



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

CRIMINAL APPEAL NO. 33 OF 2019

ESTHER NYAMBURA THONGORI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 28 OF 2019

GEORGE GICHURI KARUME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Anti-Corruption Court (Hon. V. Wakumile (SPM) dated 30th September 2019)

JUDGMENT

1. The appellants in this matter, Esther Nyambura Thongori and George Gichuri Karume, were charged as the 1st and 3rd accused persons respectively in Milimani Anti-Corruption Court Case No. 30 of 2018 with various offences. At count 1, they were charged with the offence of conspiracy to commit an economic crime contrary to section 47(A) (3) as read with sections 48 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA). The particulars of the offence were that the 1st appellant, the 2nd accused, Bonnie Stephen Otieno Oduor (hereafter 'Oduor'), and the 2nd appellant, on diverse dates between 11th May 2015 and 16th December 2015 at City Hall in Nairobi City County being persons employed in the public service as a clerical officer III, building inspector and a private person respectively, conspired to commit an economic crime to wit fraud by dishonestly receiving and retaining Kshs, 8,891,943/- building plan approval monies meant for Nairobi City County Government.

2. At count 2, the three accused persons were charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code. The particulars of the offence were that the accused persons, in the same capacities and in the same period and place as in count 1 conspired to defraud Li Wen Xue of Kshs 8,891,943/- purporting it to be building approval fees by Nairobi City County Government for L.R. No. 1/1328 (originally 1/163).

3. The 2nd appellant was charged at count 3 with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of this offence were that the 2nd appellant, George Gichuri Karume: did, on 11th May 2015 and 3rd June 2015 within Nairobi City County, with intent to defraud obtained from Li Wen Xue the sum of Kshs. 8,981,943/- by falsely pretending that he was in a position to obtain building approvals for L.R. 1/1328 (originally 1/163 from Nairobi City County Government on his behalf, a fact he knew to be false.

4. At count 4, the 2nd appellant faced a charge of making a false document contrary to section 347 as read with section 349 of the Penal Code. The particulars of the offence were that on 6th May 2015 at Nairobi City County, with intent to defraud, made a false document, namely a Nairobi City County Government construction invoice number 11517 purporting it to be a genuine invoice issued by Nairobi City County Government.

5. The 2nd appellant was further charged at count 5 with the offence of uttering a false document contrary to section 353 of the Penal Code. The particulars of this offence stated that on 8th May 2015 within Nairobi City County, the 2nd appellant knowingly and fraudulently uttered a false document namely Nairobi City County Government construction invoice number 11517 to Wen Xue Li purporting it to be a Nairobi City County Government construction invoice.

6. Count 6 was the offence of making a false document contrary to section 347 as read together with section 349 of the Penal Code. The particulars of the offence charged that the 2nd appellant did, on 11th May 2015 within Nairobi City County with intent to defraud make a false document, namely a Nairobi City County Construction Local Authority Information Financial and Operation Management receipt number PA 1505-00369-8981943 purporting it to be a genuine receipt issued by Nairobi City County Government.

7. Finally, the 2nd appellant faced, at count 7, the charge of uttering a false document contrary to section 353 of the Penal Code. The particulars of the offence were that on 11th May 2015 within Nairobi City County knowingly and fraudulently uttered a certain false document namely Nairobi City Construction Local Authority Information Financial and Operation Management receipt number PA 1505-00369-8981943 purporting it to be a Nairobi City Construction Local Authority Information Financial and Operation Management receipt.

8. The accused persons were tried and found guilty as charged. They were sentenced, in respect of count 1, to each pay a fine of Kshs.700,000/= in default to serve 12 months imprisonment. The trial court also found that as each of them had received a benefit, each would pay double the amount of the benefit received as follows:

1st accused- Kshs.5,077,550 x 2 = Kshs.10,155,100/= in default three (3) months imprisonment.

2nd accused – Kshs.140,000 x 2 = Kshs.280,000/= in default three (3) months imprisonment.

3rd accused Kshs.8,891,943 x 2 = Kshs.17,783,886/= in default three (3) months imprisonment.

9. On counts 3-7, the 2nd appellant was sentenced to a fine of kshs.50,000/= per count in default to serve six (6) months imprisonment. No penalty was imposed on the accused persons in respect of count 2.

The Appeals

10. Dissatisfied with both their conviction and sentence, the appellants filed their respective appeals challenging both their conviction and sentence. In her Memorandum of Appeal dated 26th November 2019, the 1st appellant raised the following grounds of appeal:

1. THAT the learned magistrate erred in law and in fact by accepting the prosecutions had proved their case beyond a reasonable doubt whereas the prosecution had not discharged their burden in law.

2. THAT the learned magistrate erred in law and in fact by relying on evidence that was not admissible, and which did not meet the evidentiary thresholds and was unsafe.

3. THAT the learned magistrate erred in law and in fact by failing to find that material witness were not called.

4. THAT the learned magistrate erred in law and in fact by failing to find that the accused person's defence was not considered.

5. THAT the learned magistrate erred in law and in fact by failing to take note of the fact that the chain of circumstantial evidence was broken and could not hold.

6. That the learned magistrate relied on extraneous facts in reaching his decision instead of relying on the evidence adduced.

7. THAT the learned magistrate erred in law and in fact by placing an extremely harsh sentence on the appellant.

11. The 2nd appellant filed his Petition of Appeal dated 17th October 2019 containing the following grounds of appeal:

1. THAT the learned trial magistrate erred in law and in fact in convicting the appellant for the offences charges when there was no sufficient evidence to prove the charges.

2. THAT the learned trial magistrate erred in law and in fact in convicting the appellant when the weight of the evidence does not support the conviction.

3. THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the case against the Appellant lacked essential and vital corroborating evidence, hence wanting and incapable of sustaining a conviction.

4. THAT the learned trial magistrate erred in law and in fact as he relied on his own conjectures in his judgment that were not brought out in evidence thus arriving at a wrong decision.

5. THAT the learned trial magistrate misdirected himself in both law and fact in convicting the appellant whilst failing to

appreciate that the certain crucial evidence as well as witnesses were never called in.

6. That the sentence of the court is manifestly excessive considering all the circumstances.

12. The appeals were consolidated on 10th December 2019 and were argued before me on 11th March 2020.

The Appellants' Submissions

13. In presenting the 1st appellant's appeal, Learned Counsel, Mr. Swaka, argued all the grounds of appeal together, concentrating mainly on challenging the evidence presented before the trial court. He referred to the evidence of the first prosecution witness in which he conceded that he had no pre-vetting or interest with documents within his work environment. It was Mr. Swaka's submission that whatever was presented in court by PW1 could not go to the charges against the 1st appellant.

14. Mr. Swaka further observed that PW1 could not tell whether the 1st appellant was working in the department where the offence arose. There was also no invoicing of the transaction out of which this matter arose, which PW4 had conceded, so the County Government lost nothing in terms of revenue. Reference was also made to the evidence of PW5, who had stated that KShs 500,000 was wired to his account as an agent of architect Mburu and not for his services as an ICT expert. PW5 had also stated that the 1st appellant never acknowledged refund of the said amounts, which, according to Mr. Swaka, demonstrates that the idea of a conspiracy has been quashed, and there was therefore no joining of minds demonstrated.

15. Mr. Swaka contended that the conviction of the 1st appellant was based on half-truths and misconceptions. He cited in this regard the evidence of PW6 who had stated that he was given a document whose origin he did not know, and which was shown to him by the investigating officer after a year. With regard to the evidence of PW7, Mr. Swaka contended that he had conceded that not all officers have user rights to the integrated system, and it was his submission therefore that the 1st appellant did not play a role in the offence for which she was tried and convicted. He further noted that PW8 and PW9 both denied knowing the 1st appellant, or even working with her. The evidence of PW3, PW4, and PW11, according to Mr. Swaka, was contradictory in that it introduced the element of money lost by the County Government when PW10 had stated that no money was lost.

16. Counsel argued that suspicion never forms the basis of a conviction and the evidence relied on to convict the 1st appellant was merely hearsay. Mr. Swaka observed that PW14 did not mention the 1st appellant, while PW15 had stated that he did not know the 1st appellant, and he could also not tell whether the County Government lost money. It was also his submission that PW16, 17 and 18 do not mention the 1st appellant, while PW19 denied paying any money to the 1st appellant, and that he never dealt with her at any time.

17. Mr. Swaka further observed that PW20 had conceded that there was nothing wrong with the accounts whose statements he produced, and all the transactions were proper. He submitted that the court should have considered all the favourable evidence in respect of the 1st appellant, realized that the prosecution witnesses were speaking in disjointed voices, and should have resolved the contradictions in favour of the 1st appellant. He further noted that no ID or handwriting examination was done, and there was therefore no expert evidence to assist the court in arriving at a conviction.

18. Mr. Swaka further argued that the 1st appellant's defence was not considered by the trial court. She had confirmed that she had business dealings with the 2nd appellant, and the fact that they exchanged money did not mean that they were engaged in any illegal activities in respect of the charges against them. In his view, there were serious doubts which should have been resolved in favour of the 1st appellant.

19. With regard to the sentence imposed on the 1st appellant, Mr. Swaka submitted that it was manifestly harsh, taking into account that she was a first offender, a single mother of two children and with failing health. Her children had been left destitute and in need of care, and he asked the court to consider reviewing her sentence.

20. In presenting the case of the 2nd appellant, Mr. Kangahi adopted the submissions made by Mr. Swaka. He further argued that the trial court erred in convicting the 2nd appellant while there was insufficient evidence to sustain the conviction. According to Mr. Kangahi, the first count against the appellants was conspiracy to commit an economic crime contrary to section 47(3) of ACECA. Conspiracy is an inchoate offence, and it was imperative for the prosecution to demonstrate that a specific offence known in law would have been committed. In his view, for an actual offence to exist, it must be shown that the money was meant for the County Government.

21. Mr. Kangahi observed that PW3 had stated that the applications made were not approved and payments could therefore not be made. That PW3 had also said that he did not know whether the County lost money, and since there was no invoicing, the County lost nothing. Mr. Kangahi emphasized that all the witnesses said that no money was lost, and that there was no legitimate expectation of money by the County as this would only have arisen if service were rendered.

22. Mr. Kangahi further submitted that the duration of time in count 2 was the same as in count 1, and they relate to the same amount of money and the issue of buildings approval fees by Nairobi City County. Further, that the person to be defrauded was PW19. His submission was that it is not possible for there to be two conspiracies to retain and unlawful acquisition of the same amount of money from two people at the same time. In his view, the conspiracy was incomplete. It was his submission that one cannot be charged on two different statutes in respect of the same set of facts and the same objective, the obtaining of building plans, as in the current case.

23. In relation to count 3, Mr. Kangahi submitted that this count, which relates to the 2nd appellant, when read with count 2, crystallized to acquisition of the amount by the 2nd appellant. His submission was that count 2 was rendered lame the moment the actual offence in count 2 came into being. He submitted further that count 3 suggests that the payments were for a service to be rendered while the evidence of PW19

was that the amount was to be paid as an agency fee pursuant to an agency agreement with the 2nd appellant. Mr. Kang'ahi submitted that the 2nd appellant cannot be charged with obtaining as obtaining cannot be an act in the future.

24. Mr. Kangahi referred to the evidence of PW19 in which he states that he was acting through an entity known as Archscan and was dealing with Architect Macharia. He noted that PW19 and the 2nd appellant had an agreement which seems to suggest that the 2nd appellant was to assist and facilitate in getting building plan approvals. PW19 was to pay Kshs 7 million as agency fees and a bonus of Kshs 1 million once approval was granted. Mr. Kangahi noted that PW19 had mentioned a civil suit which he had instituted to get the money from the 2nd appellant. Mr. Kang'ahi posed the question whether receipt of the money, failure to get approval and the institution of a civil suit amounts to obtaining considering that obtaining cannot be an act of the future.

25. With regard to count 4, Mr. Kangahi observed that the 2nd appellant was charged with making a false document, being invoice no 11517, purporting it to be an invoice issued by the Nairobi County Government. He submitted that the trial court erred in relying on its own conjecture, noting that in the judgment, the trial court did not lay a basis for connecting the 2nd appellant with the invoice. He further submitted that the 8.9 million in issue in count 1, 2, and 3 was paid before the payment to the account of the 2nd appellants had been substituted for cheques issued by PW19 and paid directly to the private account of the 2nd appellant. His submission was that this was a private contract between PW19 and the 2nd appellant and the Nairobi County did not come into play. The conviction of the 2nd appellant was unsafe and should therefore be quashed and the sentence set aside.

Submissions by the DPP

26. In submissions in response, Ms. Nyauncho opposed the appeals and contended that the prosecution was able to prove all the counts preferred against the appellants. It had proved in count 1 that the appellants and the 2nd accused, as employees of Nairobi County, conspired to commit an economic crime by dishonestly receiving and retaining Kshs 8,891,943 meant to go to the Nairobi County Government for building plans approvals.

27. Ms. Nyauncho submitted that PW1, PW2, PW3 and PW4, who were tasked with vetting of building plans, had testified that building plans were submitted but were rejected as they did not meet the minimum requirements. Despite the plans being rejected, the appellants had gone ahead and obtained Kshs 8,891,943 from the developer, the complainant in this case, purporting it to be money to be paid to the County for approval of the plans. Ms. Nyauncho referred to the evidence of PW19 who had testified that he had entered into a written agreement (exhibit 44 and 45) with the 2nd appellant for the 2nd appellant to obtain approval of his building plans. He had been given an invoice by the 2nd appellant for Kshs 8,891,943 which was to be paid to the Nairobi County for the approvals and had issued bankers' cheques to the County Government.

28. The 2nd appellant had later informed PW19 that the cheques had been rejected and had demanded cash. PW19 had transferred Kshs 6,281,943 to the 2nd appellant's account, while the balance was sorted out by the cheques which were not rejected. The 2nd appellant had issued a receipt (exhibit 3) for the whole amount of Kshs 8,891,943, a receipt that PW19 later came to learn was fake. He also came to learn that two of his cheques had been used to clear projects that were not known to him.

29. Ms. Nyauncho submitted that the prosecution had proved the ingredients of conspiracy to commit an economic crime. There was sufficient evidence, both direct and circumstantial, to prove that the appellants had conspired in concert and with a common intention to commit an economic crime. Exhibits 14 and 18, banker's cheques from Equity Bank which were given to the 2nd appellant by PW19, ended up being presented for payment by the 1st appellant, a fact that was proved by P15 who testified that the cheques were deposited by the 1st appellant. These two cheques had the name of the 1st appellant at the back, which proved that the two appellants worked together.

30. It was her submission further that there is evidence that the 1st appellant received Kshs 5, 077,550 from the 2nd appellant, an amount that was received through the 1st appellant's bank account at Equity Bank and through her cell phone, and there are statements to this effect. Ms. Nyauncho noted that the 1st appellant admitted in her defence that she received this amount, her explanation being that the amount was in relation to a business deal between her and the 2nd appellant, which in the DPP's view is not credible.

31. Ms. Nyauncho further submitted that the evidence of PW5, an ICT expert, also established the conspiracy between the appellants. PW5 had been tasked by the Oduor to submit the application for approval of the building plans for PW19 for a fee of Kshs 1.5m, which he had done and had obtained an invoice (exhibit 7) which he presented to Oduor. PW5 had been told by the 2nd accused to expect a call from the 1st appellant. PW5 had received a call from the 1st appellant who had asked for his account details and had then deposited Kshs 500,000 in his account as part of the fees for submitting the building plans for approval.

32. With respect to counts 4, 5, 6, and 7 relating to exhibits 2 and 3, Ms. Nyauncho submitted that the exhibits were disowned by employees of Nairobi City County, PW6, PW7 and PW11. PW6, the cashier who was alleged to have originated exhibit 3, denied handling or making the receipt. The cashier, PW7 and PW11 confirmed that the receipt was not genuine. It had the Nairobi City Council logo yet they had started using the Nairobi City County logo. It was also not genuine as the staff of Nairobi City County were not allowed to receive the amount of money indicated in the receipt by a Central Bank directive which was to the effect that an amount of over Kshs 1m must be done by electronic funds transfer. Ms. Nyauncho further noted that the Nairobi City County system had not captured exhibit 3 and it was therefore not genuine. The DPP's case therefore was that the evidence of PW6, PW7 and PW11 proved counts 4, 5, 6 and 7. Regarding count 2, her submission was that it did not prejudice the appellants as they were not found guilty on that count.

33. In response to the appeal against the sentence, Ms. Nyauncho argued that the sentences meted out on the appellants were lenient bearing in mind the large amount of money that the County Government was to receive but which ended up with the appellants. Her submission was that the evidence discloses an intricate web of conspiracy and deceit between employees of Nairobi City County and brokers who defraud unsuspecting victims. In this case, the appellants took advantage of the complainant, a foreigner, and took money from him. Such acts led to

loss of money by the government and should be punished to set an example for others. She observed that the effect of the acts committed by the appellants was serious as the country ended up with building plans approved yet they do not meet standards, with serious consequences for Kenyans.

34. Ms. Nyauncho further submitted that with respect to count 1, section 47 of ACECA provides for a fine of not more than Kshs 1 million and imprisonment for not more than 10 years. The appellants were granted a non-custodial sentence with default sentences of 13 months and 3 years 7 months respectively. In her view, the sentences were too lenient, and she asked the court to dismiss the appeals.

Appellants' Submissions in Reply

35. It was submitted for the 1st appellant that there was no evidence from mobile service providers to show communication between the 1st appellant and PW5 which resulted in deposit of funds. He reiterated that the conviction of the 1st appellant was unsafe, was based on hearsay, and the prosecution had failed to call vital witnesses. Some witnesses had also said that they could not identify the 1st appellant, while the banker's cheques ostensibly issued to the 2nd appellant and paid by the 1st appellant were not subjected to document examiners.

36. Mr. Kangahi for the 2nd appellant noted that the 2nd appellant was not an employee of the Nairobi City County. He reiterated that the County had rendered no approval that would lead to its being paid Ksh 8,891,943 and the cheques drawn in its favour were returned to the complainant.

The Evidence

37. I have considered the appellants; appeal and the submissions made on their behalf. As the first appellate court, I am under a duty to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I must bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing-see **Okeno v Republic (1972) E.A. 32**.

38. The prosecution called a total of 21 witnesses. Mr. John Amol Ojwang (PW1), an Urban Planner with the Nairobi County Government had the responsibility of dealing with applications for development plans. He explained that the approval system, which was online, had two parts, a front and back end. The front end is where consultants were able to access and submit applications. Technical officers were able to view the applications from the back end. Two to three officers are in charge of the pre-vetting stage, in which the responsible officers scan through the application to confirm whether they meet the minimum requirement of their intended area. Where they find that the application meets the requirements it is pushed to the invoicing stage. If it does not, it is returned to the applicant.

39. In December 2015, Ojwang had received inquiries regarding a letter dated 16th December 2015 written by Li Wen Xue (PW19) on behalf of Elephant Real Estate Limited, the complainant in the matter. The letter was a complaint about a pending approval. Attached to the letter was an invoice for payment purported to have been issued by the Nairobi City County and a payment receipt reflecting some purported payments. The invoice was purportedly raised in favour of Archscan Associates Limited Registration Number A081 for Kshs. 8,981,943. The receipt, for Kshs.8,981,943, was issued to Elephant Real Estate for bill No. PA1505-00369 and was dated 11th May 2015.

40. Upon checking the system, Ojwang established that no invoice had been issued in respect of the application. He also established from the revenue office that the receipt and invoice were not genuine as they were not captured in the Nairobi City County system and did not therefore emanate from there. He wrote a letter dated 18th December 2015 Ref: NCC/NP&H/DC/L/00295/WM/E setting out his findings that the application had not been invoiced or paid for. On 12th January 2016, the complainant went to Ojwang's office with an invoice No.12246 dated 6th July 2015 for Kshs.5,240,960/=.

41. Ojwang queried the systems and found that the application in respect of which the invoice had been issued had been captured and the invoice had been duly issued by the County Government of Nairobi. The application had been done by a different architect from the complainant's. In cross-examination, Ojwang confirmed that he knew the 1st appellant, who used to work in the Urban Planning Department but had no capacity to do pre-vetting or interact with documents. Invoices within the department were sent to architects once pre-vetted as it was only the architects who could retrieve the documents and issue payment instructions. The 2nd appellant had been visiting the Urban Planning Department on several occasions.

42. Jasan Ndegwa Njane (PW2) was a Development Control Officer in the County Government of Nairobi also involved in pre-vetting of building plans. Where applications for approval met the minimum requirements, the application would be escalated to the next stage and if not, the application was returned to the architect with comments. The stage after pre-vetting was the issuance of an invoice.

43. Njane had scrutinized and made three comments on application No. INV.11517 on 5th May 2015 which had been submitted on 30th April 2015 by Archscan Associates and Elephant Real Estates Limited. The ownership documents had not been attached, while the plot ratio on the plan was excess, and the building line had not been observed. He had then sent the application back to the applicant to address the comments. The applicant had resubmitted the plan but Njane had returned it with the same comments. Njane identified the bundle for the application, which had been first submitted on 30th April 2015 and which he had returned on 5th May 2015.

44. The plan had been resubmitted the same day and he returned it on 8th May 2015. The application had been resubmitted yet again on 12th May 2015, rejected and returned on 18th May 2015. The architect had resubmitted it again on 6th October 2015, rejected on 9th October 2015, further resubmitted on 12th January 2016 and returned to the Architect who had submitted it multiple times, Archscan, on 16th January 2016.

45. On all the occasions that the application by Elephant Real Estates and Archscan Architects had been submitted and rejected, the same

comments had been made- that the applicant should “deal with the comments”. The application was never cleared for invoicing at any time.

46. Like Njane, Simon Mwangi Mbugua (PW3) worked at the County Government of Nairobi. He was also involved in pre-vetting and evaluating building plans. He had also handled application file No.11517 in the name of Elephant Real Estate Limited which had been submitted by Archscan SPP Architects on 16th January 2016. The application had earlier been evaluated by Jasan Ndegwa (PW2) who had made some comments to be acted upon, but the comments had not been acted on. Mbugua had sent the application back to the architect with instructions that the previous comments be acted on, but the application was never forwarded to him again. He stated in cross-examination by Counsel for the 1st appellant that the application never got an approval, and payment could only be made after approvals are done.

47. Thomas Adanje (PW4) worked at the Urban Planning Development Control section of the Nairobi County. He had received five applications, four submitted by Nyaseme Advocate and one (exhibit 10) by Samuel Mburu Architect. He had issued an invoice for Kshs 5,240,960/=.The invoice was sent to the developer through the Architect but payment was not made.

48. Mr. George Sule Nyambok (PW5) used to do computer maintenance and repairs, and he used to assist Samuel Mburu (deceased), a registered architect, to submit copies of architectural plans online to the County Government of Nairobi. PW5 had submitted building plans for Elephant Real Estates and Kenya Institute of Supplies Limited online, an assignment that he was given by one Bonny Stephen Otieno (Oduor) for a consideration of Kshs.1.5 million and a commitment fee of Kshs.800,00/-. He had submitted the application on the online portal through architect Mburu’s account. He had received an invoice number 12246 which he immediately relayed to Oduor. He was later informed by architect Mburu that the plan had been invoiced. He printed the invoice (exhibit 7) for Kshs.5,240,960 and handled it over to Oduor.

49. PW5 had thereafter received a fee of Kshs. 500,000/=-, part of the commitment fees, which was deposited into his account through one Esther, who was a friend of Oduor. Oduor had told him to expect a call from Esther, who would ask him for his bank account. The said Esther had called him shortly afterwards seeking to know his account details. Soon thereafter, he had received a notification that Kshs.500,000/=- had been deposited into his Equity Bank account number [xxxx].

50. PW5 and the said Esther had visited the developer, who was Chinese, at his office in Kilimani area. He had presented the invoice to the developer who seemed upset, claiming that there was a difference in the name of the company he had used to do business and the name used for the application, Elephant Real Estate Limited & Kenya Institute of Supplies Limited; that they only used the name Elephant Real Estate Limited and he knew nothing about Kenya Institute of Supplies. Nyambok’s testimony was that Oduor had given him documents in the name of Elephant Real Estate and Kenya Institute of Supplies. Nyambok had given Kshs 300,000 out of the Kshs 500,000 to architect Mburu, and he returned Kshs 200,000 to Esther.

51. Mrs. Tabitha Wambui Mwangi (PW6), a cashier with the Nairobi County Government, had been shown a receipt by the investigating officer concerning Elephant Real Estate Development Limited dated 11th May 2015, bill No.PA1505-00369 in favour of Elephant Real Estate Ltd. The receipt indicated that the client had paid Kshs.8,981,943/=-, a cash payment that was allegedly received by PW6. PW6 denied ever having received the cash, and stated categorically that she had never handled such an amount during her career as a cashier. She confirmed that the receipt bears her code, 0011942015051621, but the receipt was not genuine. She pointed out that the receipt bears the Nairobi City Council logo yet at the time it was allegedly issued, the logo in use was the Nairobi County logo.

52. Nickson Otieno (PW7) was the head of Revenue at the County Government. In May, 2015 some two gentlemen of Chinese descent had gone to his office seeking verification of the receipt (exhibit 3). PW7 had noted several disparities with the documents. First, that it had the logo of the defund Nairobi City Council when the logo in use was of the County Government of Nairobi. Further, no cashier is allowed to receive cash in excess of Kshs. 999,999/=- from a client in line with Central Bank directives, and a payment of over one million must be done by EFT. He had confirmed from Tabitha (PW6) that she knew nothing about the receipt. The receipt was also not captured in the automated system of revenue collection LAIFOMS (Local Authority Integrated Financial Operations Management Systems), and it did not originate from their system.

53. Mr. Julius Kibira PW8, a freelance draftsman, had been given a C.D by Steve Otieno (Oduor), containing architectural drawings and designs to submit through a registered architect. He had handed the CD over to Architect Mburu for submission. PW8 had worked with Architect Mburu previously in regard to several other submissions. After about two days, the architect had contacted PW8 and explained that the planners had requested that the developer should observe the plot ratio. PW8 had contacted Oduor about the application, which had been given invoice number 12084.

54. Mr Joseph Mwaura Chege (PW9), had worked as a Senior Development Control officer with the Nairobi County Government. He was the deputy section head at the time material to the matter and had assigned PW2 and PW3 the duty to pre-vet the building plans the basis of this case. PW9 confirmed that exhibit 10 was invoiced through the County Government system but was not paid, but exhibit 8 did not originate from the system.

55. Francis Macharia (PW10), an architect with Archscan Architects, had, in April, 2015 received instructions from Elephant Real Estate Limited to seek approval from the Country Government of Nairobi for building plans for a building with 20 floors. PW10’s office had re-drafted the plans and submitted them online on 28th April 2015 with the tracking number INV1/481. The plans were sent back with comments on the need to rationalize the plot ratio, adjust the building line to 9 metres and clear the discrepancies in the survey map and title deed. They had acted on the comments and resubmitted the plans on 30th April 2015 and were issued with tracking no. INV1/517. They had again received the same comments as before, save for the plot number which PW10 had been able to correct.

56. PW10 had advised the client to submit plans for four floors instead of 20 twenty but the client returned later with a man whom he said would assist them to get approval for the 20 floors as he was known to the County City Planning Department. After several meetings with the client, PW10 had redesigned the plan to seventeen and later fourteen floors and resubmitted them, but they were all rejected with comments on the plot ratio. PW10 stopped working on the project due to the rejections but came to learn later that the client had made payment for the approval. Every time the plans were rejected, PW10 would inform the client, but the client indicated that they were working on the approval

themselves. None of the plans submitted by PW10 were approved by the County Government. PW10 identified the 2nd appellant as the person who had been introduced to him by the Chinese clients as the person who was to assist them obtain approvals from the County Government.

57. In 2016, PW10 was contacted by the County Government to confirm whether signed blue prints, which were for 20 floors, were from his office and he explained that they were not though they bore his name and signature. PW10 had alerted his client who believed that he had obtained approvals and together they had gone to City Hall. Upon going through the system they had established that there were no records of the drawings, and neither were there records of cash payments. He confirmed to the court that no invoice was issue for tracking number INVI/517.

58. He confirmed that the 2nd appellant was the person who the Chinese client had brought to his office and introduced as the person who would assist him to get approvals for the 20 storey building. The 2nd appellant had introduced himself as Karume. In cross-examination, it emerged that after he had made three resubmissions for 20, 17 and 14 floors, he had been warned on the last resubmission that the project was going to be blacklisted if they made a further submission. He had also at some point handed over the blue prints to the Chinese client, who had informed him that they had asked the 2nd appellant to make payments.

59. The evidence of Joseph Mwangi Gaithiaka (PW11), a Senior Accountant with the Nairobi City County, was that he had been asked by the investigating officer to confirm the authenticity of bill No. PAI505 – 00369 (exhibit 13) issued to Elephant Real Estate Limited which bears receipt No.001194 - 2015051621 and receipted by a cashier called Tabitha. He had checked in the system and had established that bill No.PAI505-OO369 dated 11th May 2015 had been issued to Paragon Property Consultants Limited for renovations on a building standing on plot 209/477/30 along River Road. The amount paid for the bill was Kshs.4,000/-. No payment had been made by Elephant Real Estate on 11th May 2015.

60. In May, 2017 the Investigating Officer had presented to PW11 two cheques to confirm the beneficiary. These were cheque No.001785 dated 8th May 2015 issued by Equity Bank (exhibit 14) for Kshs.900,000/= which was presented by Esther Thongori, cell phone 072xxxx. PW11 had checked the system and found that the cheque beneficiary was a company known as China Yuanda Real Estate Limited with invoice No. PA 1506-00032 issued on 2nd June 2015. It had been presented along with cheque No.05376 of Kshs.372,990/=-, making a total of Kshs.1,287,990/=-. The payment was received by a cashier known as Ambrose Anangwe (PW12) as shown by a cashier analysis (exhibit 16).

61. PW11 had also received cheque No.001789 dated 8th May 2015 issued by Equity bank for Kshs.900,000/=(exhibit 18). This cheque was also presented by Esther Nyambura Thongori. The cheque was receipted by a cashier known as Faith Njeru on 4th July 2015, the beneficiary being matatu savings and credit co-operative societies (saccos). The cashier analysis in respect of Faith Njeru (exhibit 19) captured the details of the payment. PW11's evidence was that there was no payment in their records by Elephant Real Estate Limited.

62. Ambrose Katiech Anangwe (PW12), had the duty of receiving cheques and direct credits from customers and issuing receipts. He would capture cheques in a cheque list and hand it over to the supervisor at the close of business. While receiving cheques, he would confirm that the client has indicated his personal details at the back of the cheque for purposes of contacting the presenter in the event that an issue arises.

63. Anangwe confirmed that he had received exhibit 14 at the counter on 2nd June 2015 from Esther Thongori, the 1st appellant. The cheque was for payment for plan approval while the applicant was China Yuanda Real Estate Limited. He had confirmed that the cheque was in order and had issued a receipt (exhibit 15) to the client. He had received two cheques, one for Kshs 900,000 and the other for Kshs.387,990/= making a total of Kshs.1,287,990/=-. Both cheques were presented by the 1st appellant, who had a full invoice which he receipted, cut the lower part which he retained, then handed over the customer's copy to the 1st appellant.

64. PW13, Simon Morintat, a County Chief Office Public Service Management in the County Government of Nairobi confirmed that the 2nd accused and the 1st appellant were employees of the County Government of Nairobi.

65. Euliter Kainda (PW14) , a clerical officer at the Nairobi County Government charged with the responsibility of supervising cashiers had confirmed from the cheque list (exhibit 21) that exhibit 14, cheque no. No.001785 was one of the cheques collected by PW12. Faith Wanja Njeru (PW15), a revenue clerk at the Nairobi County, had received cheque No.001789 for Kshs.900,000/= (exhibit 18) from the 1st appellant, to which was attached a list of matatus. She had issued seasonal stickers for the vehicles after confirming that the amount balanced with the number of vehicles.

66. PW16, Mr. Michael Wainaina, was also a clerk with the Nairobi County Government. He would receive cheques from the cashiers at the close of business and hand them over to the Chief Cashier. He had received the cheques in this case from the cashiers, prepared a banking slip for purposes of banking and handed the cheques and the slip to the Chief Cashier.

67. Mr. Safari Michael (PW17), a friend of Oduor, had been requested by Oduor to receive into his bank account at Equity Bank Kshs.140,000.00/=-, but he was not told the purpose of the funds. The funds were transferred to his account No[xxxx]on 11th November 2015. He withdrew it the following day and gave it to Oduor.

68. No.73528 PC Quinton Odeke PW18 from DCI was attached to Safaricom Headquarters Security Department. His functions were call and Mpesa data extraction. He had received court orders to produce information in respect to Safaricom Mobile numbers 071xxxx, 072xxxx, 072xxxx, 071xxxx and 072xxxx. Safaricom was also required to produce Mpesa statements on the cell phone numbers for the period 11th May 2015 to 1st May 2016. The orders also required production of registration details of cell phone No.072xxxx.

69. His findings were that cell phone No. 072xxxx (exhibit 37) was registered in the name of the appellant, with ID No.[xxxx], as was cell phone No.072xxxx. Cell phone No. 072xxxxx(exhibit 40) was registered in the name Oduor, with ID. No.[xxxx].

70. The complainant, Li Wen Xue (PW19) was a Chinese national carrying on business in Kenya with Elephant Real Estate Limited in which he was a director. He had bought land parcel number LR1/163 in Kilimani Estate as confirmed by certificate of search dated 9th January 2017 and a transfer between Godison 237 Ltd and Elephant Real Estate Limited dated 29th April 2015. In May 2015, he and his partners had decided to develop 19 floors of office blocks on the property. They had contacted Archscan & Associates and designs were submitted to City Hall by the architect (PW10). He was however unable to get the necessary approvals as approvals for developments of more than 8 stories could not be granted for the Kilimani area. The architect had however told PW19 that he could find someone who could get the complainant approval for 19 floors. The architect had referred him to a Mr. Liu, a contractor, who had linked him up with the 2nd appellant, who had worked with Liu on similar assignments.

71. The 2nd appellant had gone to the complainant's office where they had agreed that the 2nd appellant would act as their agent to get the approval within a month. PW19 and the 2nd appellant had agreed that the 2nd appellant would be paid a fee of Kshs 7million and a bonus of Kshs.1 million once the approval was granted. They had entered into a handwritten agreement (exhibit – 44) dated 11th May 2015 to this effect, which was signed by PW19 and the 2nd appellant. They had also entered into an agency agreement of the same date (exhibit - 45). Following these agreements, PW19 had issued the 2nd appellant with 8 cheques adding up to Kshs.7 million on 11th May 2015. These cheques were reflected in the bank statements of Elephant Real Estate Company Limited Account No.1470263696471 domiciled at Equity Bank Kilimani Branch (exhibit 46).

72. A few days later, the 2nd appellant had presented to PW19 an invoice for Kshs Kshs.8,981,943/= which he claimed was to be paid to the County. PW19 wrote 10 bankers cheques to the County Government covering the invoiced amount. After a few days, the 2nd appellant returned 7 cheques to PW9 claiming that the County Government officers demanded cash. He therefore transferred Kshs.6,281,943/= to the 2nd appellant's personal account and cancelled 7 bankers cheques. The 2nd appellant remained with 3 bankers cheques. Two of these cheques (exhibits 14 and 18) were drawn in favour of Nairobi County. The 2nd appellant had furnished him, ostensibly upon payment of the County fees amounting to Kshs.8,981,943/= with the acknowledgement receipt in the name of Elephant Real Estate (exhibit 3).

73. PW19 did not get the approvals promised, and after 6 months, he cancelled the last cheque when he realized there was a problem with the approvals. With his architect (PW10), PW19 had visited the Finance Department of Nairobi City County with the receipt for confirmation purposes. At the County offices, he had been informed that the receipt was not captured in the system and was therefore fake. A week later, he had been informed that two of his cheques had been used to clear other projects that were strange to him.

74. The complainant had therefore lodged a complaint (exhibit 1) with the County Government. The response he received dated 18th December 2015 (exhibit 4) was that his project had never been approved and no payment was ever received by the County Government. He identified the 2nd appellant as Karume, the person he was introduced to by his architect as able to assist him get approval for his 19 storied building. It was also his testimony that the 1st appellant had also gone to his office in the company of another man whom PW19 could not recall, and she had produced some Mpesa slips between her and the 2nd appellant. He had instituted a suit for recovery of the cash paid to the 2nd appellant and they had entered a consent for its refund.

75. Mr. Irungu Evans (PW20) was in the Security Department of Co-operative Bank Cooperative House Haile Selassie Avenue. He had produced account opening documents and bank statements (exhibit 48) for the period 1st January 2015 – 21st April 2017 in respect of account No. 01109093838800 in the name of the 1st appellant, as well as account opening documents and statements in respect of Oduor and the Nairobi City County.

76. The investigating officer, Ali Mandera (PW21) of the Ethics and Anti-Corruption Commission (PW21) had investigated the matter leading to the prosecution of the appellants. He basically summarized what the investigations had established as it emerged from the evidence of the prosecution witnesses.

77. PW21 testified that from the evidence, the 2nd appellant had received a total of Kshs.15,981,943/= from Elephant Real Estate. The 1st appellant had benefitted from the monies paid out by the complainant as was shown in the Safaricom transaction details (exhibit 48 and 38).

78. At the close of the prosecution case, the trial court found that all the accused persons had a case to answer and placed them on their defence.

79. In her sworn defence, the 1st appellant denied ever having dealt with the complainant. She was in the Research Section of the Physical Planning Department while approvals are done in the development Control Section. She confirmed that her co-accused were known to her and she had had financial transaction with them. She further confirmed that she had paid the 2nd accused Kshs.140,000/= through Mr. Safari (PW17), but that the cash was a loan. She further confirmed that she received close to Kshs. 5,000,000/= from the 2nd appellant. It was not, however, the first time that she had received cash from him through her account as she and the 2nd appellant had been doing business together, and he owed her money. She denied that she had written her name at the back of exhibit 14, the banker's cheques drawn by Equity bank and payable to Nairobi County which had been issued by the complainant to the 2nd appellant.

80. While denying the charges against him, Oduor confirmed that he had received funds from the 1st appellant, though he explained that it was a loan. The amount had been received on his behalf by his close friend Safari (PW17). He had requested his friend to receive the money as he had an account with Equity Bank and the 1st appellant was to transfer the cash from her Equity Bank account.

81. The 2nd appellant denied ever engaging in a conspiracy. He was introduced to Elephant Real Estate by a Mr. Liu Zhirui who did not testify before the trial court. He was to assist the complainant through Architect Macharia (PW10) to facilitate approval of building plans. He had received Kshs. 7 Million from Elephant Real Estate for his own use. He did not use the 9 cheque leaves given by the complainant (PW19) as he was not presented with the invoice for payment and he had returned the cheques to the complainant.

82. The 2nd appellant also denied having any interactions with China Yuanda Real Estate (whose approval fee was paid with exhibit 14) or with the matatu sacco (whose season's tickets were paid for with exhibit 18). It was his testimony that a cash deposit of Kshs. 5,400,000/= was made into his account after he returned the cheques to the complainant, but the amount was not for payment for approval of building plans but for other transactions that he was processing on behalf of the complainant. He further confirmed that there was a civil suit between him and the complainant for recovery of Kshs.7 million and not the Kshs.5.4 which had been deposited into his account. He had received Kshs.7 Million from the complainant to assist him get building plan approvals but had settled the issue in another court as he had agreed to return the Kshs. 7 million as he did not obtain the approvals.

83. The 2nd appellant confirmed that the 1st appellant was known to him and that he had transferred cash into her account as he and the 1st appellant had personal and business transactions.

Analysis and Determination

84. From the grounds of appeal set out in the respective petitions of appeal and the submissions made before me, the appellants' appeals centre around two grounds. The first is that the trial court erred by convicting the appellants when there was insufficient evidence to support the convictions. The second is that the sentences imposed are excessive in the circumstances.

85. The appellants were charged at count 1 under the provisions of sections 47(A)(3) of ACECA, which provides that:

A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

86. At count 2, they were charged under section 317 of the Penal Code, which provides that:

'Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.'

87. In **Rebecca Mwikali Nabutola & 2 others v Republic [2016] eKLR**, the High Court relied on the meaning of the term conspiracy to defraud as defined in **The Black's Law Dictionary 9th Edition at page 351**, which is:

"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."

88. The court further cited **Archibold's Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell), at pages 3025 and 3026** in which it is observed that:

"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."

89. The court went on to conclude that:

"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."

90. I believe the observations of the court and the conclusion reached on the meaning and elements of the offence of conspiracy set out above represents a fair exposition of the law. The question is whether the prosecution in this case established the commission of the offence by the appellants.

91. The evidence before the trial court, which I have summarized above, shows that the complainant, PW19, and his company, Elephant Real Estates Limited, wished to develop a 19 storey building in the Kilimani area on L.R. No. 1/1328 (originally 1/163). They consulted an architect, PW10, whom they requested to obtain approvals for them for their building. He submitted the plans no less than three times, the plans always being rejected as the County did not approve buildings of more than 8 floors in that area. Whether it was the architect who introduced PW19 to the 2nd appellant, or the other way round, the 2nd appellant emerged as the person who would assist PW19 to obtain the approvals he wanted. The 2nd appellant was positively identified by PW10 and PW19 as the person who undertook to carry out this task.

92. The evidence indicates that he entered into a written agreement with PW19 (exhibits 44 and 45) under which he would obtain the said approvals for a very generous fee of Kshs 7 million and a bonus of Kshs 1 million. He purported to have obtained an invoice (exhibit 4) for the approved plans and he obtained 10 cheques for Kshs 8,981,943 purportedly being the fees payable to the City County as approval fees.

The 2nd appellant subsequently informed the complainant that the County officers had rejected the cheques and he should replace them with cash. The complainant accordingly deposited Kshs 6,281,943 in the 2nd appellant's account. The 2nd appellant also gave the complainant a receipt (exhibit 3) purporting it to be from the County Government in acknowledgment of the payment by the complainant.

93. A subsequent visit by the complainant to the County Government had confirmed that the receipt and invoice were not genuine, a fact that was also confirmed by PW6, PW11 and PW7, the latter of whom testified that the amount could not have been received by any of the cashiers at the County Government since, under Central Bank regulations, no payment above Kshs 1 million could be made in cash. These witnesses also confirmed that the receipt bore the logo of the defunct City Council of Nairobi while the logo in use was that of the County Government.

94. The evidence further indicates that the 1st and 2nd appellants acted in concert, alongside their co-accused, Bonnie Stephen Otieno Oduor. The 1st appellant was identified by the complainant as having visited his office with another person and presented to him the receipt purportedly issued on payment of the amount due to the County. Her name and telephone number 0721583408 were on the back of the two cheques (exhibit 14 and 18) issued by PW19 to the 2nd appellant. She had used the two cheques to pay for seasonal tickets for matatu saccos and the payments had been received by Faith Njeru, PW15, a revenue clerk at the county government. It was the 1st appellant who deposited Kshs 140,000 into PW17's account. PW17 was a friend of Oduor, who had informed him that he wanted a sum of Kshs 140,000 deposited into his Equity Bank account. The 1st appellant had received Kshs 5,077,559 into her account number 002010016219 from the 2nd appellant.

95. PW5 had received a request from Oduor to submit exhibit 10, an application for approval of building plans for the complainant's company, Elephant Real Estate Limited, at a fee of Kshs 1.5 million. He had submitted the application through an architect, one Mburu (deceased) and had printed invoice number 12246 (exhibit 7) which he handed over to the 2nd accused. The 2nd accused had then told him to expect a call from the 1st appellant, and he had indeed received the call. He had given his account information to the 1st appellant, who had soon thereafter deposited Kshs 500,000 into his account.

96. I have considered the judgment of the trial court against the evidence presented before it and the submissions made before me. In my view, the court properly analysed the evidence before it, and properly arrived at the conclusion that the appellants were guilty as charged. It considered the defences offered by the appellants, which were basically denials. In respect of the 1st appellant, the trial court observed that she was lucky that she had not been charged, with the 2nd appellant, with counts 3-7 relating to the uttering of the fake documents in question. I fully agree with the findings of the trial court in this matter.

97. The trial court observed in its judgment that there is an intricate web of conspiracy and deceit in the Nairobi County Planning Department between employees of the County, brokers and gullible victims. The 1st appellant and her co-accused, Bonnie, were employees of the County Government. The 2nd appellant emerges as a well-established broker, so well known that he could command a fee of Kshs 7 million and a bonus to subvert County building laws at the behest of a developer, never mind the consequences to the city and its residents.

98. PW19, contrary to the submissions by Ms. Nyauncho for the DPP, was not a victim. He, and others of his ilk, are the reason why corruption thrives in this country, for he was not willing to abide with the advice of his architects that a building of 19 floors could not be permitted in Kilimani. Then there are those, like the deceased architect, Mburu, and perhaps even Francis Macharia (PW10), and PW5 who willingly went ahead to submit applications for approval of plans which they knew were in breach of the law.

99. The appellants have made much of the fact that there was no loss of revenue to the County Government as the plans were not approved and no payment was therefore due. It seems to me that with such arguments, they deliberately refuse to see the bigger picture. They fraudulently obtain money from an equally culpable developer, which they then apply to pay for seasonal tickets for matatu saccos and for approval of plans by another developer, Yuanda Real Estates Limited.

100. Without seeking to descend to speculation, one must ask where the money that was supposed to pay for these matatu sacco seasons tickets or the approved plans went. The 1st appellant was not paying for the plans or the tickets using PW19's cheques out of the goodness of her heart. Were the funds from the developer and the saccos part of the 'business' she and the 2nd appellant were engaged in? What kind of racket were the two involved in? They benefitted from their criminal acts, and in my view, the trial court properly imposed the sentence that it did on them. Indeed, one is inclined to agree with the DPP that the sentence imposed was light, in the circumstances.

101. It is also worth bearing in mind that under section 61 of the **Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009**, the trial court has the mandate, upon convicting a person, either on the application of the Asset Recovery Agency, the Attorney General, or on its own motion, to inquire into whether or not the defendant has benefitted from the crime for which he was convicted. If he has, the court has power to make a forfeiture order. This is a provision of the law that office of the DPP and trial courts may wish to bear in mind when dealing with matters such as this.

102. In closing, I observe that there is a bit of a discrepancy in the judgment of the trial court and the sentence imposed on the appellants. At page 20 of the judgment, after analysing the evidence, the trial court stated that "*I consider count 1, 2 and 3 proved as required by law.*" It then proceeded to consider counts 4- 7 and concluded that the 2nd appellant was guilty as charged under those counts.

103. However, as emerges from the sentence imposed which I set out earlier in this judgment, the trial court did not sentence the appellants and their co-accused on count 2, though the judgment is that he found the count proved. I note that in her submissions, Ms. Nyauncho for the DPP took the position that the trial court had acquitted the appellants on this count, which follows from the fact that he did not impose a sentence on them in respect thereof. While I deem this to have been an error on the part of the trial court, I will let it lie.

104. The upshot of my findings above is that the consolidated appeals have no merit and are hereby dismissed, and the conviction and sentences upheld.

Dated and Delivered at Nairobi this 14th day of May 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the appellants through video conferencing.

MUMBI NGUGI

JUDGE