REPUBLIC OF KNEYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ACEC APPEAL NO 18 OF 2019

JOHN FAUSTIN KINYUA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in ACC No. 2 of 2014 (Hon. L. N. Mugambi, Chief Magistrate) delivered on 13th May 2019)

JUDGMENT

1. The appellant, John Faustin Kinyua, was charged with two offences under the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (ACECA). At count I, he faced the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA. The particulars of the offence were that on diverse dates between 19th August 2003 and 27th October 2003, at Re-Insurance Plaza, Nairobi within Nairobi county in the Republic of Kenya being the Director (Finance and Corporate Services), Kenya Reinsurance Corporation Ltd, used his office to improperly confer a benefit on Charles Kinuthia Gichane by allocating and causing to be transferred to his name House No.. 70 Villa Franca estate, Nairobi belonging to the said Kenya Reinsurance Corporation Limited without any consideration.

2. The appellant faced an alternative charge of fraudulent disposal of public property contrary to section 45 (1)(b) as read with section 48 of ACECA. The particulars of this charge were that on diverse dates between 19th August 2003 and 27th October 2003, at the same place and in the same capacity as in count 1, he fraudulently disposed of public property, to wit, House No 70, situated in alI that parcel of land known as L.R. No. 209/10611/106, Villa Franca Estate, Nairobi belonging to Kenya Reinsurance Corporation Limited. Count 11 in the charge sheet related to the offence with which the appellant's co-accused, Charles Kinuthia Gichane, was charged and convicted.

3. Following a full trial, the appellant was convicted in the judgment of the trial court dated 13th May 2019. He was sentenced to pay a fine of Kshs 1,000,000 and in default to serve one year's imprisonment. He was also sentenced to pay a mandatory fine of Kshs 6,393, 792 and in default serve two years' imprisonment in compliance with section 48(1)(b) of ACECA. The trial court also ordered that in addition, in compliance with section 54(b) of ACECA, house number 70 on L.R. No. 209/10611/106 at Villa Franca Estate reverts to Kenya Re-insurance Corporation Limited.

4. Aggrieved by both his conviction and sentence, he has filed the present appeal by way of a petition of appeal dated 21st May 2019 in which he raises the following grounds of appeal:

> ***1. THAT the Learned Magistrate erred in re-interpreting the law in a manner inconsistent with the interpretation that had already been interpreted by the Judge of this court and as a result departed from the precedent of the court to which the said Magistrate was bound and hence arrived at a wrong decision.***
>
> ***2. THAT the Learned trial Magistrate erred in law and in fact in holding that Kenya-Re was a public body when there was no evidence tendered to support the said conclusion.***
>
> ***3. THAT the Learned trial Magistrate erred in fact and in law 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 (sic) contradicts the evidence placed before the court.***
>
> ***4. THAT the Learned trial Magistrate erred in fact and in law when he concluded that the appellant was part and parcel of the persons who conferred a benefit to the 2nd Accused in the trial when such conclusion was not supported by any evidence from the prosecution witness and consequently arrived at the wrong decision.***
>
> ***5. THAT the Learned Magistrate erred in fact and in law in shifting the burden of proof to the accused person contrary to the established principles of law and the constitutional provisions as regards the presumption of innocence as provided in Article 50***

(2) (a) of the constitution and hence arrived at the wrong decision.

6. THAT the Learned Magistrate erred in fact and in law in holding that the appellant allocated and caused o be transferred to the 2nd Accused the house the subject of the proceedings against the strength of the evidence tendered by the prosecution which showed otherwise.

7. THAT the Learned Magistrate erred in fact and in law in convicting the Appellant against the weight of the evidence tendered and further in holding that the loss incurred which was not ascertained at trial entitled the said Magistrate to impose a mandatory fine.

8. THAT the Learned Magistrate erred in Law and fact in imposing a mandatory fine when the evidence tendered clearly established that the House the subject of these proceedings had been surrendered in 2011 in an improved state and there was no actual loss established.

9. THAT the Learned Magistrate erred in fact and in law in fixing the alleged loss at Kenya Shilling: Three Million One Hundred and Ninety Six Thousand Eight Hundred and Ninety Six (Kshs: 3,196,896/-) when the said loss was not established by the evidence tendered by the prosecution or at all.

10. THAT the Learned Magistrate erred in law in imposing an excessive mandatory sentence/fine in the circumstances.

5. He asks the court to allow the appeal, quash the judgment of the trial court given on 13th May 2019 and acquit him, and to issue any such orders that it may deem appropriate in the interests of justice.

6. At the hearing of the appeal, the appellant's Learned Counsel, Mr. Mwenda submitted that the appellant was convicted following a re-trial. This was because the original trial had resulted in Criminal Appeal No 120 of 2011 in which Achode J had ordered a re-trial on 29th January 2014. His submission was that the trial court in the second trial should have taken into account the reason why the initial trial was declared a nullity as the decision of the High Court is binding on the trial court.

7. According to Mr. Mwenda, in her judgment, Achode J had made a finding of fact that section 35 of ACECA was not complied with before the charges against the appellant were instituted. It was his submission that before the DPP became the prosecutor, the Attorney General (AG) had prosecutorial powers and matters of Anti-corruption under the Anti-corruption and Economic Crimes Act required consent to prosecute from the AG. Such consent used to be in writing in the hand of the AG. It was his submission that the Office of the Director of Public Prosecutions Act (ODPP Act) 2003, has a commencement date of 16th January 2013. Accordingly, when the decision of Achode J was given on 24th January 2014, this was after the coming into force of the ODPP Act. The appellant presumed that the court (Achode J) had addressed itself to section 35 of ACECA and the provisions of the ODPP Act and had held that failure to comply with section 35 of ACECA was fatal to the trial, and this was why she had ordered a re-trial.

8. Counsel referred the court to the record and submitted that it showed that PW17, an Ethics and Anti-corruption Commission (EACC) officer, is the one who investigated the matter and had testified that after investigation, she preferred the charges against the appellant. It was his submission that EACC has no power to prosecute or prefer charges as it is only the DPP who can do that.

9. It was his submission, further, that PW17 had confirmed in cross examination that she was aware that the matter was a re-trial as the EACC had not complied with section 35 and had not produced a consent. The trial of the appellant, according to Mr. Mwenda, had been concluded without a consent despite the clear order of Achode J that there must be a consent. He contended that the appellant had raised the issue of the consent in submissions before the trial court; that the trial court had confirmed that the appellant had raised the issue of consent both at the trial with PW17 and at the submissions stage, but the trial court had, instead, reconsidered the law and embarked on an interpretation of the judgment of Achode J, which it could not properly do. Further, that the court had also tried to interpret Article 50 on the documents that the accused was entitled to.

10. Mr. Mwenda submitted that under Article 165(6) of the Constitution, the High Court has supervisory jurisdiction over subordinate courts. Accordingly, once the High Court has given directions, the trial court should not try to find an ingenious way of avoiding compliance with such directions. His submission was that the trial court had gone into ingenuity to avoid compliance by invoking statutory provisions and authorities that were not relevant to the matter. In his view, if the DPP did not wish to comply with the requirement to produce the consent, he should have appealed against the decision of Achode J, which he did not do.

11. With respect to the appellant's second ground on whether or not Kenya Re-insurance Corporation (Kenya Re) is a public body, Mr. Mwenda submitted that it was important to establish at the hearing whether the appellant was a public officer and Kenya Re a public body. It was his submission that the only evidence on this point was that of PW 10, the Company Secretary of Kenya Re at the material time. He observed that Kenya Re was initially established in 1971 and was thereafter reconstituted in 1997 into a limited liability company. It was now registered under the Companies Act pursuant to an Act of Parliament, the Kenya Re-insurance Corporation Act, No. 7 of 1997. He observed further that section 2 of the Act defines the Kenya Re-insurance Corporation where the offence took place as a public limited liability company. According to the appellant, the company shares are traded on the Nairobi Stock Exchange, and for it to qualify as a public body, evidence of shareholding is important, but none was produced at the hearing.

12. It was the appellant's case that in the absence of evidence that the government had the majority shares in the corporation, there is nothing that makes the Kenya Re Corporation any more a public agency than others quoted on the Stock Exchange. It was his submission that the confirmation of the Company Secretary that it was a limited liability company registered under the Companies Act was authoritative; and that the objective of the Kenya Re Act was to transform it into a limited liability company and enable the public to buy shares in it. In his view, the court taking judicial notice of the fact that Kenya Re was a public body under section 60 of the Evidence Act was not backed by any evidence.

13. On grounds 4 and 5 in the Petition of Appeal, it was argued on behalf of the appellant that the trial court shifted the burden of proof to him. Learned Counsel relied on Article 49(1)(c) and 50 (1)(a) and (2)(i) which he submitted prohibit compelling a person to make an admission, the presumption of innocence and the right to remain silent respectively. His submission was that at the time of the alleged offence, Kenya Re was aggressively collecting debt. That the appellant had testified that there were efforts to collect debts and that demands were made to various persons holding Kenya Re money.

14. In the course of business, the appellant had demanded payment from Heritage Insurance and the payment was made. He referred to exhibit 2, a letter dated 22.8. 2003, forwarding the cheque the subject of these proceedings to Kenya Re, which required the recipient to sign and return a copy of the letter in acknowledgement. The appellant had signed the letter on 25th August 2003 to acknowledge payment and the only thing in the letter connecting the appellant to the cheque is the appellant's signature acknowledging payment. Thereafter, the cheque went through the usual processes.

15. Mr. Mwenda submitted that somewhere along the way, the cheque was diverted to buy a house the subject of this trial in favour of the second accused, Charles Gichane Kinuthia. Counsel submitted that from the evidence of PW3, PW4 and PW13, no evidence was presented to the trial court from the point when the property was allocated to the 2nd accused and paid for that showed the involvement of the appellant. He submitted that the fact that the appellant could not recall what happened to the cheque after he received it was visited on him and he was called a schemer; that this was done despite the fact that he had very many people working under him; and that the cheque was handled by PW3, PW4 and PW13. This, according to Learned Counsel, shifted the burden of proof onto the appellant, which was contrary to the Constitution.

16. With regard to the appellant's sixth ground of appeal, it was submitted on his behalf that he was charged with conferring a benefit to Gichane, yet, if the court reviewed the evidence, specifically the evidence of PW3, PW4, PW8, PW9 and PW10, it would not find the hand of the appellant either in the allocation or the transfer to Gichane.

17. On grounds 7, 8 and 9, Mr. Mwenda contended that the house at issue was valued at Kshs 3,196,896 and there was a letter of offer that gives the actual value of the house. He submitted that when the initial conviction was entered on 6th February 2011 in ACC No. 3 of 2008, the 2nd accused in his testimony had stated that the house was re-possessed by EACC and Kenya Re in 2010. Thereafter, the 2nd accused never went back to the house even after a re-trial was ordered, and the house remains under Kenya Re. Mr. Mwenda submitted that in the judgment from which this appeal arises, the appellant was ordered to pay a mandatory fine of Kshs 6,393,792, which is twice the value of the house, in accordance with section 48 of ACECA.

18. His submission was that since it was not in dispute that the house had been repossessed, this should be taken into consideration in assessing any loss for the purpose of section 48(1)(b). In his view, there was no quantifiable benefit to the appellant. Since the value of the house was Kshs 3 million, having recovered the house and taken possession, there was no loss to Kenya Re, and none of the witnesses quantified the loss under section 48(1)(b) of ACECA. Mr. Mwenda's submission was that the amount ordered to be paid by the appellant is excessive, is not based on any evidence and is oppressive to the appellant.

19. Counsel relied on the decision in **Joan Chebichii Sawe v Republic [2003] eKLR** with respect to the circumstances under which the court should rely on circumstantial evidence. He also cited the decisions in **Paul Kanja Gitari v R (2016) eKLR** and **Dominic Mwilaria v Republic [2018] eKLR** on the duty of and the manner in which the appellate court should re-evaluate the evidence before the trial court.. The appellant urged the court to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant.

20. The DPP opposed the appeal on the basis of written submissions dated 16th July 2019 which were highlighted by Learned Counsel, Ms. Sigei. In the written submissions, Ms. Sigei argues, first, that the applicant was a public officer working for a public body as defined in section 2 and section 2(1)(e) of ACECA. She submitted that the trial court had taken judicial notice under section 60 of the Evidence Act that Kenya Re was a corporation formed under the provisions of the Kenya Re-insurance Corporation Act, with the majority shareholding being by the state through the Cabinet Secretary for Finance.

21. With respect to the appellant's conviction, her submissions were that the circumstantial evidence adduced against the appellant had established the offence of abuse of office against him.

22. In response to the argument that the trial court should have addressed itself to the issues raised in the judgment ordering a re-trial, Ms. Sigei submitted that this was a matter coming for re-trial in **Anti-corruption Case No. 2 of 2014** where the appellant was charged alongside Charles Kinuthia Gichane as the 2nd accused. As the case was a re-trial, it would start afresh, the witnesses called afresh and their evidence taken afresh. It would mean that it was at the court's discretion to address itself to the issues before it and make a determination, which it did. Her submission was that the court exercised its discretion judiciously and delivered its judgment from which this appeal arises.

23. Ms. Sigei further submitted that as this was a fresh matter and the appellant took plea on 28th February 2014 after the promulgation of the 2010 Constitution, the appellant was subject to that Constitution and the Acts of Parliament emanating therefrom.

24. Ms. Sigei submitted with respect to the issue of consent being sought (from the DPP) and supplied to the defence that a reading of section 35 of ACECA brings out, first, that EACC, as a public body, was given investigation powers, would conduct investigations and make a report to the DPP giving the result or outcome of the investigations. It would also give its recommendations on possible charges or actions to be taken; that the effect of the recommendation would be either prosecution or any other action as the DPP would exercise his powers conferred by Article 157. Her submission was that by virtue of the powers given to the DPP by Article 157, the presence of a prosecutor from the office of the DPP was enough consent and an indication to the court that the matter was for prosecution and section 35 of ACECA had been complied with. Further, as the ODPP Act had been enacted pursuant to Article 157 of the Constitution, it provided guidelines on how to manage prosecutorial powers conferred on the office.

25. With regard to the argument that Kenya Re was a limited liability company, Ms. Sigei submitted that the court took judicial notice under

section 60 of the Evidence Act that Kenya Re was governed by the Kenya Re-insurance Corporation Act, No 7 of 1997. The majority of its shareholding was by the government, which addresses the issue of whether the appellant was a public officer and whether Kenya Re was a public body. The answer to both questions, in her view, is in the affirmative. She submitted that this position was supported by section 2(1) (e) of ACECA which defines a public officer and a public body and the appellant fits the description of a public officer as he was an employee of Kenya Re, where he had been employed as the financial controller.

26. It was Ms. Sigei's submission that this case was one in which the court relied on circumstantial evidence. She cited the case of **R v Michael Muriuki Munyuri (2014) eKLR** in which the court relied on the decision in **Rabanga alias Onyango vCr. A. No. 32 of 1990(UR)** in which the court reiterated the principles on which circumstantial evidence can be found to have been established and on the basis of which a conviction may be founded. Her submission was that the inference of guilt against the appellant had been cogently established through the evidence of the 17 prosecution witnesses and the exhibits produced. It was the appellant who was the initiator of the letter dated 12th August 2003 requesting for settlement of the debt owed by Heritage Insurance in which the 2nd accused was employed. The 2nd accused had prepared the cheque and taken it to Kenya Re for it to be effected. The amount of the cheque (exhibit 3) was Kshs 3,196,896.

27. In the same week, immediately after the issuance of the cheque, a letter of offer dated 19th August 2003 (exhibit 6) was made to the 2nd accused for the sale of house No. 70 LR No. 209/10611/106. The same week that the request for settlement was made the letter of offer was prepared and signed by the 2nd accused, accepting the offer to buy the house. The cheque was for the same amount as had been demanded by the appellant and the cheque was signed by the 2nd accused. Ms. Sigei asked the court to note from the evidence and the exhibits that the whole process of the transfer went through smoothly until the 2nd accused got a title to the property in the letter of offer. She posed the question how a person would request for a specific amount of money and at the same time a letter of offer is made for the same amount. In her view, it showed that the appellant was aware and colluded with the 2nd accused for him to get the benefit of the house.

28. According to the state, the defence given by the appellant was that the amount was in respect of payment due to the 2nd accused to offset fees on consultancy services given by the 2nd accused to Kenya Re. However, there were no board resolutions or minutes to confirm that the 2nd accused was to be paid such amounts. Further, there were no terms or conditions or any resolutions in the letter of offer that showed that Kenya Re had resolved to offset the amounts due to the 2nd accused. She submitted that the appellant had acted without the resolution of the board and fraudulently conferred a benefit on his co-accused. From the evidence of the 17 witnesses, the authority for the money to be released emanated from the office of the appellant. The money he had requested for in the letter of 12th August 2003 was not used for the intended purpose; the appellant had, by virtue of his office, caused the 2nd accused to be allocated a house belonging to Kenya Re; and Kenya Re had as a result lost the amount in the letter of offer.

29. With regard to the contention that the court had shifted the burden of proof to the appellant, Ms. Sigei submitted that the appellant was granted a full hearing. By virtue of his being put on his defence, the burden had shifted to him to explain how he committed such a crime, and the court had found his defence not plausible and found him guilty as charged. She maintained that the circumstantial evidence pointed to his guilt and his conviction was safe.

30. As regards his sentence, it was Ms. Sigei's submission that it is within the discretion of the court to pass a sentence that was guided by the sentencing policy. The sentence against the appellant was legal, proper and was not excessive and harsh as submitted by the appellant. He had abused his position of authority and fraudulently conferred a benefit on the 2nd accused. He had also betrayed the trust bestowed on him by the public to ensure that the money entrusted to him was used in a fair and accountable manner. There was a substantial loss of Kshs 3,196,896 that was to be used for settlement to Kenya Re by Heritage Insurance and the amount was used to purchase the house. The court properly passed the sentence it did, and she urged the court to dismiss the appeal and uphold the conviction and sentence.

31. In his submissions in reply, Mr. Mwenda argued that the record will bear out the fact that the appellant was not given a fair trial. He maintained that the trial from which this appeal arises was not a fresh trial, contrary to the assertion by the state, but a re-trial. As the judgment of the High Court ordering a re-trial was on 24th January 2014, the case was a re-trial and needed to conform to the law existing at the time the offence was committed and the appellant was charged.

32. According to Mr. Mwenda, the appellant was not the initiator of the scheme; that the letter of 12th August 2003 had a total of 8,251,240 and the appellant was not demanding a specific amount that translated to a benefit to the 2nd accused. He reiterated that debt collection was part of the responsibility of the appellant, and there is no evidence showing that the appellant ever saw the letter of offer or that he dealt with it in any manner.

33. Mr. Mwenda further submitted that it was not true that there was a scheme to defraud Kenya Re; that there was no evidence that the cheque was being used to pay consultancy fees; that there was evidence that the 2nd accused and others were employed as consultants by Kenya Re and were paid in cash at the cash office; but that there was no evidence to show that the appellant approved commuting of the fees into the house. Mr. Mwenda noted that there was a letter (exhibit 16) from the 2nd accused requesting to commute his payment to a house but the letter was retrieved from the 2nd accused, not the appellant, and there was no record of it in Kenya Re. The appellant had nothing to do with the allocation and transfer process to the 2nd accused as alleged.

The Evidence

34. I have considered the record of the trial court and the submissions of the parties which I have set out above. As the first appellate court, I have a duty to re-evaluate the evidence adduced before the trial court and reach my own conclusions. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the benefit of doing- see **Okeno v Republic (1972)EA 32; Kiilu & Another v Republic [2005]1 KLR 174** and **Dominic Mwilaria v Republic [2018] eKLR**.

35. The prosecution case as it emerges from the evidence of the 17 witnesses is as follows. George Njoroge Macharia (PW1, Macharia), an employee of Heritage Insurance Company Limited whose functions included settling amounts due from and collecting amounts due to the insurance company received a letter dated 12.8.2003 (P-Exhibit -1) which indicated that an amount of Kshs 8,251,240/= was due from Heritage Insurance to Kenya Re. The said amount included an amount of Kshs 3,196,896/, which was the first item among the six items set out in the letter. It related to a fire policy for the period running from 1st January 1999 to 31st March 1999.

36. As it corresponded to the amount due from Heritage Insurance to Kenya Re, Macharia raised the supporting documents and requested the Head of Finance to pay. The letter dated 12. 8. 2003 came from the Kenya Re Financial Controller, Mr. Kinyua, the appellant in this matter, while the instructions to pay the amount came from his co-accused, Mr. Charles Gichane, who was Macharia's superior at Heritage Insurance. The documents he had prepared were then taken to the Heritage Insurance Finance Department and a cheque was issued.

37. It emerged from the evidence of Anne Nyokabi Murira (PW2) an Administrative Assistant at Heritage Insurance, that in August of 2003, she had been dispatching cheques, among which was one for Kshs. 3,196,896/=. Heritage Insurance used to record in a register the details of the cheque, including the date and amount of the cheque, and the person who received the cheque had to sign the register. The cheque for Kshs. 3,196,896/= payable to Kenya Re was forwarded by way of a letter dated 22.8.2003 (P-Exhibit-2) addressed to Kenya Re- and marked for the attention of the appellant. The letter was signed by the appellant's co-accused, Mr. Charles K. Gichane, the Re- Insurance Manager of Heritage Insurance. The letter was written to the attention of the appellant, was signed by his co-accused, and was the letter which forwarded the cheque No. 026937 dated 22.8.2003 for Kshs. 3,196,896 (P-Exhibit -3) to Kenya Re.

38. According to the register in which the cheques for dispatch were recorded, the cheque was received by Mr. Charles Gichane, the author of the letter that dispatched the cheque. He had indicated that he wanted to deliver the cheque personally to Mr. Kinyua. She knew his signature which she identified on the voucher (P-Exhibit- 4) in respect of the cheque and had witnessed him signing the register after he received the cheque from her and indicated that he had received the cheque on 22.8.2003.

39. Michael Jeti Mbeshi (PW3) was in charge of property management and administration at Kenya Re. He had been informed by one of the Kenya Re property officers, Rosemary Gitau (PW4), that the appellant had indicated that a Mr. Charles Gichane was interested in buying one of the Kenya Re properties at Villa Franca Estate in Nairobi. On 19.8. 2003, he signed a letter of offer to Mr. Charles Kinuthia Gichane. Mr. Gichane had accepted the offer (P-Exhibit -6) on 25.8.2003 and indicated that he had attached a bankers cheque 026937 for Kshs. 3,196,896/=. A receipt was issued to Mr. Gichane for that amount (receipt No. 0010201415 dated 28th August 2003, Exhibit 7).

40. The transaction details indicated were in respect of Villa Franca Estate House No. 70 under account name Gichane Charles Kinuthia. Once the payment was confirmed, a sale agreement dated 30.9.2003 had been prepared between Kenya Re- Limited as the vendor and Charles Kinuthia Gichane as the purchaser in respect of land reference No. 209/10611/106 – House No. 70 for the purchase price of Kshs.3,000,000/= and a further Kshs.196,896/= in respect of, inter alia, the estimated legal fees, making a total of Kshs 3,196,896/=. This was the amount of the cheque that had been sent to the appellant by his co-accused by way of the letter dated 22.8. 2003.

41. A transfer dated 7.10.2003 from Kenya Re Ltd to Charles Kinuthia Gichane in respect of L R No. 209/10611/106 House No. 70 was thereafter prepared and registered in favour of Gichane, and he was thereafter given possession of the property by a letter dated 1.10.2003 (P-Exhibit-10) from Kenya Re. This emerged from the evidence of Rosemary Wambui Gitau (PW4) who had prepared a letter of offer in respect of House No. 70 Villa Franca estate (P. Exhibit 6] and had also recorded the completion documents, pertaining to water and power, in a delivery book **(**P-Exhibit-13) which she had handed over to Gichane.

42. Momut Asman Ole Sialo (PW5) was an accountant at Kenya Re. He had opened an account number P1000703 in respect of House No. 70 Villa Franca which had been offered to Charles Kinuthia Gichane upon receipt of the letter of offer at a purchase price of Kshs 3,000,000/=. A memo dated 26.9.2003 confirming that the account had been cleared addressed to the Legal and Property Department was then prepared and signed by the Assistant Chief Accountant, a Mr. Mbugua. The memo showed that the selling price of Kshs. 3,000,000/= had been fully paid.

43. Nicholas Macharia (PW7 Nicholas), an employee of CFC Stanbic Bank at the material time, confirmed that cheque No. 026937 (P exhibit 3) for Kshs 3,196,896/= had been drawn by Heritage Insurance on an account held at CFC Bank Chiromo Road Branch. It was payable to Kenya Re-Insurance Corporation Ltd, had a collecting stamp of 29.8.2003 and was received by CFC on 1.9.2003. It was debited to the account of Heritage AII Insurance Company Ltd Account No. 0200055004. The cheque was payable to Kenya Re-Insurance Corporation Ltd.

44. Johnson Githaka (PW8, Githaka), the Managing Director of Kenya Re, produced the sale Agreement dated 30.9.2003 for L. R. No. 209/10611/106 House No. 70. It was drawn by R. O. A Otieno & Co. Advocates and was signed on behalf of Kenya Re by Githaka and the Company Secretary. He also produced the transfer of L R No. 209/10611/106 House No. 70 from Kenya Re to Charles Kinuthia Gichane. The transfer, which bore two dates, 20.4.2004 and 7.10.2003 was signed by Githaka and the Corporation Secretary.

45. With regard to a letter dated 28.4..2000 with the reference *"Appointment of Consultancy Services"* written by the appellant and addressed to Mr. Charles Gichane, Mr. Githaka stated hat he had never seen it before, but he was not the Managing Director in 2000. The letter was signed by the appellant and appeared to be in respect of consultancy services rendered by Gichane to Kenya Re. There was, however, also produced in evidence a handwritten letter from Gichane to Kenya Re marked for the attention of the appellant, regarding a house for sale. The letter, which was not stamped with the Kenya Re stamp, referred to a telephone conversation, between the appellant and Gichane. In the letter, Gichane asks for part of the commission he had earned to be commuted to purchase of a house either in South "C" or Villa Franca Estate. According to Mr. Githaka, there was no policy in Kenya Re at any time of commuting commission earnings to houses.

46. Mr. Githaka acknowledged that there was a problem in Kenya Re with bad debts and outstanding amounts that related to the core business of the organization, re-insurance. The Finance and the Re-insurance Departments were involved in the reconciliation and collection of the bad debts. As Kenya Re did not have the internal capacity to do the reconciliation work, it resolved the problem by recruiting data entry personnel to capture the information. Mr. Gichane, however, was not a data entry personnel as such personnel were domiciled in Kenya

Re.

47. Margaret Otega (PW9) was the Corporation Secretary of Kenya Re in 2003. She had written the letter of instructions dated 2.9.2003 to the firm of R.O.A Otieno & Co. Advocates, the firm of PW8, to prepare the sale agreement and transfer between Kenya Re and Gichane. Ms. Otega had indicated that the purchaser had paid Kshs. 3,196,896/=. The agreement for sale was executed by Kenya Re and the purchaser. Ms. Otega produced the letter of offer dated 2.9.2003 (P exhibit 17) and the original title for L.R 209/10611/106 (P-Exhibit -18).

48. Ms. Otega's evidence was that she was not aware that Mr. Gichane had been contracted by Kenya Re to offer consultancy services. Had he been, the matter would have gone to the Board of Directors and the Board would have made a resolution to that effect. She was the Secretary to the Board but did not remember Mr. Gichane having been appointed by the Board for those services.

49. Patrick Batiko (PW 11) was an employee of Heritage Insurance at the material time. In 2001, he was working in Heritage Insurance as a cashier. He had prepared a cheque after he was given a payment voucher to which was attached the letter dated 22. 8. 2003 (Exhibit 2) from Heritage Insurance in respect of money due to Kenya Re from Heritage. The letter was for a total sum of Kshs.3,196,896/= due to Kenya Re and was signed by Gichane. Batiko had printed the cheque dated 22.8.2003 (exhibit 3) in his capacity as cashier at Heritage Insurance Company. According to Batiko, this was the same amount that was mentioned in exhibit 2, which stated that the amount was in respect of the first instalment of the amount which was indicated in the reconciliation of the Heritage Insurance Re- Insurance Department as money due to Kenya Re-insurance Corporation.

50. John Gwitheria Mbugua (PW12) was working with Kenya Re- Insurance Corporation as an Assistant Chief Accountant in 2003. He had received a memo from Mbechi, the Property Manager, dated 29.8.2003 regarding House No. 70 Villa Franca Estate and Charles Kinuthia Gichane. The memo was in reference to a letter of offer to Gichane duly signed by the purchaser, who had paid Kshs 3,196,896/=. There was also a letter of offer dated 19.8.2003 addressed to Charles Kinuthia Gichane. The purchase price was indicated as Kshs.3,000,000/=. He had sent a memo dated 26.9.2003 addressed to the Corporation Secretary/Principal Legal Office with respect to the same property in which he confirmed that the purchase price had been paid in full. The payment for the property was made by a cheque of Kshs.3,196,896/= from Heritage Insurance. The letter from Heritage Insurance (Exhibit 1) referred to payment of an outstanding account that was due to Kenya Re from 1st January 1999 to 31.12.1999.

51. Isaac Kiprop Tuhumo (PW13) was working as a cashier in the Accounts Department of Kenya Re at the material time. He had banked two cheques to a KCB account. One cheque for Kshs Kshs.3,196,896 was shown in the banking slip as drawn by Gichane. However, the cheque, dated 22.8.2003, was payable to Kenya Re and was drawn by Heritage A11 Insurance Co. Limited. He had indicated the cheque in the banking slip (KCB cheque deposit slip dated 29.8.2003 – Exh-20) as having been drawn by Gichane since, upon receiving the cheque, he had issued the receipt on the basis of other documents which included an account number. The account number, according to the system, belonged to C. Gichane.

52. Stephen Lugaria (PW14) was an employee of Heritage Insurance from 1997 to 2015. He was an Assistant General Manager, Finance at the company. The company used to make large payments by way of cheques, and it was his evidence that cheque No. 026937 dated 22.8.2003 (P exhibit 3) drawn by Heritage Insurance for the sum of Kshs.3,196,896/= was payable to Kenya Re-Insurance Corporation Ltd. It was however used to offset a mortgage by one of the staff of Heritage Insurance, Charles Gichane. George Gachihi (PW15) a state counsel at the Attorney General Chambers was a Land Registrar in the Ministry of Lands between – 1993 – 2013. He had registered the transfer of land parcel no. L.R. 77511 in respect of L. R. No. 209/10611/106. The transfer was from Kenya Re to Charles Kinuthia Gichane. The transfer was duly executed by the parties and he had signed it on 20.4.2004. The consideration for the transfer was Kshs. 3,000,000/=.

53. Senior Superintendent of Police John Muinde based at DCI Headquarters in Nairobi had received and examined various documents pertaining to the offences in this case. Among them was the letter dated 22.8.2003 from Heritage Insurance to Kenya Re; the letter dated 4.7.2003 from Gichane to Kenya Re- which was marked for the attention of the appellant; the transfer form in respect of L. R No. 209/10611/106 house No. 70 from Kenya Re to Charles Kinuthia Gichane dated 20.4.2004; the agreement for sale between Kenya Re Corporation Ltd and Charles Kinuthia Gichane over the same property dated 30.9.2003; a letter from Kenya Re to Heritage Insurance Co. Ltd dated 12.8.2003; a letter from Kenya Re to Charles Gichane dated 26.4.2000. He had also examined specimen signatures of the appellant and Charles Gichane. He had confirmed that the documents alleged to have been signed by the appellant and his co-accused respectively were indeed signed as alleged.

54. The final prosecution witness, Eva Wachuka Thigini (PW17), a Forensic Investigator with EACC had undertaken the investigation of the matter. The investigations related to allegations that Kenya Re Insurance Corporation had fraudulently transferred a property L. R No. 209.10611/106 – House No. 70 situated at Villa Franca Estate without any consideration. The investigating officer reiterated the evidence that had emerged from the other prosecution witnesses.

55. It emerged in cross-examination of the investigating officer that the offence in this case took place in 2003 when Kenya Re was a state corporation, though she did not have documents to support this position. She confirmed from a newspaper that the corporation was now listed on the Nairobi Stock Exchange. She further conceded that the matter before the trial court was a re-trial ordered by the High Court because the EACC had not complied with section 35 of ACECA at the inception of the first trial.

56. It also emerged from her evidence that there was a double loss for Kenya Re as its cheque was used to buy a house. The cheque came from Heritage Insurance to pay premiums but it was not supposed to be used by Heritage Insurance staff to buy a house from Kenya Re. There was no independent payment made by Gichane to Kenya Re, and while there was a reference (Exh-6) to a Bankers cheque No. 026937 for Kshs.3,196,896/=, that was the same number as in Exhibit -3 cheque No. 026937 and the amount was the same.

57. When placed on his defence, the appellant elected to give a sworn statement. He stated that he was employed at Kenya Re in 1992 as a Senior Accountant, and in 1994, was appointed Assistant Chief Accountant. He was appointed Financial Director in 2003. At the time of his appointment, Kenya Re was operating under a statute called Kenya Re-insurance Corporation Act and was thus a parastatal until 1997

when its status was changed to a limited liability company and reconstituted as the Kenya Re–insurance Corporation Ltd.

58. According to the appellant, prior to 1997, there were discussion about government getting out of re-insurance business, and it was therefore necessary to reconstitute the corporation for purpose of privatizing it. To do that, strategies were put in place, one of which was to identify non - core assets of the corporation to be sold in order to generate cash, and it was also necessary to update financial statement of the corporation. As part of the reconciliation of the data of Kenya Re, persons were appointed from outside Kenya Re to work on the data. Among these people were the appellant's co-accused. The appellant decided that the people working on the reconciliations would be paid on a commission basis. It was agreed that the appellant's co-accused would be paid on the basis of percentages, but before that, he was paid through petty cash.

59. The appellant confirmed that Kenya Re developed Villa Franca Estate among many other estates. The development was completed in 1996, but uptake of the houses was very low and it was costing Kenya Re a lot to keep the estate in presentable form. A decision was made to explore possible avenues to create awareness to attract buyers, and they tried to sensitise staff members to reach out to possible buyers, including staff from insurance companies. It was his testimony that Mr. Gichune got to know about (the property) through such marketing, and the appellant did not personally market the property to him. As they had interacted, Mr. Gichane mentioned to the appellant that he would be interested in buying one of the Kenya Re houses, and the appellant informed him that Villa Franca Estate was a good option. The appellant did not know how house No. 70 was identified and allocated to Gichane.

60. On the letter dated 4.7.2003 which was addressed to him by Mr. Gichane requesting to commute his commission to pay for the house, the appellant stated that he did not receive the letter personally. If he had, he would have initialed it personally to somebody indicating action he wanted taken and would not be involved in the process of purchase. He denied that he participated in anything apart from introducing Gichane to buy a house until he saw this matter in court.

61. He conceded that he had received P-Exhibit 16, a handwritten letter from Gichane to Kenya Re and marked for his attention. It was his case that the letter was in reference to a telephone discussion between him and his co-accused to formally request that part of the commission that was due to him from Kenya Re for consultancy work done be commuted for purchase of any of the houses on offer at either South C or Villa Franca. He did not know whether Gichane paid for the house as he did not handle the transaction after he shared the information with the property department.

Analysis and Determination

62. From a consideration of the appellant's grounds of appeal and the submissions of his Counsel, I believe that five issues arise for determination:

> ***i. Whether the appellant was a public officer employed in a public office for the purposes of ACECA;***
>
> ***ii. Whether the trial court erred in failing to find that there was non-compliance with section 35 of ACECA which was the basis on which the court seized of Criminal Appeal No. 120 of 2011 John Faustin Kinyua & another v Republic [2014] eKLR prosecution had ordered a re-trial;***
>
> ***iii. Whether the circumstantial evidence adduced before the court was sufficient to found the conviction of the appellant;***
>
> ***iv. Whether the court erred in shifting the burden of proof on the appellant;***
>
> ***v. Whether the sentence imposed on the appellant was proper and in accordance with the law.***

Whether the appellant was a public officer

63. A key plank of the appellant's appeal is that he could not be charged under ACECA as he was not a public officer, his argument being that Kenya Re was a limited liability company, not a public or state corporation. The trial court had therefore erred in taking judicial notice of the fact that it was a state corporation.

64. Section 2 of ACECA defines a public officer to mean "***an officer, employee or member of a public body, including one that is unpaid, part-time or temporary.***" The same section defines a public body as follows:

> ***"public body" means—***
>
> ***(a) the Government, including Cabinet, or any department, service or undertaking of the Government;***
>
> ***(b) the National Assembly or the Parliamentary Service;***
>
> ***(c) a local authority;***
>
> ***(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or***
>
> ***(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body***

by virtue of any of the preceding paragraphs of this definition;(Emphasis added)

65. The appellant is aggrieved that the trial court took judicial notice under section 59 and 60 of the Evidence Act that Kenya Re is a statutory body under the provisions of the Kenya Re-insurance Corporation Act. He is further aggrieved that the trial court had observed that it is a matter of public knowledge that the corporation, though quoted on the Nairobi Stock Exchange, is a public company whose controlling interest is held by the government of Kenya through the Cabinet Secretary in charge of Finance. The trial court had accordingly found that the corporation was a public body and the appellant a public officer as defined under section 2(1)(e) of ACECA.

66. Having considered the appeal and the submissions on this ground, I am unable to agree that there was any misdirection on the part of the trial court. The Kenya Re-insurance Corporation was and remains a public statutory corporation. The Kenya Reinsurance Corporation Act, 1997 Act No. 7 of 1997 was enacted in 1997 but it remains in force and is the operating statute with respect to the corporation. Section 3 thereof provided for incorporation of a limited liability company whose primary shareholder is the government through the Cabinet Secretary for Finance. Accordingly, the trial court properly found that the appellant was a public officer as defined under ACECA. This ground of appeal therefore has no merit.

Non-compliance with section 35 ACECA

67. The second issue to consider is whether the trial court erred in failing to find that the prosecution had not complied with section 35 of ACECA, the section on the basis of which the appellant's initial trial had been nullified. The submissions by Mr. Mwenda, as I understand them, were that the trial court re-interpreted the decision of Achode J in the appeal instead of finding that the trial from which this appeal arose was also a nullity as the document from EACC to the DPP had not been produced in court, implying that there was no consent to prosecute.

68. I have read the judgment of the trial court on this point. I note that the court considered the submissions made on behalf of the appellant, and the authorities relied on, the thrust of which seems to have been that the trial was a nullity as the report under section 35 of ACECA had not been exhibited by the prosecution. The trial court relied on the decision in **R v Joseph Koech Sirma & Others Criminal Revision No. 3 of 2016 (R vs Josphat Sirma and 5 Others (2017) eKLR)** a decision rendered by Achode J. The trial court found, correctly in my view, that there was no need to exhibit the report from the EACC under the said section. The prosecution was being undertaken by the DPP, the clearest indication that the investigation of the appellant and his co-accused were brought to his attention and he had taken further action to bring the prosecution before the court.

69. I am unable to find any error on the part of the court in the manner in which he dealt with the question of the report under section 35 of ACECA. I agree with the reasoning of Achode J in **Josphat Sirma and 5 Others v R** that the report is an internal assessment report prepared by investigating officers. It is not evidence required to be supplied to an accused person under Article 50(2)(j) of the Constitution. Nor is it in the nature of a consent, required under the old prosecution regime when prosecutions were conducted by the office of the AG, the absence of which would render a prosecution a nullity. Accordingly, I find no error on the part of the trial court in the manner in which it addressed itself to the issue, and accordingly find no merit in this ground.

Circumstantial Evidence

70. I will consider the issue of whether the circumstantial evidence adduced before the trial court was sufficient to found the conviction of the appellant together with the question whether the trial court shifted the burden of proof to him.

71. I have set out above the evidence adduced before the trial court on the basis of which the appellant was convicted on the charge of abuse of office. I have found that the appellant was a public officer employed in a public body as the Chief Finance Officer and later as the Director, Finance. The evidence before the trial court shows that the appellant authored the letter dated 12. 8.2003 (P exhibit 1) which was a demand for certain monies owed by Heritage Insurance to Kenya Re. One of the items in the letter was the amount of Kshs 3, 196,896 in respect of a fire policy, according to the evidence of PW1, Macharia, for the period 1st January 1999 to 31st March 1999.

72. The letter was delivered to the appellant's co-accused. The amount was confirmed as owing from Heritage to Kenya Re, and a cheque was raised for the said amount (P exhibit 3) according to the evidence of PW1 (Macharia), PW11 (Batiko) and PW24 (Lugalia). The cheque was collected personally by the appellant's co-accused, Gichane, as emerged from the evidence of PW2, (Murira) who was in charge of dispatch of cheques. Gichane sent the cheque via a forwarding letter dated 22. 8. 2003 marked for the attention of the appellant. This is the cheque that was then used to ostensibly 'pay' for the house that was 'sold' to Gichane.

73. Counsel for the appellant argues that the trial court shifted the burden of proof on the appellant in violation of his rights under Articles 49(1)(c) and 50 (1)(a) and (2)(i). I note in passing that Article 49 relates to the right to bail and has no application in the present context. Article 50(2)(a) relates to the right to be presumed innocent, while 50(2)(i) relates to the right to remain silent.

74. Having considered the prosecution evidence and the appellant's defence, I am not satisfied that the trial court shifted the burden of proof onto the appellant. He elected to give a sworn statement in his defence, and was, properly so, cross-examined. His defence was that at the time of commission of the offence, Kenya Re was aggressively collecting debts, and that the cheque in contention was in respect of such debts owing from Heritage Insurance. The appellant had signed the letter forwarding the cheque on 25th August 2003 to acknowledge payment, and the only thing linking him to the cheque and the letter was his signature acknowledging payment. He also stated that he had assigned his co-accused the task of collecting debts for Kenya Re, for which he was paid a commission on the basis of percentage of the amount collected.

75. The appellant and the state have referred this court to several decisions in which the principles regarding circumstantial evidence are enunciated. These include **Joan Chebichii Sawe v Republic** and **R v Michael Muriuki Munyuri (2014) eKLR**. The decision of the Court of Appeal in **Joan Chebichii Sawe v Republic** sets out succinctly what is required to justify a conviction on the basis of circumstantial

evidence, and on whom that burden rests. The Court stated as follows:

> ***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."***

76. The evidence in this case shows the following: It is the appellant who authored the letter demanding various payments from Heritage Insurance in which Gichane was the Re-insurance Manager. The letter was demanding various amounts, including Kshs 3, 196,896. This amount was confirmed to be due and owing to Kenya Re from Heritage, and a cheque was drawn in respect thereof. It was collected personally by Gichane and was forwarded for the personal attention of the appellant. It was diverted into the Kenya Re system to appear as though it had been paid by Gichane for purchase of a house. In the banking slip, even though drawn in favour of Kenya Re by Heritage Insurance, it was indicated, according to the evidence of Tuhumo, as having been drawn by Gichane.

77. It was the appellant who had informed Gichane about the house, and the house was transferred to him without his ever having paid a coin to Kenya Re for it. The appellant suggested in his defence that he had given his co-accused consultancy work to assist with reconciliation of debts due to Kenya Re and to assist in collection; and that the amount of Kshs 3, 196,896 was used to pay for the house in lieu of payment of consultancy fees. There was, however, no evidence to show such a practice within Kenya Re, nor was there anything to show that anyone other than the appellant could have directed the use of the cheque to facilitate the payment for a house by Gichane under the guise that it was a cheque drawn by him.

78. In my view, the evidence adduced before the trial court showed, as the trial court found, that the appellant, who occupied a position of authority in Kenya Re, used his position to assist in a criminal scheme that led to the loss of the amount of Kshs 3, 196,896 and a house by his employer. He and his co-accused had hatched the scheme to have the house allocated and transferred to his co-accused without the payment of any money whatsoever. As the trial court found, he had facilitated the purchase of a house from Kenya Re by Gichane using money that was due from Heritage Insurance to Kenya Re in respect of a debt owed by Heritage Insurance to Kenya Re.

79. The inculpatory facts in this case are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. I therefore find that the circumstantial evidence in this case pointed to the guilt of the appellant in the scheme that led to the loss of the house and the amount due to Kenya Re from Heritage Insurance. I am not able to find that there was a shifting of the burden of proof to him, for to observe that he had been silent on what had happened to the cheque after he received it is not to shift the burden of proof to him.

Whether the sentence imposed on the appellant was proper and in accordance with the law

80. The final issue for consideration regards the sentence imposed on the appellant. It was argued for the appellant that no quantifiable loss had been established, and it was therefore erroneous on the part of the trial court to impose a mandatory fine of Kshs 6,393,792, which is twice the value of the house, in accordance with section 48 of ACECA.

81. Section 48 of ACECA provides as follows:

> ***(1) A person convicted of an offence under this Part shall be liable to—***
>
> ***(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and***
>
> ***(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.***
>
> ***(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—***
>
> ***(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);***
>
> ***(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.***

82. In sentencing the appellant, the trial court passed sentence as follows:

> **a. Punishment under section 48(1)(a) of ACECA a fine of Kshs 1,000,000 (one Million) in default one (1) year imprisonment**
>
> **b. Mandatory punishment under section 48(1)(b) he acquired (sic) a quantifiable benefit of Kshs 3,196,896- hence the mandatory fine shall be Kshs 6, 393,792(Six Million Three Hundred and Ninety Three Thousand, Seven Hundred and Ninety Two Shillings in default serve three years imprisonment.**

83. The trial court had also directed that pursuant to section 54 (b) of ACECA, House No. 70 on L. R. No. 209/10611 /106 at Villa Franca Estate shall revert to Kenya Re forthwith.

84. From the evidence, upon transfer of house No. 70 Villa Franca Estate to the appellant's co-accused, Kenya Re had suffered a double loss.

It was owed Kshs 3,196,896 by Heritage Insurance. This amount had been paid by cheque but instead of being credited to the Kenya Re account as a 'first instalment,' as it was described in the letter of 22.8. 2003, in respect of a debt due to it, the cheque was diverted and utilised as the purchase price for the house that Gichane purported to buy. The order of the court from which this appeal arises was that house No. 70 on L.R. No. 209/10611/106 Villa Franca Estate shall revert to Kenya Re forthwith. Mr. Mwenda stated from the bar that the house had reverted to Kenya Re in 2011 after the first trial.

85. I have perused the record of the trial court and the evidence tendered before it by the defence. Apart from the statement by the appellant's co-accused, Mr. Gichane, that the house reverted to Kenya Re after the first trial, I have not found any evidence that it did. The evidence on record indicates that the house was transferred to Gichane and a title issued to him. There was thus a loss to Kenya Re of Kshs 3,196,896. Should the house have reverted to Kenya Re as submitted by Mr. Mwenda, and I note that the state did not dispute this contention or comment on the issue at all, which suggests that it may have reverted to Kenya Re, then there would be a lesser loss to Kenya Re, and a lesser quantifiable benefit for the appellant or his co-accused, than found by the trial court.

86. I thus have some misgivings about the judgment of the trial court with respect to the mandatory fine under section 48(1)(b). On the material before me, I find that the trial court may well have fallen into error in imposing the mandatory fine of Kshs 6, 393,792 (Six Million Three Hundred and Ninety Three Thousand, Seven Hundred and Ninety Two Shillings, and the default term of imprisonment for three years' imprisonment on the appellant.

87. The court has a duty to do justice in the matter before it, and to maintain this mandatory fine in light of the facts before it would be to maintain an injustice against the appellant. When there is a doubt, I believe it should be resolved in favour of the accused or, in this case, the appellant before the court.

88. The trial court made an order that house No. 70 on L.R. No. 209/10611/106 Villa Franca Estate reverts to Kenya Re. The evidence indicates that the value of the house was Kshs 3,000, 000. The amount of the cheque diverted to purchase the house was Kshs 3,196,896. The evidence of Mbeshi (PW3) indicates that the balance of the amount of the cheque, Kshs.196,896/=, was utilised in respect of, *inter alia*, the estimated legal fees. Once the house reverted to Kenya Re, which had already received the payment of Kshs 3,000,000 purportedly as purchase price, then the quantifiable loss to it in respect of this transaction was the balance which went to other parties in respect of expenses related to the purchase, being Kshs. 196,896. Under section 48(1)(b), the mandatory fine would amount to double the quantifiable loss, being Kshs 393,792.

89. I will accordingly allow the appeal as regards the sentence under section 48(1)(b) on the mandatory fine in part. I hereby set aside the orders with regard to the mandatory fine of Kshs 6, 393,792 and substitute therefor a mandatory fine of Kshs 393,792 and in default, imprisonment for a further term of four months.

90. I further direct that house number 70 on L.R. No. 209/10611/106 at Villa Franca Estate shall revert to Kenya Re-insurance Corporation Limited (if it has not already done so) and the requisite documentation to effect this reversion duly executed.

91. Save for this limited extent with respect to the mandatory fine under section 48(1)(b), the appellant's appeal fails and the conviction and sentence under section 48 (1)(a) are hereby upheld.

Dated and Signed at Nairobi this 17th day of September 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Nairobi this 18th day of September 2019

JOHN ONYIEGO

JUDGE