



**Kimunya & 2 others v Republic (Criminal Appeal E052 of 2023)
[2024] KECA 1925 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1925 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E052 OF 2023
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
DECEMBER 20, 2024**

BETWEEN

AMOS KIMUNYA 1ST APPELLANT

LILIAN WANGIRI NJENGA 2ND APPELLANT

JUNGHAE WAINAINA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the judgment of the ACEC Court (E. Maina J) delivered on 6th October 2022 in ACEC Appeal No.6 of 2020)

JUDGMENT

1. According to the classic fable about the Tuareg and his camel, one cold night a camel asked its master if it could put its head inside his tent to get some warmth and the master allowed it. A few minutes later it asked if it could move its neck and front legs inside too and again the master allowed it. The camel then asked if it could bring in its whole body and just stand inside the tent. The master allowed it and with its whole body inside the tent it took over the tent!
2. In this appeal the main issue underlying the slew of charges brought against the appellants variously, is whether a company known as Midlands Limited, which surreptitiously entered into a parcel of land belonging to Njabini Agricultural Training Centre (ATC), in a manner akin to the Tuareg’s camel, did so legally and is therefore on the land legitimately. That however, is not the issue for determination in this appeal. What we are required in our consideration are first, whether at an interlocutory stage, the learned Judge made definitive findings that would tie the hands of the trial court if the appellants were to be put on their defence as ordered, and secondly, whether she erred in finding that the prosecution had established a prima facie case.



3. Amos Kimunya, Lilian Wangiri Njenga and Junghae Wainaina (the appellants), filed in this Court three appeals being Criminal Appeal E052 of 2023, Criminal Appeal EO68 of 2023 and Criminal Appeal E069 of 2023 respectively. The three appeals spring from the judgment of the High Court's Anti-Corruption and Economic Crimes Division (E.N Maina J), delivered on 6th October 2022 in ACEC Appeal No. 6 of 2020. The appeals were consolidated on 24th April 2024 and Criminal Appeal No. E052 of 2023 became the lead file.
4. The genesis of these appeals was the allocation and transfer of land parcel No. Nyandarua/Njabini/5852 (suit land), from the Settlement Fund Trust, (SFT) to Midlands Limited. The land measuring 25 acres is located in Njabini Settlement Scheme. The allocation and transfer spawned the charges preferred against the appellants and Midlands Limited, in eight counts of various corruption related offences under the provisions of Anti- Corruption and Economic Crimes Act and the Penal Code in Chief Magistrate's ACEC Milimani Case No. 4 of 2014: Republic v Amos Kimunya and 3 others.
5. The charge sheet read as follows:

Count 1: Abuse of the Office contrary to section 46 as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, 2003.

Amos Kimunya on or about June 30, 2005 at Ardhi house within Nairobi County being a person employed in the Public Service, to wit, the Ministry of Lands and Housing as the Minister used your offices to improperly confer a benefit on Midlands Limited by causing to be allocated the said company a public land identified as Nyandarua/Njabini/5852 while knowing that the said land was not available for alienation.

Count II: Failure to disclose a private interest to one's principal contrary to section 42 (1) (a) as read with section 48 (1) of the *Anti-Corruption and Economic Crimes Act*, 2003:

Hon. Amos Kimunya on or about June 30, 2005 at Ardhi house within Nairobi County being Minister in charge of Ministry of Lands and Housing and whilst knowing that the Government was not aware of your private interest in Midlands Limited, failed to disclose that you were a Director and allowed the allocation of public land identified as Nyandarua/Njabini/ 5852 to the said company.

Count III: Fraudulent disposal of public property contrary to section 45(1) (B) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act No. 3 of 2003:

Hon. Amos Kimunya on or about June 30, 2005 at Ardhi house within Nairobi County being persons employed as in the Public Service, to wit, the Ministry of Lands and Housing as the Minister used your offices to improperly confer a benefit on Midlands Limited by causing to be allocated the said company a public land identified as Nyandarua/Njabini/ 5852 while knowing that the said land was not available for alienation.

Count IV: Breach of trust by a person employed in the public service contrary section 127 of the Penal Code:

Hon. Amos Kimunya on or about June 30, 2004 at Ardhi House within Nairobi County being a person employed in the Public Service, to wit, the Ministry of Lands and Housing as the Minister and being concerned with the administration of public land, committed a breach of trust by causing to be disposed off a public property to wit land parcel No. Nyandarua/ Njabini/5852 to Midlands Limited, an act which was prejudicial to the public.



Count V: Breach of trust by a person employed in the public service contrary section 127 of the Penal Code:

Lilian Wangiri Njenga on or about June 30, 2005 at Ardhi House within Nairobi County being a person employed in the Public Service, to wit, the Ministry of Lands and Housing as the Director of Land Adjudication and Settlement and being concerned with the administration of public land, committed a breach of trust by causing to be disposed off a public property to wit land parcel No. Nyandarua/Njabini/5852 by issuing a

Letter of Offer to Midlands Limited, an act which was prejudicial to the public.

Count VI: Abuse of office contrary to section 46 as read with section 48 of the Anti - Corruption and Economic Crimes Act, 2003:

Lilian Wangiri Njenga on or about June 30, 2005 at Ardhi house within Nairobi County being a person employed in the Public Service, to wit, the Director of Land Adjudication and Settlement used your offices to improperly confer a benefit on Midlands Limited by allocating the said company a public land identified as Nyandarua/Njabini/5852 while knowing that the said land was not available for alienation.

Count VII: Fraudulent disposal of public property contrary to section 45 (1) (B) as read with Section 48(1) of the Anti- Corruption and Economic Crimes Act No.3 of 2003:

Lilian Wangiri Njenga on or about June 30, 2005 at Ardhi house within Nairobi County being a person employed in the Public Service, to wit, the Director of Land Adjudication and Settlement fraudulently disposed of a public property to wit land parcel No. Nyandarua/Njabini/5852 by issuing a letter of offer to Midlands Limited while knowing that the said land was not available for alienation.

Count VIII: Fraudulent acquisition of public property contrary to section 45(1)(A) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act No. 3 of 2003:

Junghae Wainaina and Midlands limited on or about February 06, 2006, at Ardhi House within Nairobi County, fraudulently acquired of a public property to wit land parcel number Nyandarua/Njabini /5852 registered in the name of

Settlement Fund Trustee while aware it was not available for alienation.

6. The appellants pleaded not guilty to all eight counts precipitating the trial in which the State presented 17 witnesses to prove its case. For clarity of the appeals before us we have summarized the case that was presented before the trial court.
7. Peter Muchiri PW1, was the Principal of Njabini ATC at the material time. His duties included coordination of all farmers' training programmes at the ATC and keeping custody of the ATC property, which included the suit land. He testified that the suit land was acquired from a white settler named Nightingale Gill and was handed over to the Ministry of Agriculture in 1981 by the Department of Settlement and NCKK.
8. The acreage of the land was 75 acres in total. This included 60 acres of farmland and 15 acres of what was just indicated as "P1" land in the record. PW1 recalled that he received a letter dated 21st September, 2004 from the Director of Agriculture, Dr. Joseph K. Wanjama addressed to the Managing Director, Midlands Limited. Subsequently, ATC entered into an engagement with Midlands Limited. PW1 signed a collaboration agreement with the interim chairman of Midlands Limited, one Mr Njungae



Wainaina the 3rd appellant, which allowed Midlands Limited to utilize 7.5 acres of the suit land for 2 years.

9. PW1 later received a letter from Ms. Lillian Wangiri Njenga the Director Land Adjudication and Settlement, dated 9th June 2005. It was addressed to the District Land Adjudication and Settlement Officer Nyandarua District, and was titled “Subdivision of plot No. 530/Njabini Settlement Scheme”. According to the letter, the land was to be divided into two portions of 25 and 50.4 acres respectively.
10. PW1 informed his immediate supervisor Ms. Agatha Thuo, the District Agricultural Officer Nyandarua District and she promised to take up the issue with the ministry headquarters. However, on 30th June 2005 he received another letter. This time it was a letter of offer for the 50.4 acres authorized by the Director of Land Adjudication and Settlement L.W. Njenga. The suit land was subdivided on the mentioned date into plots No. 5851 and No.5852. ATC was offered plot No. 5851 measuring 20.83 hectares while Midlands Limited was offered plot No. 5852 measuring 10.12 hectares. To his knowledge plot No. 530 was not available for sub-division as it was reserved for use by ATC for its programmes.
11. Zaverio Kinyua Gitunge PW2, was the Nyandarua District Surveyor at the material time. It was his evidence that on 13th June 2005 he received a letter from the District Land Adjudication and Settlement Officer Ms. R. W. Maina, requesting his office to facilitate the subdivision of plot No. 530 Njabini Settlement Scheme and prepare the mutation for action by the Director of surveys. His office implemented the instruction and curved out a plot measuring 20.38 hectares to which they issued land Ref: No. Nyandarua/ Njabini /5851 and another plot Ref: No. Nyandarua/ Njabini /5852 measuring 10.12 hectares. The mutation registered by the Land Registry was produced in evidence.
12. James Elvis Omariba Ongwae PW3, was the Permanent Secretary (PS), in the Ministry of Agriculture at the material time. He recalled that sometimes in 2005 he received a request from a company called Midlands Limited seeking to be allocated government land, measuring about 25 acres out of Njabini FTC Land. He responded by a letter dated 29th March 2004 informing them that the request could not be considered, since the land referred to was not available for allocation. A few months later he ceased being a permanent secretary. He produced the letter in evidence.
13. John Wahome Gitu PW4, worked in the Ministry of Lands in 2010. In 2007 he was deployed in the Directorate of Personnel Management and his duties included staff appointments for ministries and payment of salaries among others. His evidence was that in 2003, the Minister of Lands was Hon. Amos Kimunya, from 6th January 2003 to 1st November 2010. He produced an extract from the ministry payroll to prove as much.

He also provided a payroll extract for Mrs. Lilian Wangiri Njenga confirming that she was an employee of the ministry from 7th June 1982 to January 2005.
14. Rachel Wanjiku Maina PW5, worked in the Ministry of Lands and Settlement as the District Settlement Officer for Nyandarua District at the material time. She recalled that some time in the course of her duties, she was directed to prepare a report on the status of land parcel No. 530 Njabini by the District Agricultural Officer called Agatha Thuo. She gave the acreage of the land and provided the report to the officer for documentation. The documentation was required for loan repayment.
15. PW5 prepared a further report on 7th June 2005 addressed to the Director of Settlement about the ground status of the suit land indicating that the FTC was still on the land. She identified the letter addressed to her by the Director of Land Adjudication, instructing her to subdivide parcel No. 530 into two portions of 25 acres and 50.4 acres respectively. She forwarded the matter to the District



- Surveyor and requested him to do the subdivision and prepare a mutation. She subsequently received the mutation from the Surveyor and forwarded the matter to the Director of Settlement.
16. Joseph Wanuna Wathenja PW6, was the Assistant Director of Agriculture based in Kinangop District at the material time, who oversaw the operations of the ATC at Njabini. He was a member of the District Development Committee and secretary to the District Agricultural Committee. His evidence was that when he joined the ATC in 2009, he checked through the records of the Agricultural Committee and the District Committee and did not find any approval for the excise of 25 acres of land in favour of Midlands Limited. What he found in the record was the initial agreement where Midlands Limited requested for 2 acres of land for purposes of multiplication of seed potatoes in 2004. The excision came in 2005. According to him there was on record an objection by the Permanent Secretary Ministry of Agriculture against the excision.
 17. Agatha Thuo PW7, was the District Agricultural Officer in the period between the years 2005 to 2017. She testified that Nyandarua has two agricultural training centres being Ol-jororok to the north and Njabini to the south. She recalled that some time in the year 2004 she was instructed by the District Commissioner for Nyandarua to accompany him to a meeting that was to be attended by the then Minister for Agriculture, Kipruto Arap Kirwa. During the meeting, the Minister introduced a company called Midlands Limited and stated that it would be allowed to use the Njabini facility for demonstration of potato seed multiplication. The then Minister for Lands and Settlement, Amos Kimunya (1st appellant) was present.
 18. Amos Kimunya clarified that the company would use only 5 acres and that this was not an allocation, but a collaborative exercise. She therefore expected that Midlands Limited would use 5 acres for a while and surrender the land back to FTC. However, the land was not surrendered and subsequently 25 acres were carved out of it instead of the initial 5 acres. PW7 sought intervention from the Ministry of Agriculture by a letter dated 12th November 2004 over the encroachment by Midlands Limited. There were numerous communications after her letter, one of which was dated 9th May 2005 from PS Ongwae stating that the land was not available for permanent allocation to Midlands Limited.
 19. Kipruto Rono Arap Kirwa PW8, was the Minister for Agriculture between 2003 and 2008. He oversaw policy direction in the ministry and was a member of SFT. Other members of SFT were the Minister of Finance and the Minister of Land. They dealt with policy matters appertaining to government land. He recalled that in the year 2004, he was invited by the then Minister for Land, Amos Kimunya to a function in Njabini FTC to promote farmers' activities.
 20. In his speech the minister stated that there was going to be a partnership between the ministry and the local farmers. However the partnership would be between the ministry and Midlands Limited. He also received a briefing from Mr. Joseph Kinyua and Romano Kiome the PS in the Ministry of Agriculture informing him that the ministry could work with Midlands Limited, but should not cede any part of the land to a private individual or entity. He did not recall any meeting by SFT that discussed transfer of land in Nyandarua to Midlands Limited. The primary purpose of SFT was to acquire land from colonialists and transfer it to new owners and the property so acquired would be owned by SFT.
 21. Pius Nyange Maithya PW9, was a Valuer and Investigator in the Ethics and Anti-Corruption Commission (EACC). He recalled that on 11th June 2012 he accompanied his colleague Wilfred Mutiga to Nyandarua County to visit parcels of land Ref: No. Nyandarua/Njabini /6087, 6088, 6089, 6091 and 6092. The colleague was a case officer on a matter touching on land in Njabini. His instructions were to advise on the open market value of the land and ignore the buildings.



22. He prepared a report which indicated that the registered owner of the six parcels of the land they visited was Midlands Limited. The titles were freehold, and the charge indicated that each parcel had two encumbrances. One charge dated 29th September, 2007 was for kshs.9.5 million and a further charge dated 15th January 2010 was for Kshs. 4 million. There was also a restriction against any dealings placed by EACC on 17th May 2011 until investigations were completed. He valued each parcel of land at Kshs. 10 million. Altogether the six parcels of land totaled Kshs. 60 million. The report was produced in evidence.
23. Peterson Wachira PW10 who worked at the Companies Registry testified that on 18th April 2011 a request came in from Kenya Anti-Corruption Commission (KACC), the predecessor of EACC, for them to provide details of Midlands Limited and Midlands Agro Industries Ltd. They responded that there was a public registered company under the name of Midlands Agro-industries Limited, whose name was later changed to Midlands Limited by special resolution.
24. PW10 provided several documents including: the list of shareholders showing the first appellant's name as item 254 with 250 shares: the form bearing the details of 12 Directors and the first appellant's name was listed as item 7 having been a director from 2005 – 2007: and, Form 203A indicating that the 1st appellant resigned from the board of Directors on 28th January 2006 having 0.2% shares in the company, which would not give him control of the company.
25. Dr. Romano Mungeria Kiome PW11, was the PS in the Ministry of Agriculture from 2005 - 2013. He was the Accounting Officer responsible for running administrative and financial affairs of the ministry. He stated that the suit land was transferred to the Ministry of Agriculture in 1981. He identified an application dated 11th February 2004 made to the PS by Midlands Limited signed by the 3rd appellant requesting to be allocated part of the suit land. His predecessor told him that they had objected to the process, and that the land could not be allocated for any other purpose. He produced a letter dated 10th January 2006 that he wrote to the PS Ministry of Lands to protest the excision. In August 2009 he wrote to EACC requesting them to find out why the allocation was made despite their objections.
26. Charles Onyambu Birundu PW12, was the Land Registrar in Nyahururu/Nyandarua from 2004 to 2012. He identified the Green Card relating to Nyandarua/Njabini /530. He stated that the land measured 30.5 hectares and was in the name of Settlement Fund Trust registered on 28th August 1978. He confirmed that he made entry number 2 registered on 12th August 2005 for the mutation registered in respect of new parcels No. 5851 and No. 5852. The entry was in the name of Settlement Fund Trust - 20.38 hectares and Midlands Limited - 10.12 hectares, respectively.
27. PW12 testified that he made the first entry on 12th August 2005 and the second entry on 6th February 2006. He made a further entry from the subdivision of Nyandarua/ Njabini/5852 into six parcels from no. 6087 to no. 6092 on 16th March 2006. The encumbrance section had a charge to Equity Bank Limited for 13 million, and a further charge to the same bank for kshs.60 million. The Green Card also had a restriction registered by EACC made on 17th May 2011. In his view the right procedure for transfer of the land to Midland Limited was followed and the documentation was proper.
28. Stephen Kienji Macharia PW13, who was chairman of the board of Njabini FTC BOG from 2010 to 2012 stated that the institution was previously known as FTC, before the name was later changed to ATC (Agricultural Training Centre). The function of the institution was to develop potato seedlings for sell at a fair price, raise and sell livestock to farmers and also train them in modern farming methods. When he joined the board, he found a factory on the institution's land.



29. A board meeting was held to discuss the existence of the factory and that was when he learnt that 25 acres of the land had been hived off and given to Midlands Limited without the consent of the institution. They visited the PS Ministry of Lands in Nairobi and established that the land had been allocated in an unclear manner. They held another meeting, and resolved to write to KACC to investigate how Midlands Limited obtained the land. KACC informed them of a pending case concerning the land and that he would be called as a witness.
30. Samuel Kariuki Gathungu PW14, was a farmer who testified that he was trained at FTC Njabini and used to receive potato seeds from them. However, this stopped when Midlands Limited fenced off the land and built structures on the FTC land announcing that everyone could buy shares for Kshs. 5000. He bought shares worth Kshs. 5000 as member no. 32 but he was never invited for any shareholders meeting, nor did he benefit from the company in any way.
31. Lucy Njoki Ndengwa PW15, was a board member of ATC from 2005 to 2013. In one board meeting the Principal asked board members for permission to sell the sheep on the farm because of lack of pasture land since Midlands Limited had acquired their land. The board wrote to the Ministry to inquire and were informed that indeed the land had been acquired.
32. Mucheru Kanuna Kamau PW16, was a shareholder in Midlands Limited with a share of Kshs. 5000. He told the court that he did not know that the 1st appellant was a shareholder too, or how Midlands Limited acquired ownership of the land.
33. Finally, Wilfred Gituma Mutiga PW17, a Senior Forensic Investigator at EACC employed since 2007, stated that this matter was reported to the commission by the then PS Agriculture Dr. Romano Kiano. His report was that the facility that his ministry was using to train farmers in Njabini had been taken over by private individuals, without the consent of his ministry which was a stakeholder in the SFT. PW17 visited the site and later gathered evidence by including documents from the Ministry of Lands which was the domicile of SFT and which managed the scheme. He compiled the evidence and submitted the file to the office of the DPP. The matter ended up in court.
34. He explained that when a settlement scheme is being executed by the government, there is a requirement that part of the scheme be set apart for public facilities. He established that the ATC was such public facility whose land measured 75.4 acres. Its registration indicated that it was ref: no. Nyandarua /Njabini/ 530 measuring 30.4 hectares. The land was however, subdivided into parcels no. 5851 and no. 5852 through an instruction given by the then Director Land Adjudication and Settlement, who was Mrs. Lilian Wangiri Njenga, the second appellant.
35. PW17 learnt that plot No. 5852 went to Midlands Limited, and was later sub-divided into six parcels being numbers 6087, 6088, 6089, 6090, 6091 and 6092 respectively. These parcels fell on the prime portion of the suit land, while plot no. 5851 which was left for the ATC lay mostly on a rocky place. He recorded a statement from the Principal Mr. Peter Muchiri who was shocked that the land which was already not enough had been subdivided. He also recorded a statement from PW5.
36. PW17 found communication to the ministry of agriculture where Midlands Limited had requested for an allocation of 2-3 acres but that allocation was not done. The ministry responded that it would not cede the land requested. However, something changed along the way because he saw allotment letters to Njabini FTC and also to Midlands Limited which was given an offer that it accepted, paid for and got a discharge.
37. His findings following the investigation were that the Director of Adjudication took it upon herself to dispose of the FTC land irregularly and without following procedure. He learnt that Midlands Limited



was launched during the 1st appellant's tenure as Minister for Lands and he was also one of the Directors of Midlands Limited. Therefore, there was a conflict of interest. He concluded that 25 acres of prime FTC land used for farmers training was wrongfully taken from the institution and the suit land should be restored to the farmers who needed it most.

38. PW17 recommended that the 1st appellant being the minister who received the application and was in collusion with others, be charged with the charges he faced herein. He recommended that the 2nd appellant be charged with abuse of office for issuing instructions for the subdivision of the land and for issuing the allotment letters. He recommended that the chairman of Midlands Limited and the company itself be also charged. His investigations also established that after the subdivision of parcel No. 5852 into six plots, individual parcels were charged to Equity Bank for Kshs.86.5 million. This went against the purpose of Midlands Limited had advanced for being on site.
39. Upon the close of the prosecution case, the learned magistrate, Felix Kombo (SPM) considered the evidence and held that there was no prima facie case established against the appellants in any of their respective counts as required by law. He acquitted each of them under section 210 of the Criminal Procedure Code (CPC) provoking the Director of Public Prosecutions (DPP), to file an appeal in the superior court.
40. The appeal was premised on 19 grounds in which the DPP faulted the learned magistrate for finding that: the Settlement Trust Fund was the complainant and not the Ministry of Agriculture; the prosecution had not made out a prima facie case against the appellants; Count 2 was defective; the failure to call Kombo Mero was fatal to the prosecution case; PW6, PW13, PW14, PW15 and PW16 "were dubious utility without basis"; neither Njabini Settlement Trust Fund, nor its Principal the Ministry of Agriculture could obtain a "right through PW5 pros exhibit"; the investigating officer did not undertake exhaustive investigations; the magistrate failed to take into account the provisions of section 111 of the *Evidence Act*; He was in error in holding that the process of transferring plot No. 530 to Midlands Limited was proper; and in acquitting the appellants under section 210 of the CPC.
41. Upon considering the appeal before her, Maina J found that the evidence adduced by the prosecution met the threshold of a prima facie case having been established against the appellants in counts 1, 3, 4, 5, 6, 7, and 8. She set aside the order acquitting the appellants and directed that each appellant be placed on their defence in their respective charges.
42. It was now the appellants' turn to be aggrieved by the verdict of that court. They filed the three appeals which were later consolidated and advanced the grounds that the Judge erred in law:
 - i. By holding that the prosecution had discharged the burden of proof beyond reasonable doubt to warrant the appellants being put on their defence;
 - ii. By shifting the burden of proof to the appellants against the weight of the evidence tendered by the prosecution and against the law;
 - iii. By basing her finding on the Settlement Fund Trustee (SFT) procedures which was not the case before the trial court in the process introducing new facts in the proceedings;
 - iv. By holding that the evidence of the 17 witnesses pointed to the appellants' guilt whereas all the prosecution witnesses exonerated the appellants of any wrong doing or involvement in any criminal act;
 - v. By not finding as was found in the trial court that the prosecution was discriminatory and selective and erred in referring the case back to the magistrate for defence after acquittal;



- vi. By finding that the appellants had a case to answer against the weight of the evidence and testimonies of the 17 witnesses;
 - vii. By failing to find that the failure by the prosecution to call Mr. Kombo Mweru was fatal to the prosecution case and it was unsafe to put the appellants on their defence without such crucial evidence;
 - viii. By holding that the land transferred to Midlands Limited was not available for such transfer against the weight of the evidence tendered in the magistrate court;
 - ix. By making conclusive findings and suggestive directions to the trial court that the prosecution established that the land in issue was owned by Settlement Fund Trust, that the allocation was illegal and the appellants were a beneficiaries, and that the land was held by the Settlement Fund Trustees in trust for the settlers and farmers within the Njabini Settlement Scheme, and could therefore not be allocated to the Midlands Limited.
43. By the direction of the Court, the firm of Gikunda Miriti and Co Advocates filed written submissions dated 20th November, 2023 on behalf of the 1st appellant. The firm of Muriu Mungai and Company LLP Advocates filed those dated 9th November 2023 for the 2nd appellant. The firm of Solonka and Company Advocates filed those dated 28th November 2023 for the 3rd respondent. In rebuttal Mr Akula Alex the Principal Prosecution Counsel filed the submissions dated 1st December 2023 on behalf of the State.
44. The 1st appellant's appeal is against the judgment of the superior court in count I, count III and count IV. He submitted that the cardinal rule in criminal proceedings and jurisprudence is the presumption of the innocence of the accused and the need for proof beyond reasonable doubt to make a prima facie case. He urged that a statement in the impugned judgment stating that: "...the issue in consideration is whether there is evidence that the 1st and 2nd respondent in their respective capacities improperly transferred the land to Midlands Ltd...." shifted the burden of forming a prima facie case to the defence.
45. Counsel urged that the evidence from the witnesses evinces that the suit property belonged to SFT, and the steps taken in the transfer were procedural. The SFT was within its rights to make the allocations and the unanimous evidence exonerated the appellant of any wrongdoing as was found by the magistrate. He contended that any decision should rest on the strength of the prosecution's case and not the weakness of the defence.
46. Counsel urged that the Judge made definitive findings of fact and directed the magistrate to put the appellant on his defence. She failed to evaluate the entire evidence and arrived at selective conclusions by considering the evidence of the prosecution alone. Counsel relied on the decisions of Ramanlal Tramklal Bhatt v Republic 1957 EA 332 and Republic v Alex Mwanzia Mutangili 2017 eKLR to state that a prima facie case is that which a reasonable tribunal directing its mind to law and evidence could convict if no explanation is offered by defence.
47. Counsel asserted that it is not disputed that the suit land belonged to SFT, and the transfer from SFT to Midlands Limited was signed by one Kombo Mweru who was authorized by the trustees to administer the fund. Therefore, Kombo Mweru was a crucial witness who was selectively left out.
48. For the 2nd appellant it was submitted that the learned Judge infringed her right to a fair trial under Article 50 (2) (k) and (p) by making a definitive finding that tied the trial magistrate's hands. Consequently, the magistrate will have to proceed on the basis that this was public land that was not available for allocation and that it was irregularly excised and transferred to Midlands Limited. She



urged this Court to be persuaded by the superior court's decision in *Festo Wandera Mukando vs Republic* (1980) KLR 103 where it was held that:

“...where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submissions upheld when reasons should be given; for then that it is the end to the case, or the count or counts concerned.”

49. It was contended that the learned Judge's definitive finding that the role of the 2nd appellant as Director of Adjudication was clear in the entire scheme, and that she should be put on her defence to exonerate herself is contrary to the principle of presumption of innocence as provided under Article 50 (2) (a). That by doing so the learned Judge shifted the burden of proof to the accused.
50. On without prejudice basis, the 2nd appellant urged that failing to call Mr. Kombo Mwero who executed the transfer and discharge of charge to tender his evidence which could have formed a core part of the case left an unfilled gap in the prosecution's case. Any evidential gap in the prosecution case raising material doubt must be applied in her favour. It was posited that the learned Judge failed in her duty as the 1st appellate court, as she merely rehashed, but did not re-evaluate and analyze the evidence to make proper conclusions on the entire evidence as she was duty bound.
51. Counsel for the 3rd appellant also submitted that the learned Judge made definitive findings in her pronouncement that the land was not available for allocation and that it was irregularly transferred to Midlands Limited contrary to the evidence that was presented. It is their submission that the actions of the learned Judge infringed on the 3rd appellant's right to a fair trial and placing him on his defence is not only prejudicial but will also impede the independence and impartiality of the trial court in rendering its decision.
52. Counsel urged that the learned Judge failed to recognize that the mere act of applying for allocation of land is not a crime, and the signing of an application made by Midlands Limited for allocation of land by the 3rd appellant as the interim Chairman of the board could not have amounted to a crime. He submitted that he is no longer a board member of Midlands Limited and wondered how the prosecution inferred private interest when the suit property has never been in his name.
53. Counsel contended that the prosecution did not explain why the other directors were not charged. Charging only the 3rd respondent was contrary to the provisions of section 23 of the Penal Code which provides that if a corporate entity commits an offence, then everyone responsible for management ought to be charged.
54. It was urged that the SFT, exercising its own discretion, vetted and subsequently approved the application and there was no evidence of fraudulent conduct on the part of the 3rd appellant as was affirmed by the prosecution witnesses. Counsel posited that the allocation of the land to Midlands Limited, a public company, by SFT was executed with a clear understanding and acknowledgment that the utilization of this property would serve the interests of farmers in Nyandarua County. The 3rd respondent, just like the 1st and 2nd respondents, held the view that Mr. Kombo Mwero was the most crucial witness for the prosecution and should have testified.
55. The State Counsel contested the submissions of all three appellants and we have set out his response in regard to each appellant.
56. Regarding the 1st appellant counsel urged that the State had established a prima facie case against him in counts 1, 3, and 4 as demonstrated by the seventeen witnesses. He argued that the 1st appellant being one of the Trustees of the SFT, used his position to the advantage of Midlands Limited where he was a director and a shareholder, to the detriment of the Ministry of Agriculture and Njabini FTC. This



he did without involving the other Trustees and without compliance with the threshold under the Agriculture Act and the Land Utilization and Settlement Rules, 1962.

57. Counsel asserted that the impugned judgment was proper and did not shift the burden of proof to the appellants. It complied with the provisions of section 111 of the *Evidence Act* as read with section 211 of the CPC which requires the appellants to rebut the evidence produced by the respondent, as was held in *Republic vs Alex Mwanzia Mutangili* (2017) eKLR and *Ramanlal Trambalklal Bhatt v R* (1957) EA 335.
58. Regarding Mr. Kombo Mweru, counsel submitted that he was the PS Ministry of Lands and was administering the SFT when he signed the transfer of parcel No. Nyandarua/Njabini /5852 from the SFT to Midlands Limited. This evidence is not disputed and his role for the prosecution would be repetitive and would not add value to the prosecution case. Further, under section 172 of the Agriculture Act, powers exercised by Mr. Kombo were those instructed by the 1st and 2nd appellants. For the appellants to insist that a certain witness must be called amounts to interfering with the discretion and powers of the DPP in prosecuting its case, unless they prove that the omission of the witness was not in good faith as was observed by this Court in *Julius Kalewa v Republic* (2006) eKLR.
59. Counsel urged that the suit land was public land held in trust by SFT for the settlers and was only available for allocation to settlers. Further, the evidence evinces that Midlands Limited was incorporated on 5th April 1987 and the directors were neither farmers nor settlers within the meaning of the Agriculture Act.
60. In response to the 2nd appellant, counsel urged that a prima facie case was established in counts 5, 6 and 7 as demonstrated by the evidence of the 17 witnesses and the exhibits tendered in court. It was submitted that the 2nd appellant being the Director of Land Adjudication and Settlement in the Ministry of Lands which was a Trustee of the SFT, used her position to the advantage of Midlands Limited and to the detriment of the Ministry of Agriculture and Njabini FTC. She caused the alienation of the parcel of land without involving other trustees and without compliance with the thresholds under the Agriculture Act and Land Utilization and Settlement Rules, 1962.
61. In response to the 3rd appellant counsel submitted that a prima facie case was established regarding count 8 by the evidence of the witnesses and the exhibits tendered in evidence. He argued that the 3rd appellant was the chairman of Midlands Limited and was quoted by the Ministry of Agriculture, a Trustee of SFT, as the one who insisted on the allocation of the 25 acres alienated from the suit land. The 3rd appellant is the one who applied for allotment and executed all the requisite documents on behalf of Midlands Limited.
62. In conclusion, counsel for the State urged that the Judge did not adjudicate on the innocence or guilt of the appellants as alleged by the appellants. She adjudicated on the sufficiency of the evidence on a prima facie case. As such, depending on the explanations given by the appellants, the trial court may acquit or convict them based on the evidence.
63. We have anxiously considered the record of appeal, the submissions of the parties and the law applicable. This being the second appeal, our duty is limited to matters of law as provided under section 361 of the CPC and restated in numerous decisions of this Court. For example in *David Njoroge Macharia vs. Republic* [2011] eKLR, this Court pronounced itself thus:

“That being so only matters of law are for consideration -see section 361 of Criminal Procedure Code. As this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based



on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v R* (1984) KLR 611.”

64. Upon considering the record and the submissions from the parties it is our view that only two issues fall for our determination. That is:
- i. Whether the learned Judge made definitive findings that would tie the hands of the trial court, should the appellants be put on their defence and,
 - ii. Whether the learned Judge erred in finding that the prosecution had established a prima facie case.
65. The close of the prosecution’s case is governed by section 306 of the Criminal Procedure Code, which provides thus:
1. When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
 2. When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.
 3. If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.
66. The learned Judge in her analysis that led to the finding that the prosecution had established a prima facie case, expressed herself regarding Count I and VI thus:
- “45. In my view, regardless of the number of shares owned by the 1st respondent, it suffices that the land was allocated to his company during his tenure as Minister for Lands and Trustee of the SFT, contrary to section 167 and 181 of the Agriculture Act Cap 318 without the approval of the other Trustee. This calls for an explanation by the Respondents on whether the objects of the 4th Respondent company include resettlement of landless people and whether the land was used in furtherance of this objective. Indeed, the land in itself was public land not available for allocation to the company as it was held in trust for settlers.”
 46. The 4th respondent company was not a “settler” as defined under Section 2 of the Agriculture Act: “a person holding land in an approved settlement scheme and includes an assisted owner or farmer.”



47. Neither was the company a beneficiary of the Njabini Settlement Scheme as it was not a landless or displaced person or a farmer in the scheme or a Farmers Training Center for which the land was allocated for. The 2nd Respondent issued a letter of offer which set the ball rolling in the process of the excision and transfer to the 4th Respondent. There is in fact evidence that the land was used as security to secure a loan for kshs. 85,000,000. In my view, the prosecution established a prima facie case against the 1st and 2nd Respondents on Counts I and VI respectively and they should accordingly be put on their defence.”

67. Regarding Count III, VII and VIII the learned Judge had this to say:

“ 53. It is my view that once the prosecution had established that the land was owned by the Settlement Fund Trust and that it was irregularly excised and transferred to the 4th Respondent company, the prosecution had successfully established a prima facie case against the Respondents. The roles of the 1st Respondent as Minister for Lands, 2nd Respondent as Director of Adjudication, and 3rd Respondent as Director of the 4th Respondent were clear in the entire scheme of the allocation and transfer. It was also established that each of the Respondents had a role to play in the transfer including signing the application and issuance of the letter of offer and it is imperative that they should be put on their defence to exonerate themselves on the charges in Counts in III, VII and VIII.

68. On Count IV and V the learned Judge went on to state that:

“ 55. The land subject of these proceedings was a property registered in the name of the Settlement Trust Fund, a creature of statute established under the Agriculture Act Cap 318 (repealed). The property was held in trust for “settlers” and farmers within the Njabini Settlers Scheme. From the foregoing analysis, the excision and transfer to a company ostensibly owned and under control of the 1st Respondent, Minister of Lands at the material time, would or could be interpreted as a breach of trust.

56. In my finding therefore, the prosecution established a prima facie case against the 1st and 2nd Respondents by virtue of their undertaking the subdivision and transfer of land belonging to a Settlement Fund Trust contrary to section 167 and 181 of the Agriculture Act and to the detriment of the interests of the farmers/ settlers. Accordingly, the trial court misdirected itself in acquitting them under Section 210 of the Criminal Procedure Code.”

69. The appellants argue that the learned Judge made definitive findings in her judgment that will tie the hands of the trial court, if the matter goes for defence hearing. The prosecution on the other hand argues that the learned Judge did not give a definitive judgment as she did not enter a verdict of guilty against the appellants.



We are cognizant of the prejudice of a definitive finding at the close of the prosecution case and its undesirability was emphasized by this Court in Anthony Njue Njeru vs Republic (2006) eKLR as follows:

“We wish to point out here that it is undesirable to give a reasoned ruling at the close of the prosecution case, as the learned Judge did here unless the Court concerned is acquitting the accused person.”

70. It is clear that the standard of establishing a case beyond reasonable doubt after the close of the prosecution’s case is not required in determining whether or not the accused has a case to answer. This can only be done after an accused person has been called to tender a defence. Only then can the court critically examine the evidence tendered as under a microscope. (See this Court’s decision in Martin Makhakha v Republic [2019] eKLR
71. The learned Judge adverted to some undisputed facts in the evidence such as the objects for which the land was held in trust and observed that this called for an explanation by the appellants on whether the objects of Midland Limited were similar. She further observed that the excision and transfer of the land to a company ostensibly owned and under control of the 1st Respondent, Minister of Lands at the material time, “would or could be interpreted as a breach of trust.”
72. In our view, these were findings based on whether a prima facie case was established by the prosecution. We are not persuaded that the learned Judge expressed herself so conclusively as to tie the trial magistrate’s hands as urged by the appellants. We therefore, hold that the findings were not definitive that the prosecution had proven its case beyond reasonable doubt in the impugned judgement.
73. Turning to the second issue, Black’s law dictionary 8th Edition defines “Prima facie case” as “The establishment of a legally required rebuttable presumption.” Prima facie therefore, describes a fact or a presumption that is sufficient to be regarded as true, unless otherwise disproved or rebutted.
74. The locus classicus case of Ramanlal Trambaklal Bhatt v R [1957] E.A. 332 at p. 334-335 established the standard of proof in a prima facie case thus:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one:-

“Which on full consideration might possibly be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:-

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made



when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

75. More recently, this Court revisited the discussion on what makes a prima facie case in Martin Makhakha (supra) thus:

“The basis of putting an accused on his defence is founded on the prosecution establishing a prima facie case. The standard of proof as to whether the prosecution has established a prima facie case has been laid down in the case of Ramanlal Trambaklal Bhatt -Vs- Republic (1957) E.A. 332 and stated with approval by this Court in the case of Anthony Njue Njeru v Republic [2006] eKLR Criminal Appeal 77 of 2006 as follows: -

“It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

76. We note that it is not disputed that the suit land was public land under the management of the SFT, and that it was transferred from SFT to Midlands Limited. The learned Judge crystallized the issue for consideration in these appeals as, whether there was evidence that the 1st and 2nd appellants in their respective capacities, improperly transferred the land to Midlands Limited. The presumption of impropriety is rebuttable.

77. Upon careful consideration of the record, the grounds of appeal and the submissions before the Court, and without delving into the merits of the case, we are satisfied that the learned Judge did not err in holding that the prosecution had established a prima facie case against the appellants.

Consequently, we uphold the superior court’s decision and dismiss this appeal.

78. We direct that the case file shall be remitted to the Chief Magistrate, Anti-Corruption and Economic Crimes Court for further hearing and disposal on the basis that the prosecution had made out a prima facie case under Section 211 of the Criminal Procedure Code, and accused person therein do have a case to answer. The said trial shall proceed before a magistrate of that Court of requisite jurisdiction, other than Felix Kombo, (CM).

79. We further direct that the resumed hearing shall proceed on expedited basis and the matter shall in the first instance be mentioned before the Chief Magistrate in charge of that Court, within fourteen (14) days of the date hereof, for appropriate directions.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

P. O. KIAGE

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JUDGE OF APPEAL

ALI- ARONI

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JUDGE OF APPEAL

L. ACHODE



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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

