own as a due diligence measure.

51. PW13 Michael Oyuke Otieno Records Manger, Companies Registry confirmed that Rockhound Company was registered on 18th January 1996 with Alice Wanjiru Murage, Njeri Murage Kimingi and Isaac Murage Gicheru as the Directors. He confirmed that directorship had never changed as evinced by the physical records (exh.56) and the incorporation certificate (exh.54).

52. PW14 Neliu Wanjiru Kariuki the then chairman board of Directors Kenya Re confirmed that on 19th May 2005 he attended a board meeting of Kenya Re with 8 Directors in attendance with the Jane Otieno as Corporation Secretary. That the meeting was given a status report concerning a pending case in respect of the house in L.R. 1160/613 between Kenya Re and Dr. Ngok. He stated that the board was informed how Dr. Ngok had defaulted in honouring the sale transaction and that there was a prospective buyer of the same house. In cross examination by Mr. Wandugi, the witness stated that he could not remember the board authorizing the sale of the said house.

53. PW15 Antipus Nyanchwa a forensic document examiner on 27th April 2007 received questioned documents from KACC which had disputed signatures. The documents were an agreement for sale between Kenya Re and Rockhound Properties dated 31st August, 2005 (exh.35). That the second document was an extract of minutes of the meeting of Rockhound Directors held on 11th August 2005 (exh.4) and transfer of documents L.R. 1160/613 from Kenya Re to Rockhound Properties Limited (exh.26). Together with the questioned documents which were marked A1-A3, there were two sets of documents containing signatures of one Mary Njeri Kimingi plus her known signature marked 'B1-B6' and C1-C3 respectively. His task was to examine and confirm whether the signature on the disputed documents exh. 34, 35 and 26 could have been signed by the author of the specimen signatures (Mary Njeri Kimingi). Upon analysis, the examiner found them to be similar and indistinguishable hence prepared a report marked exh.61.

54. That on 30th March, 2009 through a separate exhibit memo, he received 11 additional documents that had disputed handwritings and signatures marked A1-A11 among them; A1 the sale agreement (exh.35), A2 KCB Bank deposit slip dated 26th April 2005 (ex 8), A3 transfer of properties to L.R. 1160/613 (Exh.26), A4 NBK deposit slip (exh 9), A5 was an extract of MF513 which was a letter written to the MD Kenya Re by Jane Otieno, A6 a letter dated 26th April 2005 signed by Kinyua the Ag. Corporation Secretary (exh.16), A7 letter from Kenya Re to Muse Mwaniki Kiruti and Wamita Advocates dated 5th May 2005 signed by Jane F Otieno (exh.17) but expunged from the record, A8 letter from Kenya Re dated 3rd October 2005 signed by Jane Otieno to Muse Mwaniki Kiruti Advocates (exh.62), A9 a letter from Kenya Re to Kiruti Advocates dated 26th January 2006 signed by Jane F Otieno (exh.63), A10 a letter from Muriu Mungai & Co, Advocates dated 22nd April 2005 (exh.11) and, A11 a letter from Kenya Re dated 6th May 2005 addressed to Muriu Advocates signed by Jane Otieno. Together with this questioned documents, the investigating officer submitted specimen signatures of John Githaka (Accused 1) marked B1-B11 (MFI 64) and specimen signatures of John Kinyua C1-C25 (MF1 65), known writings of John Githaka D1-D3 (MF1 66) and F1-F4 known writings of Joseph Kinyua. Upon analysis, the questioned signatures marked in green ink in A1 (sale agreement exh. 35) and A3 (transfer to L.R. No. 1160/613) did match that on the specimen signature on B1-B11 (specimen of Johnson Githaka Accused 1).

55. On the other hand, the questioned writings and signatures marked in green ink (A5 being MF1 13 a letter signed by Jane Otieno to the MD matched those on B1-B11 (signatures of Johnson Githaka) and D1-D3 being known writings of Johnson Githaka (Accused 1) were

similar and indistinguishable. That the questioned signature B5 was also similar to B18-B25 being specimen signature of Jane Otieno and her known writings in E1-E3. The signatures in A6(exh.16 being a letter dated 26th April 2005 signed by Jane Otieno) matched C1-C9 (MF1 65) as well as F1-F2 being known signatures and writings of John Kinyua which were found to be similar and indistinguishable.

56. Lastly, he compared the questioned handwriting on A2 (KCB deposit slip of 26th April 2005 (exh.8) and NBK deposit slip (exh.9) with documents circled in red ink on exh. Marked A10 (exh.11) being a letter from Muriu and & Co Advocates dated 22nd April 2005 with specimen signature on C10-C25 (being signatures of Kinyua) and known handwriting on F3-F4(known handwriting of J.F. Kinyua the Appellant) and found them to be similar and distinguishable. He produced the report as exhibit 68.

57. PW16 John Lokoloi Deputy Director Forensic Investigator who was stepped down and later testified as PW18 investigated the case and compiled the evidence of the witnesses and forwarded the file to the DPP for directions. From his investigations, he found out that the money purported to have been paid for the purchase of the house in question was actually money paid by Alexander Forbes and United Insurance to Kenya Re but diverted by the Appellant and his colleagues working in Kenya Re purporting the same to be the purchase price of the said house by Rockhound a company incorporated or acquired by the Appellant for purposes of fraudulent acquisition of the house through proxies (Rockhound Company Limited).

58. He further stated that from the banking slips of the two cheques (exh. 2 and 6) and the document examiner's report, it was the Appellant who deposited the two cheques purporting them to be the consideration for the purchase of the subject house. He further went to state PW9 an advocate representing the Appellant in the conveyance transaction had confirmed that it was the Appellant who informed him that he was buying the house from Kenya Re in the name of Rockhound Kenya Limited. According to him, the appellant colluded with the Directors of Rockhound among them Accused 4 to fraudulently transfer public property to Rockhound without paying even a shilling using monies paid to Kenya Re legally for agency services rendered on its behalf by Alexander Forbes and United Insurance.

59. PW17 Jane Florence Otieno who was originally charged with the other accused persons but had a case terminated via nolle prosequi told the court that at the material time she was the Kenya Re's Corporation Secretary. She further confirmed that L.R. 1160/613 was rented out to Dr. Ngok who later expressed the desire to buy it but defaulted in payment. That when Ngok was ordered to vacate he filed a civil case in court resisting the eviction.

60. That upon expiry of Ngok's tenancy, the Corporation started looking for a purchaser. She made reference to her internal memo to the MD dated 22nd April 2005 expressing that position pursuant to a legal opinion from their lawyers Muriu and Mungai & Co. Advocates via the email dated 21st April 2005 (exh. 73). She confirmed executing a sale agreement (exh. 35) together with the MD (accused 1) on behalf of Kenya Re as the vendor and Rockhound as the purchaser. She went further to state that Joseph Kinyua the Appellant had confirmed to her that full payment had been made by Rockhound and that upon receipt of a demand letter from the purchaser's lawyer demanding the excess payment she authorized release of a sum Kshs.132,504.

61. She denied involvement in negotiation regarding the purchase price. She also confirmed that the Board of Directors Kenya Re had via minute No. 60 of 19th May, 2005 authorized the Kenya Re management to look for the prospective buyer of the house.

62. On his defence the Appellant made unsworn statement admitting that at the material time he was the financing director at the Kenya Re. That he was the in charge in managing finances, cash and expenses; he would receive cheques, bank them by himself or direct for banking and thereafter have the banking slips surrendered to cash office for receipting which could then be forwarded to the drawer or a letter acknowledging receipt done.

63. He confirmed banking cheque marked exh. 6 on 22nd December 2004. He denied giving the cashier (pw6) any verbal instructions that the cheques were meant for the purchase of the house. He also denied collecting cheque exh. 2 from Alexander Forbes. He further denied giving instructions to the firm of Muriu Mungai advocates to act for him in respect of the sale transaction regarding the house in question. He also denied writing an internal memo confirming how much money had been paid as a purchase price.

64. DW2 Mary Njeri Ng'ang'a Kimingi (Accused 4) also gave unsworn statement stating that sometime on 28th February 1996, she and her late father registered a company known Rockhound for purposes of managing business. That having been unable to start business, the company remained dormant for a long time. That in the year 2002, she met with one Faustin Kinyua (the Appellant) in company of Githaka (accused 1) with whom they discussed business matters. That it was then that he informed Kinyua that she had a dormant company. Sometime 2003, the Appellant approached her to buy the company name. She stated that, she offered to give the company for free to the Appellant.

65. That around 2004, Kinyua went to her school for the company documents which she handed over to him together with blank transfer documents to enable Kinyua to facilitate the transfer of the company into his name. She denied buying the house in question. According to her, the property belonged to Kinyua and she had no role to play towards its transfer to Rockhound Company Limited. She also denied receiving any money from Kenya Re in the tune of Kshs. 132,504.

66. DW3 Mrs. Alice Ngok alleged to be the legitimate owner of L.R. No. 1160/613 claiming to have bought the same at a consideration of 12 million. On cross examination, she stated that they had paid 9 million leaving a balance of Kshs. 3 million.

67. DW4 Executive Officer Commercial Division Court produced a court file No. 776/03 which Kenya Re Corporation as the Plaintiff and Dr. Joseph Ngok as the Defendant. He said the suit was pending determination and the same was scheduled for hearing on 27th February, 2019.

Analysis and determination:

68. Having considered the grounds of appeal herein, lower court record and submissions by both parties, the following issues (grounds as set out by the Appellant do arise for determination)

a) Whether the charges against the appellant were proved beyond reasonable doubt.

b) Whether the trial magistrate failed to consider the appellant's defence.

c) Whether the trial magistrate was biased when he passed different sentences to the appellant and the 4th accused yet both accused were charged with same offences.

d) Whether the trial magistrate erred in failing to put into consideration the mitigation advanced by the appellant thereby imposing maximum sentence.

(a) Whether the charges against the appellant were proved beyond reasonable doubt.

(i) Count II: fraudulent acquisition of property contrary Section 45(1)(a) as read with Section 48(1) ACECA.

69. The particulars to this charge were that, the Appellant, Mary Njeri Ng'ang'a (accused 4) and Rockhound Company, accused 5 jointly and fraudulently acquired public property to wit L.R. 1160/613 situated within Karen estate. There is no dispute that at the material time, the subject property was still registered in the name of Kenya Re Corporation which was by then a public body incorporated under the Kenya re-insurance Corporation Act No. 7 of 1997 and therefore holding a majority share. It is also an undisputed fact that at the material time, the Appellant was the Finance Director to Kenya Re.

70. It is also not contested that a sale agreement dated 6th May 2005 (exh. 35) and transfer dated 6th December, 2005 were duly executed by the MD (accused 1) and Jane Otieno (Accused 2) Corporate Secretary on behalf of Kenya Re as the vendor and the purported Directors of Rockhound Limited L.R. No. 1160/613 as the purchaser and finally, the property transferred to Rockhound Company Limited. Subsequently, a grant No. IP77067(Exh.25) in favour of Rockhound was issued on 8th December 2005 by Fredrick Lidoko Registrar Titles Ministry of Land (PW8).

71. This position was later confirmed by PW9 and PW11 both advocates from the law firm of Muriu Mungai acting on behalf of the Appellant representing Rockhound Limited. This fact was further confirmed by PW17 Kenya Re's Corporation Secretary. The key question was whether consideration was passed by Rockhound to Kenya Re for the purchase of the house? If so, who signed the sale agreement and transfer documents on behalf of Rockhound? Who made the purchase price on behalf of Rockhound and what was the source of the money. According to the Appellant, he was not a Director of Rockhound LTD neither did he have any beneficial interest in that company nor the property transferred to it.

72. From the prosecution evidence, Rockhound Company Limited was a proxy through which the Appellant indirectly acquired the property in question using funds paid to Kenya Re insurance by other parties for different purposes. That the Appellant took advantage of his position as Director finance to divert funds made by Alexander Forbes (exh. 2) for a sum of Kshs 1,070,043 and cheque marked exh. 6 for Kshs.11,062,461 paid by United Insurance to Kenya Re to be the purchase price for the house.

73. From the evidence of PW1, cheque No.005319 was payment by Alexander Forbes to Kenya Re being collection of re-insurance premium on behalf of Kenya Re. This evidence was corroborated by PW2 and PW3 both employees of Alexander Forbes. Equally, PW4 and PW5 both employees of united Insurance confirmed drawing and signing cheque No. 003300 dated 9th December, 2004 for Kshs. 11,062,461 (exh.6) in favour of Kenya Re being payment of compulsory cessation of premium and treaty. This fact was confirmed by PW6 Kenya Re's cashier who received banking slips for the two cheques from the Appellant who had allegedly banked them claiming that they were for the purchase of the house at Karen (L.R. No. 1160/613).

74. As a routine, PW6 issued receipts in respect of the two deposits being payment of the purchase for the house by Rockhound Limited. To corroborate the statement of PW6, the Document Examiner PW15 upon comparing the signatures on the banking slips for the two cheques when compared with the known handwriting of the Appellant and the specimen signatures, found them to be similar and indistinguishable.

75. The Appellant admitted banking cheque No. 003300 (exh.6) and presented the banking slip to PW6 but denied instructing PW6 that the money was for the purchase of the house by Rockhound Company. He also denied depositing cheque No. 005319. However, PW3 Tom Ashiono Chief Accountant Alexander Forbes in his evidence in chief stated that, while preparing cheque exh.No.2, he saw one Kinyua the Appellant a person he knew before as an employee to Kenya Re seated in their office. Pw3 was informed by their MD's personal secretary that Kinyua was waiting to collect the cheque in question. That after the MD signed, the secretary returned the requisition to him minus the cheque implying that the cheque had been released to Kinyua.

76. Although Kinyua the Appellant denied having gone to Alexander Forbes' office to collect a cheque (exh.2), and although he denied depositing the cheque, the evidence of PW3, PW6 and PW15 the Document Examiner confirmed that the banking slip (exh.8) was made by a handwriting similar to that of the Appellant. Equally, PW9 counsel instructed by the Appellant to prepare conveyance documents on behalf of the Appellant confirmed that the Appellant presented to him the cheque in question (exh.2) to which he wrote a letter on his behalf forwarding the same to Kenya Re purporting to be part of the purchase price of the house in question.

77. From this kind of evidence, and considering the circumstances surrounding the sale transaction, I have no doubt that the appellant went for the cheque (exh.2), deposited it and presented it to PW6 for receipting. I do not think PW3, PW6 and PW9 had any grudge against the Appellant nor did they have a reason to fabricate this case. None of them was cross examined regarding the frame up or the existence of any differences with the Appellant. The claim by the Appellant on his defence that he had work related differences with PW6 would at best be

described as an afterthought as he did not put these questions to the witness during cross examination.

78. Was the money out of the cheque marked exh. No.2 used as the purchase price by Rockhound? According to PW9 and PW11 who prepared the conveyance document on behalf of the Appellant and by extension Rock hound, they acted on instructions from Kinyua the Appellant who confirmed that he was buying a house from Kenya Re his employer through a company known as Rockhound.

79. PW9 confirmed receiving a cheque worth Kshs1,070,043 from Kinyua which he forwarded to Kenya Re as part of the purchase price for the house. Pw9 and pw11 both advocates confirmed they prepared conveyance documents for the purchase of the house on behalf of Rockhound through Kinyua. That Kinyua would always pick the unsigned documents purporting to be taking them to Rockhound Directors to sign and thereafter return them duly signed. They further confirmed that the Appellant had indicated to them that he had made direct payment to Kenya Re. In other words, they did not witness exchange or payment of any consideration by Rockhound to Kenya Re for the purchase of the house.

80. Equally, DW2 Mary Njeri (Accused 3) also told the court that she and her late father had registered Rockhound Company which remained dormant for a long time. She confirmed that sometime 2004 the Appellant offered to take over the company which she agreed at no cost and gave him blank transfer forms to effect the change of directorship. The question is, how could Rockhound secure transfer for the house without paying for it yet none of the Director admitted buying the house. So, who are the ghosts behind the purchase, payment and transfer of the house to Rockhound?

81. It is not a surprise that there was no resolution specifically made by the board Kenya Re to sell the house although PW17 the Corporation secretary claimed that there was a resolution by the board and the authorization by the MD. A look at minute number 60 of 19th may 2005 did not specifically authorize for the sale of the house as there was a suit then pending between Kenya Re and Dr. Ngok who had claimed purchaser's interest and secured an injunction restraining any further dealings with the property.

82. It is also questionable that the law firm of Muriu & Mungai Advocates are the same ones who gave a legal opinion to Kenya Re for the sale of the house after Dr. Ngok purportedly failed to complete the transaction for the purchase of the same house yet again turned around to represent Rockhound as the purchaser of the same house. Through a letter dated 22nd April 2005 Mr. Muriu & Mungai wrote to Kenya Re on behalf of Rockhound as purchasers of the house seeking facilitation in the preparation of a draft sale agreement. According to PW7 the Manager in charge of property Kenya Re, the said letter was received by the Appellant who marked it for attention of PW17 confirming that Rockhound were the prospective purchasers. PW7 denied that there was a resolution by the board for the sale of the house and that there were no minutes to that effect that Rockhound was approved as a purchaser.

83. From the evidence analysed above, it is apparent that the house was sold in secrecy to Rockhound. This is confirmed by the denial by Mary Njeri (accused 4) one of the Directors of Rockhound Limited regardless of her appending her signature on the sale agreement and the transfer document as verified from the document examiner's report. It is also curious that the Appellant is denying having beneficial interest in the property yet he was the key player in the transaction. Key questions that are bound to arise are; why would the Appellant follow cheques (exh. 2 and 6) personally, and present them to PW6 if he had no interest? Why would the Appellant go to Alexander Forbes pick a cheque (exh.2) and then bank it personally as money for the purchase of the house fully aware that the money was for a different purpose? Why would he instruct PW9 and PW11 to act on his behalf as the purchaser of the house through Rockhound? I do not think even with the remotest imagination that PW9 and PW11 were lying as having been instructed by the Appellant to represent him through Rockhound. From the Appellant's conduct and the role he played in misrepresenting facts that cheques paid by Alexander Forbes and United Insurance for other purposes to Kenya Re were meant to be used for purchase of the house by Rockhound is proof enough that he had a beneficial interest in the house.

84. Also, the appellant's expression of interest to DW2 his co-accused in taking Rockhound Company from her and the fact that he later got involved in the purchase of the house through that same company is itself a testimony that the Appellant had an hand in the acquisition of the property without sweat and indeed succeeded in doing so.

85. Even without proof of direct purchase of the property, direct ownership and physical occupation, it is clear that the transfer was orchestrated by and for the benefit of the Appellant through fraudulent means. There is sufficient evidence that the Appellant jointly with others through fraudulent means acquired public property in this case L.R. No. 1160/613.

86. The act of fraud is evident from the fact that Rockhound did not pay any money yet benefited from the transfer of the property into its name. As defined in the Black's Law Dictionary 10th Edition, fraudulent act means;

“1. Conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude. 2. Conduct satisfying the element of a claim for actual or constructive fraud-also termed dishonest act: fraudulent or dishonest act

87. The submissions by Mr. Opiyo that the Appellant having not acquired the property in his name nor taken its possession is proof that he did not acquire the property is not tenable. Transfer of the property from the vendor to the purchaser is proof of acquisition of ownership. The grant (title) is already in the name of Rockhound meaning prima facie that they have acquired ownership. Failure to take physical possession is subject to the fact that there is an injunction in place affecting the same property pursuant to the suit filed by Dr. Ngok which is yet to be determined.

88. As stated above, there is sufficient circumstantial evidence to infer or conclude that the Appellant was the beneficiary behind the acquisition of the property by Rockhound who were his proxy. In the case of **Republic vs Michael Muriuki Munyuri (supra)** while quoting the holding in **Rabanga alias Republic Cr. App 32 of 1999** the principles governing admission and reliance of circumstantial evidence were summarized as:

i. Circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established.

ii. These circumstances should be of a definite tendency unerringly pending towards guilty of the accused.

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

89. Similar position was held in *Sawe vs Republic (2003) eKLR 364*, the case of *Simon Musoke vs Republic (1958) EA 715* and *Teper vs Republic 1952 AC, 480* where the court held that:

“It is necessary before drawing an inference of the accused’s guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

90. I am alive to the fact that the burden of proof at all times lies with the prosecution and the same does not shift to the accused. See *Republic vs Silas Magongo Onzere alias Fredrick Namena (2017) KLR* where the court held that:

“In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the State in a court of law.”

91. However, it is trite law that proof beyond reasonable doubt does not necessarily mean proof with certainty at 100%. See *Miller vs Minister of Pension (1947) 2 ALL ER 372-373* where Lord Denning held that:

“The degree is well settled-it needs not reach certainty, but it must carry high degree of probability. Proof beyond reasonable does not mean proof beyond the shadow of doubt. The law would fail to protect community if it admitted fanciful possibilities to deflect the course of justice.”

92. From the evidence on record, one is left with an inescapable conclusion circumstantially that, the Appellant was the mastermind in the illegal acquisition of the property in conjunction with other parties in this case, Rockhound Company and its Directors among them Mary Njeri. I am also satisfied that the court properly found the accused liable and there was no error committed whatsoever. There was no shift of the burden of proof and that the prosecution evidence was not shaken at all. Accordingly, the conviction in respect of that count is upheld.

ii. Count III: conflict of interest contrary to Section 42(3) as read with section 48(1) of ACECA.

93. Particulars in respect of this charge are that the Appellant being an agent of a public body to wit Director of finance of Kenya Re knowingly acquired a private interest in L.R. 1160/613. Mr. Opiyo adopted similar submissions as argued in count II above. Counsel submitted that the appellant could not acquire a private interest in a property transferred to a company to which he was not a Director.

94. There is no dispute that the property in question was public property as defined under Section 45(3) of the ACECA. There is no dispute either that the Appellant was an employee to Kenya Re which is a public body hence an agent to the said corporation. Did his role in the acquisition of the property by Rockhound amount into conflict of interest? From the analysis of evidence regarding the role the Appellant played in facilitating transfer of the property to Rockhound Properties Limited, it leaves no doubt as correctly held by the trial court that, by the Appellant hiding behind Rockhound Company, he caused the said property to have it registered in its name. As an agent of the corporation, he caused and facilitated the purchase of the property to Rockhound knowing very well that he was in the end result going to benefit and have personal interest or private interest over the property.

95. The application or use of the word private interest does not in any way derogate from the word personal benefit or interest. In my view, the action taken by the Appellant was purely in conflict of personal interest. He owed a duty of care in respect of the property to the employer to the best of his ability. In the circumstances of this case, he took private interest at heart to the prejudice of his employer’s interest in the property.

96. Accordingly, it is my finding that the trial court properly and correctly addressed itself to the evidence available and made appropriate conclusion in convicting the Appellant. I have no reason to quash the finding.

iv. Count IV: Fraudulent acquisition of public property contrary 45(1)(a) as read with Section 48(1) of ACECA.

97. The particulars of this charge were that on 26th January 2006 jointly with Mary Njeri Kimingi and Rockhound Limited jointly acquired Kshs.132,504. From the evidence of PW9 and PW11 both advocates representing the Appellant, they were instructed by the Appellant to demand excess payment of Kshs.132,504 from Kenya Re which money was refunded by cheque. This fact was corroborated by PW6, PW7 and PW17. This amount of money accrued from the total amount allegedly paid by cheques (exh. 2 and 6) totaling Kshs.12,132,504 less Kshs.12 million being the purported purchase of the house.

98. However, Mr. Opiyo argued that since the money was remitted to the firm of Muriu & Co. Advocates and is still held by the said firm, the money cannot be said to have been received by the Appellant. It is clear from PW9 that the money is still held by their firm being agents to the Appellant. The fact that he has not collected the money from his lawyers does vitiate the fact that he had been paid through his agents Muriu & Co. Advocates who acknowledged receipt. I do agree with Miss Sigei for the State that receipt of the said amount by Muriu Advocates on behalf of their client was sufficient proof of payment received and acknowledged by the Appellant. It is my finding that the trial court did not err in any by convicting the Appellant in any way in that count as the money was duly refunded to the appellant through his advocates which is admitted.

b. Whether the trial magistrate failed to consider the Appellant’s defence.

99. It is trite that failure to consider a defence in a judgment contravenes the principles of natural justice (See **Okethi Okale & others vs Republic (1965) EA 55**). It is a statutory obligation under Section 169(1) of CPC that a judgment in a criminal case must contain the point or points for determination, the decision and reasons, dated and signed by presiding officer. Mr. Opiyo did not specifically state the part of the defence the court did not consider. At page 45 and 46 of the judgment, the trial magistrate made several references to the Appellant's defence and juxtaposed it with the prosecution's case and submissions by both counsel. I do not find any merit on Mr. Opiyo's submission on this ground.

c. Whether the trial magistrate was biased when he passed different sentence to the Appellant as against the 4th Accused yet they faced same charges and that he did not consider the Appellant's mitigation.

100. It was Mr. Opiyo's submission that there was no justification in imposing lenient sentence on accused 4 yet they faced similar charges. It is true that the court found the Appellant guilty of counts II, III and IV and proceeded to sentence him to three years imprisonment to each count and the same to run concurrently. However, accused 4 whom he found guilty of count II and IV was sentenced to a fine of Kshs.1 million in default 12 months imprisonment in respect of count II and for count IV, a fine of Kshs. 500,000 in default serve 6 months imprisonment. Accused 5 was also sentenced through its Directors to a fine of 1 million to each of the two counts (II and IV) to be shared between the three Directors with accused 4 paying a third of the sentence in default serve 6 months imprisonment.

101. In his ruling while sentencing the accused, the learned magistrate stated that although he was aware that the Appellant had been convicted in another case, he had closed his eyes considering that the Appellant had appealed. He therefore treated the Appellant as a first offender but fell short of giving reasons why he decided to give a custodial sentence to the Appellant yet on the same charges he gave the 4th and 5th accused persons a noncustodial sentence.

102. It is not true that the magistrate did not consider the mitigation as he did make a lengthy ruling before sentence addressing various accused persons' mitigation. The only item missing in the sentence is failure to give reasons for preferential treatment in sentencing. It is trite law that sentencing is a discretion of the trial court (See **Janet Muthoni Thiaka vs Republic (supra) and Shadrack Kipchoge Kogo vs Republic (supra)** where the court found that for an appellate court to interfere with exercise of sentencing discretion of the trial court, it must be satisfied that; the trial court failed to take into account sentencing legal principles; took into account irrelevant factors or, that the sentence was excessive of harsh.

103. Miss Sigei however submitted that the sentence was lawful as the Appellant was not a first offender and that he had abused his position as a public officer. The general principles in the sentencing policy guidelines (Para. 3) provides parameters for consideration before sentencing. One such crucial consideration is equality/uniformity/parity/consistency and impartiality. This in effect means equal treatment in sentencing offenders found guilty of similar charges. Thus the offenders who have committed the same offences in similar circumstances should serve similar sentences. (See **Republic v Jackson Wangui & Another HCCRI No. 35/12**).

104. It is worth noting that the offence committed under Section 48(1) ACECA is punishable by a fine of Kshs.1 million in default ten years imprisonment or both. It is trite that where a penalty is prescribed by an option of a fine, the court should give reasons why the most punitive sentence should apply as opposed to a fine as a first option. In the case of **Boniface Okerosi Misera & Cephass Kamande Mwaura vs Republic Anti-Corruption Cri. App No. 5 of 2018** Judge Ong'udi substituted imprisonment term imposed without the option of fine first on grounds that the trial court did not give reasons why he could not give the option of fine first.

105. I do agree with Mr. Opiyo that the trial court did not treat the Appellant properly as it segregated him when sentencing yet the offence committed was the same and the accused were treated as first offenders. However, taking into account that the trial court had found that the accused had been convicted in ACC No. 2/14 an offence committed in similar circumstances and the trial court having found that he had appealed hence treated him as a first offender, and the appeal No. 18 of 2019 having been dismissed on 17th September, 2019 before justice Mumbi, it implies that the Appellant is not a first offender. On that ground I do agree with Miss Sigei that accused should not have been treated as a first offender. Despite that fact, I do not find any reason why he did not give the Appellant an option of fine. Considering his mitigation that he is sickly as per the medical report submitted in court on 13th September, 2019 from the Prisons Department indicating that he is suffering from high blood, chest pain and blurred vision and, further considering that the co-accused were given the option of fine, I will substitute the sentence of three years imprisonment for each count to a fine of Kshs.1 million in default serve imprisonment of three years imprisonment for each count and sentences to run concurrently from the date of sentence.

106. For the above reasons stated, the appeal against conviction is disallowed and that against sentence succeeds to the extent that:

- a. The Appellant is sentenced to a fine of Kshs. 1 million in default serve three years imprisonment in respect of each of the 3 counts (Counts II, III and IV).
- b. The sentences in (a) above to run concurrently commencing from the date of sentence before the trial court.
- c. The Deputy Registrar to cause and draw an amended committal warrant to reflect the stated sentence above.
- d. L.R. No. 1160/613 Karen house be surrendered to the Kenya Re-insurance by the Chief Land Registrar cancelling the title deed (grant) currently held in the name Rockhound Properties Limited as per the directions of the trial court.
- e. The sum of Kshs.132,504 held by the law firm of Muriu, Mungai & Company Advocates on behalf of Rockhound be refunded to Kenya Re as directed by the trial court.
- f. Right of appeal 14 days.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 14TH DAY OF JANUARY 2020.

.....

J. N. ONYIEGO

JUDGE