



**Ng'ethe & another v Republic (Criminal Appeal 57 of 2021)
[2025] KECA 1549 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1549 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 57 OF 2021
PO KIAGE, WK KORIR & JM NGUGI, JJA
OCTOBER 3, 2025**

BETWEEN

MARY NGENCHI NG'ETHE 1ST APPELLANT

ALEXANDER MUSANGA MUSEE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nairobi (J.N. Onyiego, J.) dated 23rd September, 2020 in HC Anti-Corruption Appeal No. 9 of 2020)

JUDGMENT

1. A brief background to this appeal is that Sammy Kipngetich Kirui, John Gakuo, Mary Ngechi Ngethe, and Alexander Musanga Musee were charged before the Chief Magistrate's Anti-Corruption Court at Nairobi in Anti-Corruption Court Case No. 20 of 2020 with various offences under the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 (ACECA). At the conclusion of the trial, each one of them was found guilty as charged. They all filed appeals to the High Court. John Gakuo passed away before the appeal was concluded and his appeal thus abated. The appeal by Sammy Kipngetich Kirui was successful. The appeal by Mary Ngechi Ngethe was unsuccessfully whereas that of Alexander Musanga Musee was partially successfully. Undeterred and dissatisfied with the outcome of their appeals, Mary Ngechi Ngethe and Alexander Musanga Musee moved to this Court on second appeal.
2. When this appeal came up for hearing before us on 8th April 2025, the 1st appellant, Mary Ngenchi Ng'ethe, who appeared in person, had filed a notice dated 15th April 2024 withdrawing her appeal. She informed the Court that, having fully served her sentence, the appeal had been overtaken by events. There being no objection by the respondent, the appeal by the 1st appellant was marked as withdrawn pursuant to rule 70 of the Court of Appeal Rules. We are therefore only addressing the appeal by



the 2nd appellant, Alexander Musanga Musee. “Mr. Musee” and “appellant” will hereinafter be used interchangeably to refer to Alexander Musanga Musee.

3. The appellant, who was the 4th accused person before the trial court, was faced with a single count of knowingly giving a misleading document to a principal contrary to section 41(2) as read with section 48 of ACECA. The particulars of the charge were that on or about 10th November 2008 at City Hall in Nairobi, Mary Ngethe and Mr. Musee being employees of the City Council of Nairobi tasked respectively as the chair and secretary of the Tender Evaluation Committee, knowingly gave a misleading report of the minutes of the deliberations of the Tender Evaluation Committee dated 10th November 2008 to the Tender Committee purporting that the Tender Evaluation Committee had unanimously agreed that land tendered by M/s Naen Rech Limited was suitable for cemetery use; an act which was to the detriment of the City Council of Nairobi in that it misled the City Council of Nairobi into procuring land not suitable for cemetery use.
4. In a memorandum of appeal drawn by his counsel on 23rd November 2020, the appellant raised 20 grounds of appeal as follows:
 - i. The Superior Court erred in law by upholding the conviction when there was no tangible and/or cogent evidence to support the hypothesis that the 2nd Appellant knowingly and deliberately altered the minutes of the tender evaluation committee.
 - ii. The Superior Court erred in law by failing to re-evaluate the entire evidence and draw its own conclusion.
 - iii. The Superior Court erred in law by misapprehending the facts, applying wrong legal principles and generally misdirecting itself on the core issue.
 - iv. The Superior Court failed to appreciate that the charges against the 2nd appellant were never proved beyond reasonable doubt.
 - v. The Superior Court failed to analyze the plausible defence given by the 2nd Appellant.
 - vi. The Superior Court failed to appreciate that PW4’s testimony required corroboration and it could not corroborate PW3’s testimony.
 - vii. The Superior Court and trial Court erred in law by failing to allow a proper defence as contemplated by the law to the prejudice of the appellant (See Paragraph 88 of the High Court Judgment).
 - viii. The Superior Court failed to appreciate that the principle of fair trial under Articles 25(c), 27, 49, 50(1)(2)(4) of *the Constitution* was violated to the prejudice of the Appellant.
 - ix. The Superior Court erred in law and fact by failing to reconcile the material contradictions and inconsistencies in the prosecution’s case vis-à-vis the [defence of the] 2nd Appellant.
 - x. The Superior Court failed to appreciate that under Procurement Law, the Secretary to the tender evaluation committee cannot be personally liable for the decision of the entire committee.
 - xi. The Superior Court erred in Law and fact by confirming the conviction and sentence that is unlawful and manifestly excessive.
 - xii. The Superior Court failed to appreciate that the charges against the appellant were never proved to the required legal standards.



- xiii. The Superior Court erred by shifting the burden of proof to the appellant contrary to the well-settled legal principles.
 - xiv. The trial Court and Superior Court misapprehended the facts and the law by assuming that the 2nd Appellant was an agent without defining the principal.
 - xv. The Superior Court failed to take into account the material contradictions and inconsistencies and the fact that PW16 was not credible.
 - xvi. The charges against the 2nd Appellant were never proved beyond reasonable doubt as required by the law (see paragraph 185 of the High Court Judgment).
 - xvii. The Superior Court and the trial Court failed to accord the 2nd Appellant the benefit of doubt in view of the fact that the material particulars of the charge sheet were at variance with evidence.
 - xviii. The Superior Court erred in law and fact by holding that the 2nd Appellant did not acquire a benefit and failed to reduce the sentence of three years which is manifestly excessive (see paragraph 245 of the High Court Judgment).
 - xix. The Superior Court applied wrong legal principles to the prejudice of the Appellant.
 - xx. The Superior Court erred in law and fact by rejecting the 2nd Appellant's Application to adduce additional evidence to illustrate the irreconcilable [nature] of PW3 Mr. Tom Odongo's [evidence] in Acc. No. 19 of 2010 vis- à-vis his testimony in Acc. No. 20 of 2010 to the prejudice of the Appellant.
5. Although this is the second appeal whose mainstay is matters of law, it is important that we rehash the evidence that was adduced at the trial. In doing so, we will confine ourselves to the evidence that directly touched on the appellant before us. Gibson Njamura Kanyi (PW1), who worked with the defunct City Council of Nairobi as the Director of Procurement between July 2006 and April 2010, testified that in 2008, the Council requested the defunct Ministry of Local Government for funds to buy land for a cemetery because the Langata facility was full. In July 2008, the then Deputy Town Clerk constituted a team made up of himself (PW1), Mr. Peter Kibinda (Director of Planning), Mr. Gitonga Akotha (Chief Valuer), Ms. Mary Ngethe (Director of Legal Services), and Dr. Daniel Nguku (Medical Officer of Health) to procure the land. The team convened and prepared a tender document followed by advertisements in the print media inviting bids. Among the requirements were that the land had to be within the Nairobi Metropolitan Region; the soil depth was to cover 6 feet; the land was an own holding; if several parcels were being considered, the minimum size under one title deed was to be 50 acres; free from encumbrances; accessible from an all-weather road not more than 1 kilometer from a classified road; and, with close proximity to water, electricity and telephone services.
6. On 7th October 2008, a Tender Opening and Evaluation Committee (the Evaluation Committee) was appointed. The Evaluation Committee was to be chaired by Mary Ngethe, with Mr. Musee being designated as the Secretary. Other members of the Committee were Mr. Gitonga Akotha, Mr. Ngaca, Mr. Tom Odongo, and Mr. Wanjohi. The bids were opened on 9th October 2008, with minutes signed on 10th October 2008. The Committee evaluated the bids, and on 12th November 2008, the Tender Committee awarded the tender to Naen Rech Co. Ltd ("Naen Rech") for land measuring 120 acres in West Mavoko Municipality at Kshs. 2,360,000 per acre, totaling Kshs. 283,200,000, only for Mr. Tom Odongo and J.K. Barreh to subsequently protest that none of the bidders had met the conditions of the tender. PW1 testified that none of the two officers had raised any queries during the tendering process and that none of the other bidders had challenged the award of the tender to Naen Rech.



7. The witness nevertheless confirmed during cross-examination that none of the bidders had met the conditions of the tender, and even though this fact was brought to the attention of the Tender Committee, the Committee went ahead to award the tender. The witness also testified that the Tender Committee never sought a valuation report from the City Council's Valuation Department. PW1 further testified that the Evaluation Committee had recommended further consideration and not the making of an award, and that he had briefed the Tender Committee to consider the tender as appropriate.
8. David Mukubi Wanjohi (PW2), an Assistant Funeral Superintendent with the City Council of Nairobi, who was co-opted to the Evaluation Committee, testified that after evaluating the 12 bids that had been submitted, they zeroed in on five of them, which included that of Naen Rech (Bidder No. 7) from Kitengela. The 5 shortlisted bidders were called and instructed to dig 5 holes on their parcels of land so that the Committee could sample the soil profile. On the first visit to Naen Rech's parcel of land, they found that the trial holes had not been dug. When they went back to the site on 29th October 2008, the holes had been dug. PW2 observed that the top layer was made of cotton soil instead of red soil, and the underlying layer was rocky, thus not meeting the requirements of a cemetery. The witness testified that he was therefore surprised when he saw minutes dated 14th October 2008 signed by Ms. Ngethe and Mr. Musee, indicating that the Committee had recommended the purchase of Naen Rech's land. It was PW2's testimony that although he expected that another meeting would be convened for the preparation of a final report after the site visit of 29th October 2008, no such meeting was ever held.
9. John Koyier Barreh (PW3), Patrick Tom Odongo (PW4), and Peter Mburu Kibinda (PW5), all of the Department of Planning of the City Council of Nairobi, testified that although they participated in the procurement, including the site visits, they found the land offered by Naen Rech unsuitable for a cemetery. It was their evidence that they raised the issue with Ms. Ngethe and the concerned Permanent Secretary, but the procurement was nevertheless proceeded with. They denied attending the Evaluation Committee's meeting of 14th October 2008, where a recommendation was made to purchase Naen Rech's parcel of land.
10. Henry Musyoki Kilonzi (PW6), who was the owner of the land that was sold to the City Council of Nairobi by Naen Rech, testified that he sold the land to Naen Rech after agreeing on a purchase price of Kshs. 110,000,000, the payment was made in two instalments of Kshs. 10,500,000 and Kshs. 97,000,000, one month apart. He denied transferring the parcel of land to the City Council of Nairobi. He also disclaimed appointing Naen Rech as his agent in the transaction with the City Council of Nairobi.
11. Antony Matinge Itui (PW7), the Chief Government Valuer at the Ministry of Lands, recalled that on 22nd September 2008, he received a letter dated 7th August 2008 from Mr. Otido on behalf of the Town Clerk of the City Council of Nairobi, requesting valuation of L.R. No. 14759 Mavoko. That request was never followed up by the City Council. Again, on 13th November 2008, he received a similar request, which also aborted. In March 2009, he was confronted with a valuation report dated 1st November 2008 allegedly authored by his department, and he denied the existence of such a report.
12. Pius Nyange (PW8) testified that he was a valuer and a forensic investigator with the Ethics and Anti-Corruption Commission. He stated that in May 2009, he visited L.R. 14759/2 for inspection and valuation. In his report dated 7th May 2009, he valued the 120-acre property at Kshs. 30,000,000.
13. Edward Omoti (PW13), an Advocate of the High Court of Kenya trading as E. N. Omoti & Co. Advocates, testified that pursuant to instructions received through a letter dated 16th November 2008



- from Mary Ngethe, the City Council of Nairobi's Director of Legal Affairs, he represented the Council in the purchase of the suit property from Naen Rech. A tender award notification dated 13th November 2008 provided details of the property being sold by Naen Rech to the City Council. The seller's representatives later informed him that they had appointed other law firms for the conveyance. Under the tender terms, the purchase price would be held by him pending completion of the transaction. Subsequently, a cheque from the City Council for Kshs. 175 million was issued on 18th December 2008, followed by another for Kshs. 108 million on 16th January 2009.
14. Mr. Omoti prepared a sale agreement with Mr. Kilonzi (PW6) on 19th December 2008. The agreement was signed by PW6 and the Mayor, Geoffrey Majiwa. According to the sale terms, the purchase price was to be released upon successful registration of the title. A transfer was signed by PW6 on 30th January 2009 and registered on 3rd February 2009. Mr. Alphonse Mutinda, the seller's advocate, forwarded the title deed to Mr. Omoti, requesting payment of Kshs. 281,500,000. After a previous payment of Kshs. 1.7 million, Mr. Omoti issued a banker's cheque for Kshs. 281,300,000 on 11th February 2009. After completing the transaction, Mary Ngethe informed him that Kshs. 13 million would be remitted to his firm's account, and she would issue him instructions on how to deal with the money. He later received instructions from her and acted on them. During cross-examination, Mr. Omoti stated he was unaware of any direct sale between Naen Rech and PW6 but acknowledged there could be back-to-back sales where the initial seller transfers directly to a third party.
 15. Tabu Lwangu (PW16) was the investigating officer. He gave an account of his investigations and reiterated the evidence of the other prosecution witnesses. He noted that out of the 26 transactions that were flagged, Kshs. 4,000,000/- was paid to Shell Kenya Ltd, and another Kshs. 4,000,000/- was paid to Stiff Enterprises. His testimony was that these were monies lent by the appellant to Mr. Stephen Githinji. The witness also stated that the appellant, who was the Deputy Director of Procurement and the Secretary of the Evaluation Committee, signed a fraudulent evaluation report recommending the award of the tender to Naen Rech, from which he received a benefit of Kshs. 8,000,000/- through a proxy, Mr. Stephen Githinji.
 16. When placed on his defence, the appellant opted, as he was entitled to, not to testify or call any witness.
 17. In a judgment dated 15th May 2018, D.N. Ogoti, the then Chief Magistrate, found the appellant guilty as charged and sentenced him to three years' imprisonment. He also imposed upon him a mandatory fine of Kshs. 32 million in default, one year's imprisonment.
 18. The appellant, being dissatisfied with the decision of the trial court, appealed to the High Court. In a judgment delivered by Onyiengo, J. on 23rd September 2020, the learned Judge, while upholding the conviction and sentence of the appellant, found that there was no proof that the appellant had acquired a benefit or conferred a benefit of Kshs. 8,000,000 to Naen Rech. Consequently, the learned Judge set aside the mandatory fine of Kshs. 32,000,000 that had been imposed upon the appellant in compliance with section 48(1)(b) & (2) of ACECA.
 19. When this appeal came up for hearing on the virtual platform on 8th April 2025, learned counsel Mr. Evans Ondieki appeared for the appellant, while learned Senior Assistant Director of Public Prosecutions Mr. O. J. Omondi appeared for the respondent. Counsel for the parties had filed written submissions, which they sought to rely on, accompanied by oral highlights.
 20. In submissions dated 24th October 2021, Mr. Ondieki argued that the appellant's rights to fair trial and protection of the law as guaranteed by Article 25(c) of *the Constitution* were violated. He submitted that the full import and objective of the right to fair trial, as contemplated by Article 25(c) of *the*



Constitution, was not accorded to the appellant. According to counsel, the violations transcended the rights protected under Article 25(5) & (6) of the Constitution.

21. Turning to another issue, learned counsel asserted that the appellant's rights under Article 50(2)(b), (j) & (k) of the Constitution were violated due to a defective charge sheet, which lacked sufficient details of the offence, thereby hindering his ability to adduce and challenge evidence. It was learned counsel's plea that the appellant, being 71 years of age and thus an older person, and having worked for the City Council of Nairobi for over 27 years, should have his rights under Article 57(a) and (c) of the Constitution protected. According to counsel, the conviction should not be sustained because it was based on a defective charge.
22. Still on the issue of the defectiveness of the charge sheet, Mr. Ondieki submitted that the particulars of the charge were at variance with the evidence adduced. Further, that the count for which the appellant was convicted did not disclose the particulars of the offence with clarity. To buttress the arguments, learned counsel referred to Jason Akumu Yongo vs. Republic [1983] eKLR, to urge that a charge is defective if it does not accord with the evidence adduced at the trial, or if the charged offence is not disclosed by evidence, or if it misdescribes the alleged offence. Counsel also faulted the first appellate court for what he termed as overreliance on the testimonies of PW3 and PW4, which he argued was not credible because their opinion against the tender award came a month after the decision had been made by the Evaluation Committee, of which the second appellant was a mere secretary. Citing Nashon Marenya vs. Republic [1983] KEHC 19 (KLR), counsel emphasized that charges and particulars should be clearly framed so that accused persons know what they are charged with, to avoid confusion and potential failure of justice. It was counsel's assertion that the charge as framed offended Article 50(2)(b), (j) & (k) of the Constitution as it was prejudicial to the appellant and led to miscarriage of justice.
23. Next, Mr. Ondieki faulted the learned Judge for failing to review the entire evidence and draw his own conclusions. Counsel submitted that the charge never disclosed the ingredients of the offence "knowingly giving a misleading document to principal" as established in section 41(2) as read with section 48 of the ACECA, and that no cogent evidence was adduced to demonstrate that the submitted report did not reflect what transpired in the Evaluation Committee meetings. Further, that the Evaluation Committee had simply recommended to the Tender Committee to award the tender to Naen Rech, and the Tender Committee had the mandate to affirm or reject the recommendation. Additionally, counsel submitted that the learned Judge ought to have appreciated that there was no connection between the appellant and the payments allegedly made to Mr. Githinji. Further, that apart from PW1, PW3, PW14, and PW16, no other witness adversely mentioned the appellant. According to counsel, a careful analysis of the evidence showed nothing cogent or tangible to implicate the appellant. Counsel also argued that the legal principles invoked to acquit Sammy Kipngetch Kirui in the High Court were applicable to the appellant's case, and the appellant ought to have been acquitted.
24. Mr. Ondieki contended that the first appellate court erred by relying on a theory not supported by facts or submissions, and thereby shifting the burden of proof, thus violating the legal principle that requires the prosecution to prove its case beyond reasonable doubt. Relying on Stephen Nguli Mulili vs. Republic [2014] KECA 408 (KLR), learned counsel submitted that the burden of proof should never be shifted to the accused person, and the learned Judge erred in requiring the appellant to offer an explanation. Counsel urged that the appellant's role was merely to transmit the collective decision of the Evaluation Committee, which only made a recommendation, with the Tender Committee retaining the power to accept or reject the recommendation.
25. Stressing that the charge was not proved, Mr. Ondieki relied on section 178 of the Public Procurement and Asset Disposal Act to urge that the appellant was protected from personal liability for acts or



- omissions done in good faith in the performance of his duties. He maintained that the appellant could not be held liable for the collective decisions of the Evaluation Committee, as he had no capacity or power to change or amend minutes ratified by the entire Committee. In the end, counsel urged us to allow the appeal and let the appellant enjoy his retirement as a senior citizen.
26. On his part, Mr. O. J. Omondi opposed the appeal through submissions dated 2nd February 2022. He focused on the validity of the conviction and sentence, and the limited scope of this Court's jurisdiction on a second appeal. Relying on *Njoroge vs. Republic* [1982] KECA 19 (KLR), learned prosecution counsel submitted that on a second appeal, the Court deals with matters of law, not fact, and should generally be bound by the concurrent findings of fact by the trial court and first appellate court, unless those findings are not supported by evidence or are based on a misapprehension of evidence or wrong principles.
 27. Rejecting the appellant's claim that the charge was defective, Mr. Omondi asserted that the provision under which the appellant was charged and convicted is clear that an "agent who, to the detriment of his principal, uses, or gives to his principal a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence". Learned prosecution counsel submitted that the appellant, as a member of the Evaluation Committee, was acting as an agent of the City Council of Nairobi. He submitted that the minutes of the meeting held on 14th October 2008, which recommended Naen Rech as the successful bidder, contained misleading information regarding the land offered for sale, as the land was not fit for purpose.
 28. Learned counsel argued that the charge was proved, pointing out that the misleading information in the report submitted to the principal by the appellant included the land's depth for excavation and its distance from an all-weather road, which were inconsistent with the available evidence. Counsel stressed that the appellant provided a false valuation report to the Tender Committee, which misled the City Council of Nairobi into acquiring land that was significantly above its market value.
 29. In rebuttal of the argument that the charge was bad because of variance between the date in the charge and the evidence adduced, counsel for the respondent referred to *Obedi Kilonzo Kevevo vs. Republic* [2015] eKLR to urge that such a defect, if any, is curable under section 382 of the Criminal Procedure Code, and is not prejudicial so as to warrant the setting aside of the conviction and sentence.
 30. Responding to the appellant's claim that there were discrepancies in the prosecution's case, particularly concerning dates, learned prosecution counsel argued that such omissions or discrepancies did not necessarily prejudice the appellant or cause a miscarriage of justice so as to render the conviction a nullity.
 31. On the elaborate arguments by the appellant's counsel regarding the constitutionality of the trial, Mr. Omondi submitted that the issues are not available for the Court's consideration because they are being raised for the first time in this appeal.
 32. Regarding the appeal against sentence, Mr. Omondi contended that the sentence imposed upon the appellant was within the legal framework of section 41(2) as read with section 48(1)(a) of ACECA, which allows a fine not exceeding one million shillings, or imprisonment for a term not exceeding ten years, or both. He argued that the sentence was justified, given the gravity of the offence and the financial loss suffered by the City Council of Nairobi as a consequence of the commission of the offence. Mr. Omondi, therefore, urged us to dismiss the appeal and affirm the concurrent findings by the two courts below.
 33. This being a second appeal, our jurisdiction flows from section 361(1) of the Criminal Procedure Code and is focused on matters of law, and not facts, which have presumably been settled by the two courts



below. We also observe that, as per the cited provision, severity of sentence is a matter of fact. Our interference with factual conclusions is only warranted where the courts below considered irrelevant facts, neglected relevant ones, or were plainly wrong. This approach of a second appellate court has been reiterated in several decisions, including *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR), wherein the Supreme Court held that:

“Thus, the Court of Appeal’s jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the respondent’s appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal’s jurisdiction.”

34. Another limitation to our jurisdiction was expressed by the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (supra) as follows:

“The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the respondent’s sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.”

35. We have addressed our minds to the record, the submissions, and authorities cited by counsel for the parties. Going by the decision of the Supreme Court and the provisions of section 361 of the Criminal Procedure Code, it is evident that the severity of the sentence is not within our mandate, and neither is the challenge to the constitutionality of the proceedings against the appellant. In so finding, we note that the issue of the constitutionality of the appellant’s trial was never taken up before the first appellate court. As regards the sentence, no illegality has been pointed out, and as already stated, severity of sentence is not an issue for consideration on a second appeal. Additionally, the alleged defectiveness of the charge was not raised by the appellant before the High Court, and the issue does not therefore fall for our consideration. Therefore, in our view, what arises for determination are: whether the first appellate court lived up to its mandate; whether there were material contradictions and discrepancies in the prosecution case; whether the appellant was denied an opportunity to tender his defence; whether the appellant’s actions were protected by section 178 of the *Public Procurement and Asset Disposal Act*; and, whether the offence was proved to the required standard.

36. The first ground we address is whether the first appellate court properly discharged its mandate. According to the appellant, the learned Judge erred in law by failing to re-evaluate the entire evidence and draw his own conclusion. The duty of a first appellate court has been reiterated in several decisions



of the Court, including Erick Onyango Ondeng' vs. Republic [2014] KECA 523 (KLR), wherein it was held that:

“Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyze the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified.”

37. Earlier, in David Njuguna Wairimu vs. Republic [2010] eKLR, the Court underscored the duty of the first appellate court as follows:

“In Okeno vs. R [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

38. We have reviewed the judgment of the learned Judge, and it is apparent that the learned Judge set out by recalling his duty as a first appellate court before proceeding to rehash the evidence, analyze it, and reach his own independent conclusion. There is thus nothing upon which the learned Judge can be faulted for the manner in which he executed his duty in determining the appeal that was before him. With respect to counsel for the appellant, we find that there is no merit on this ground of appeal.

39. The next issue is whether there were material contradictions and discrepancies in the prosecution's case. This issue was raised within the context of an allegedly defective charge. In urging this ground, learned counsel for the appellant argued that there was variance between the date of the commission of the offence as stated in the charge sheet and in the minutes adduced in evidence to support the charge. According to counsel, the variance went to the substance of the charge and ought to have been resolved in favour of the appellant. Section 134 of the Criminal Procedure Code requires that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

40. This Court has held in a plethora of decisions that for a charge to be declared fatally defective, the defect must be substantive and not formalistic. For instance, in Benard Ombuna vs. Republic [2019] eKLR, the Court held that:

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”

41. On our part, we do not find a deviation in the dates to be material. The information in the charge was sufficient to inform the appellant that the charge he faced concerned his role in the tendering process leading to the acquisition of L.R. 14959 by the City Council of Nairobi. He was also sufficiently



informed that the charges related to his actions and role as the Secretary of the Tender Opening Committee, which is the same as the Evaluation Committee. It was also clear to the appellant that he was being accused of submitting minutes to the Tender Committee indicating that the Evaluation Committee had unanimously recommended the award of the tender to Naen Rech, which was not true.

42. Still on the alleged contradictions and discrepancies, we note that other than the claim of variance between the dates in the particulars of the charge and the evidence adduced, the appellant did not pursue the issue any further in submissions. In that regard, we find that counsel for the appellant failed to pinpoint with precision where the other alleged contradictions were and how they vitiated the prosecution's evidence. Learned counsel simply submitted that "there were several discrepancies as the court assumed that the second appellant was a member of the tender committee, which was not correct and highly prejudicial to the second appellant." On our part, we do not see any finding by the learned Judge that the appellant was a member of the Tender Committee and neither was such a finding pointed out to us by Mr. Ondieki, learned counsel.
43. Be that as it may, we find it prudent to reiterate the proper legal position where there are contradictions and discrepancies in the prosecution case. The applicable principles have been stated in several decisions of the Court, including *John Nyaga Njuki & 4 Others vs. Republic* [2002] KECA 288 (KLR) wherein it was held that:

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

44. Similarly, in *Philip Nzaka Watu vs. Republic* [2016] eKLR, the Court opined that:

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

45. We acknowledge that the law is as enunciated in the cited authorities. In the appeal at hand, the appellant did not precisely pinpoint the alleged contradictions and discrepancies, and the manner in



which it prejudiced him. As already stated, all his counsel said was that there were contradictions in the evidence of the prosecution witnesses. Without highlighting what those contradictions were in order to enable us to consider their impact on the appellant's case, we can only conclude that this ground of appeal is without merit, and we so do.

46. The next issue was the appellant's contention that he was denied the right to a fair hearing. Even though this ground was raised by the appellant in his memorandum of appeal, there was no elaboration on how the right was infringed. However, we note that the learned Judge addressed it in terms of whether the defence evidence and submissions were considered, and held as follows:

“Both appellants submitted that the trial Magistrate did not consider defence counsel's submissions. Indeed, in his determination, the learned Magistrate made reference to the defence counsel's submissions from page 33 to 35. A trial court may not necessarily reproduce verbatim counsel's submissions. Courts make reference to submissions in summary depending on their relevance. I do not agree that the learned Magistrate did not consider their submissions.”

47. Out of an abundance of caution, we have gone through the entire record. We note that at the close of the prosecution's case, parties were allowed to put in their submissions. The record shows that Chief Magistrate, D.N. Mulekyo (Mrs.), who had heard the case, was on transfer and had, at the close of the prosecution case, found that the appellant and his co-accused had a case to answer. That ruling was read on her behalf on 12th January 2018 by the then Chief Magistrate, Mr. L. N. Mugambi. Thereafter, the matter was placed before Chief Magistrate, Mr. D.N. Ogoti, who, upon complying with section 200 of the Criminal Procedure Code on 19th February 2018, was informed by all the accused persons that they were not going to testify or call any witness. The record shows that on this day, learned counsel Mr. Nderitu appeared holding brief for learned counsel Mr. Babu for the appellant. The record again confirms that Mr. Nderitu informed the Court that the appellant was not calling any evidence. That is when the trial court gave counsel time to file submissions.

48. From the foregoing, and having ourselves read the trial court's judgment, we agree with the finding by the learned Judge that the submissions, even though not reproduced, were referred to by the trial court. We note that submissions cannot be equated to evidence but are a rehash of well-established legal principles, which are then applied to the facts of the case at hand so as to guide the court in its determination. It is upon the court to pick and apply the authorities that, in its view, elucidate the correct legal position. We find that is what the trial magistrate and the learned Judge did, and the ground of appeal that the appellant's defence and submissions were not considered, therefore fail.

49. Another issue is whether the appellant's actions were protected by section 178(1) of the *Public Procurement and Asset Disposal Act*. The provision states:

“A person shall not, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under this Act.”

50. There is no gainsaying that the immunity granted to a public officer under section 178(1) of the *Public Procurement and Asset Disposal Act* is not absolute but is only in respect of actions done or omitted in good faith. For the defence to hold, an employee charged as a result of actions arising in the course of the performance of his or her duties is required to establish, to the satisfaction of the court, that his or her actions were not marred by ill motive or intentions. It is also important to point out that the question as to whether the appellant acted in good faith is one of fact and requires ascertainment. That ascertainment would therefore fall for consideration by the trial court, and on a second occasion, the



first appellate court. Hence, unless it is shown that the two courts erred in arriving at the conclusion regarding the question of “good faith” or lack of it, we are not to enter that discussion.

51. The defence of “good faith”, like the one established under section 178(1) of the Public Procurement and Asset Disposal Act has previously been considered by the courts. For instance, in the persuasive decision of the Supreme Court of the United States in *Harlow vs. Fitzgerald* 457 U.S. 800 (1982), delved into the defence and the majority held that:

“Qualified or “good faith” immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U. S. 635 (1980).¹ Decisions of this Court have established that the “good faith” defense has both an “objective” and a “subjective” aspect. The objective element involves a presumptive knowledge of and respect for “basic, unquestioned constitutional rights.” *Wood v. Strickland*, 420 U. S. 308, 322 (1975). The subjective component refers to “permissible intentions.” *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury”

52. In our jurisdiction, the Supreme Court in *Bellevue Development Company Ltd vs. Gikonyo & 3 Others* [2020] KESC 43 (KLR) considered the defence of “good faith” in the context of judicial immunity and after adopting the views in *Harlow vs. Fitzgerald* (supra), proceeded to hold thus:

“Further, in *Harlow vs. Fitzgerald* 457 US 800 (1982) (*Harlow*), the United States Supreme Court qualified the principle and stated that immunity could be granted to government officials and specifically judicial officers only if:

1. an official believed in ‘good faith’ that his conduct was lawful and
2. that the conduct was objectively reasonable.

The test in *Harlow*, in addition to the good faith test and lawfulness, was that of objective reasonableness, in that the conduct of the officials is evaluated to ascertain whether they acted reasonably under the circumstances thus warranting immunity. This objective reasonableness test was defined by the court to allow protection for judicial officials performing discretionary functions, so long as those functions did not violate clearly established Constitutional or statutory rights of which a reasonable person would have been aware of.”

53. To further appreciate this defence, we refer to *Black’s Law Dictionary* 10th Edition, at page 808, which defines “good faith” thus:

“A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. – Also termed *bona fides*.”



54. To contrast, the same dictionary at page 166 provides one of the definitions of “bad faith” as follows:

“Dishonesty of believe, purpose, or motive. – Also termed mala fides.”

55. It is apparent that the defence of “good faith” is one that should be put forth by an accused person through cross-examination of witnesses or production of evidence by way of a defence. It is not one left for submissions. Additionally, assessing whether there was good faith or not is a matter of fact, and the person seeking to rely on the defence must establish it for consideration by the trial court or an appellate court. For the defence to apply, the accused person must show that he/she believed in ‘good faith’ that his/her conduct was lawful and that the conduct was objectively reasonable. The defence ceases to apply once it is established that the accused person knew or should reasonably have known that the action violated his oath of office or that the action was taken with malicious intent to defeat the oath of office.

56. Having established the applicable test, can it be said that the learned Judge erred in his analysis and determination of the appellant’s defence? We think not. First, the appellant did not raise the defence of “good faith” before the trial court or the High Court. Secondly, even in the absence of such a defence, the trial court and the first appellate court rightfully found that the appellant acted with malicious intention when he presented the fraudulent report. In handing over minutes showing that Mr. Barreh and Mr. Odongo attended a meeting that recommended the award of the tender to Naen Rech when he knew they did not, the appellant cannot be said to have acted in good faith. The appellant also knew that there was no valid valuation of the land in question, and by the time he was preparing the minutes on 14th October 2008, the second site visit to the property on 29th October 2008 had not been made. As an agent, he knowingly gave false information to his principal, the City Council of Nairobi. After all, he was the secretary of the Evaluation Committee and therefore the originator and the keeper of the minutes of the meetings held by the Committee. Any false statement in the minutes was therefore directly attributable to him. For the foregoing reasons, we find no merit in this particular ground of appeal.

57. There was a plea by the appellant that the learned Judge erred by shifting the burden of proof to him. In prosecuting this ground, learned counsel Mr. Ondieki posited in his submissions that:

“At page 826 lines 7-18 the superior court stated that the prosecution called the witness but the appellants opted not to offer any defense. The appellant did not have any obligation to prove their innocence. It was the duty of the prosecution to prove their case beyond reasonable doubt. The prosecution never discharged this burden to the required legal standards...”

58. We have perused the record, and we note that learned counsel was referring to paragraph 8 of the High Court’s judgment. Our observation is that in the paragraph, the learned Judge was merely summarizing what transpired before the trial court. This was at the beginning of the judgment before the learned Judge even started to reproduce the facts, summarize the submissions, and conduct his independent analysis. It cannot, therefore, be said that the learned Judge shifted the burden of proof in that instance, yet what he captured was exactly what transpired before the trial court. Be that as it may, on our part, we note that the learned Judge properly appreciated the import of section 111 of the *Evidence Act*.



59. The import and application of section 111 of the *Evidence Act* was summarized by the Court in Wilson Wanjala Mkendeshwo vs. Republic [2002] KECA 322 (KLR) as follows:

“As a general rule the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge. For instance Section 111 of the *Evidence Act*, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. The said section is silent on what would happen if he fails to do so. But section 119 of the same Act deals with presumptions of fact. A court is entitled under that section to raise a presumption of fact from the circumstances of the case, that the appellant knew how the deceased died. The presumption being one of fact is rebuttable.”

60. We will only add that in such circumstances the accused person’s burden is on a balance of probabilities and not beyond reasonable doubt. We are therefore satisfied that the learned Judge properly invoked section 111 of the *Evidence Act*, and the invocation did not in any manner shift the burden of proof to the appellant.

61. Finally, regarding sentence, we observe that under section 361(1)(b) of the Criminal Procedure Code, this Court can only entertain appeals against a sentence where the sentence was enhanced by the High Court or where the trial court had no power to impose it. Additionally, sentencing remains a discretionary function of the trial court, and unless it is shown that the court erred in the exercise of its discretion, an appellate court, more so the second appellate court, must refrain from interfering with the sentence simply because it would have handed down a different sentence. That being the case, we find no basis for entering the arena of sentencing in this appeal.

62. For the foregoing reasons, we find the entire appeal lacking in merit. We dismiss the appeal in its entirety and affirm the judgment of the High Court.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.

P.O. KIAGE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

