Republic v Wario & 3 others (Criminal Case 217 of 2019)
[2025] KEHC 14232 (KLR) (Crim) (6 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14232 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL CASE 217 OF 2019

B MWAMUYE, J

OCTOBER 6, 2025

BETWEEN

REPUBLIC ..... APPELLANT

AND

ABDI MOHAMED WARIO ..... 1ST RESPONDENT

ABDULLAH HASSAN GOLE ..... 2ND RESPONDENT

ABDI IBRAHIM DIDA ..... 3RD RESPONDENT

ABDI EDIN IBREN ..... 4TH RESPONDENT

(Being an Appeal from the original judgment by Hon. C. Muthoni (SRM) delivered on 11th October, 2019 in the Chief Magistrate's Court at Milimani in CR No. 2350 of 2018, Republic -vs- Abdi Mohamed Wario & 3 Others)

JUDGMENT

Introduction And Background

1. This is an appeal by the Director of Public Prosecutions against the decision of the Chief Magistrate's Court at Milimani in Criminal Case No. 2350 of 2018, delivered by Hon. C. Muthoni on 11th October 2019. The Respondents, who were the accused persons before the trial court, faced charges under five (5) counts;

   Count 1: The four Respondents were charged with being in Possession of Proceeds of Crime contrary to section 4(c) as read with Section 16(1)(a) of the Proceeds of Crime Act of 2009.

   Count 2: The four Respondents were charged with being in Possession of mineral contrary to Section 203 of the *Mining Act* as read with Section 203 (A).

Count 3: The 3rd and 4th Respondents were charged with the offence of Deliberately defaulting in the obligation to file income tax returns by due date contrary to section 97(e) of the Tax Procedure Act as read with section 104 (1) of the Tax Procedure Act, 2015.

Count 4: The 4th Respondent was charged with the offence of Deliberately defaulting in the obligation to file income tax returns by the due date contrary to section 97(e) of the Tax Procedure Act as read with section 104 (1) of the Tax Procedure Act, 2015.

Count 5: The 3rd and 4th Respondents were charged with the offence of failure to submit Income Tax returns by due date contrary to section 94 of the Tax Procedure Act, 2015 as read with section 102 (1) of the Tax Procedure Act.

2. The trial court acquitted all four Respondents on the counts save for finding the 4th Respondent guilty on count 4 of defaulting to register as a taxpayer. Dissatisfied with that acquittal, the Appellant lodged this appeal seeking to have the acquittal set aside or quashed and a conviction and sentence substituted in accordance with the law.

3. The charges arose from an incident on 3rd December 2018 along Marsabit-Isiolo Road within Isiolo County, where the 1st and 2nd Respondents were found transporting a bag containing multiple foreign currencies, namely 20,000 USD, 220,555 Euros, 44,415 GBP, 121,185 Canadian dollars, 5,000 Swedish Kroner, 11,815 Australian dollars, and 3,413.44 grams of gold. The 3rd Respondent later claimed ownership of these items, while the 4th Respondent admitted preparing a handwritten note itemizing the said bag's contents and delivering it to the 1st and 2nd Respondents for onward transportation to Nairobi.

4. The Prosecution's analysis was that the large sum of money and gold constituted proceeds of crime, specifically, from tax evasion and that none of the Respondents had lawful authority to possess or transport the gold. Further, the 3rd and 4th Respondents were accused of defaulting in their obligation to file tax returns. Subsequently, the 4th Respondent was alone charged with the offence of defaulting to register as a taxpayer.

5. The prosecution called a total of fourteen (14) witnesses in support of its case. At the conclusion of the trial, the learned magistrate found, among other things, that there was insufficient proof that the sums of money or the gold were proceeds of crime within the meaning of the Proceeds of Crime Act, that there was no proof of unlawful possession of a mineral, and that the 3rd Respondent's tax compliance certificate, albeit one issued in 2019, rebutted any suggestion of noncompliance for prior tax periods. The trial court, consequently, acquitted all the Respondents save that the 4th Respondent who was convicted for failing to register as a taxpayer.

6. Aggrieved by that judgment, the Appellant appeals to this Court to set it aside and substitute it with a conviction and sentence under each relevant count.

7. The Appellant's petition of appeal dated 4th November, 2019 raises numerous grounds;

    i. That the Learned Trial Magistrate erred in law and fact by failing to consider, evaluate, and appreciate the prosecution evidence that allegedly proved the charges against the Respondents.

    ii. That the Learned Trial Magistrate erred in dismissing the Prosecution's application under Section 212 of the Criminal Procedure Code (CPC) for leave to adduce rebuttal evidence, thus denying the Prosecution an opportunity to challenge the authenticity and circumstances surrounding documents produced by the defence, a Tax Compliance Certificate for 2019.

iii. That the Learned Trial Magistrate erroneously relied on the 3rd Respondent's Tax Compliance Certificate of 2019 to acquit him in respect of alleged default over the years 2015–2018.

iv. That the Learned Trial Magistrate failed to invoke Section 111 of the *Evidence Act* on evidential burden, where proof of facts especially within a Respondent's knowledge is upon him.

8. On the other hand, the Respondents oppose the appeal, contending that the prosecution did not prove its case beyond reasonable doubt, that no credible evidence was adduced of any crime or illegal source of the subject money and mineral (gold), and that the trial court correctly acquitted them.

9. The Appeal was canvassed by way of written submissions.

10. In compliance with the directions of this Court, both parties filed their submissions. The Appellant's submissions reiterate the grounds of appeal and urge this Court to allow the appeal. The Respondents' submissions support the trial court's findings and pray that the acquittal be upheld.

The Appellant's Submissions

11. The Appellant filed its written submissions dated 20th January, 2025 urging this Court to set aside the acquittal and substitute the same with a conviction and sentence. The Appellant's submissions highlight several points on each count.

12. With regard to the count of being in possession of proceeds of crime, citing Section 2 of the Proceeds of Crime Act, the Appellant contends the subject money and gold bars were "proceeds of crime," given that the 3rd Respondent could not credibly account for their source. The prosecution witnesses (PW1, PW2, and PW5) established the physical possession of USD 20,000, EUR 220,555, GBP 44,415, CAD 121,185, SEK 5,000, AUD 11,815, and 3,413.44 grams of gold bars.

13. The Appellant avers that PW9 from the Kenya Revenue Authority (KRA) confirmed that the 3rd Respondent had not filed tax returns for the years 2015–2018, and no sale receipts or records were produced by him despite claiming to have run a business for ten years. In the Appellant's view, the shifting evidential burden required the 3rd Respondent, under Section 111 of the *Evidence Act*, to show the legitimate source of the money and gold. The Appellant placed reliance in the case of Mwingi v Republic (Criminal Appeal 36 of 2021) [2023] KEHC 1594 (KLR). The Appellant asserts that since the 3rd Respondent claimed ownership of the bag and insisted it was from his businesses, the law required him to prove the same. His inability to show business records, his lack of a name on the business permits, and his failure to file returns demonstrate that the trial court ought to have found him guilty of the charged offence.

14. On the count of being in possession of a mineral, the Appellant contends that the prosecution's evidence by PW4 (Chief Laboratory Technologist, Ministry of Mining) confirmed that the metal bars recovered were indeed gold. The Appellant further contends that the 3rd Respondent gave contradictory assertions about being an agent of Inktoming Gold Trading Company. None of the Respondents were listed as directors or shareholders in that company's certificate of incorporation or CR12. No director of the alleged gold trading company was called by the defence to corroborate the 3rd Respondent's story. Thus, the Appellant argues, the gold bars were unlawfully possessed.

15. With regard to deliberate default in filing returns, the Appellant submitted that PW9, an investigator at KRA, testified that the 3rd Respondent was a registered taxpayer since 14/1/2015 but never filed returns for the years 2015–2018. The 4th Respondent was not even in the KRA records.

16. It was the Appellant argument that the trial court erroneously relied on a 2019 Tax Compliance Certificate to acquit the 3rd Respondent in respect of alleged default for earlier years, 2015–2018. To buttress this, the Appellant relied on the case Republic v Kenya Revenue Authority ex parte Tom Odhiambo Ojienda SC t/a Tom Ojienda & Associates [2017] eKLR.

17. The Appellant further contended that it should have been allowed to adduce rebuttal evidence under Section 212 of the CPC once the 3rd Respondent produced an unexpected 2019 Tax Compliance Certificate. The Learned Trial Magistrate's refusal curtailed the prosecution's right to impeach that document. They relied on the case of Danmark Ochieng Otieno v Republic (Criminal Case 32 of 2015) [2017] KENHC 4644 (KLR) to support the above argument.

18. It is the Appellant's contention that the trial court misapplied the law by ignoring the shifting evidential burden and by refusing to allow rebuttal evidence regarding the 3rd Respondent's 2019 Tax Compliance Certificate. The Appellant urges this Court to find that all ingredients of the offences charged were met, to overturn the acquittal, and to impose an appropriate sentence.

19. The Appellant after being granted leave, filed its further submissions dated 20th June, 2025. The main issue raised was whether the circumstances of the case warrant a re-trial. Relying on the decision in Pius Olima & Another v Republic C.A NO. 110 of 1991, it was submitted that the facts and circumstances of the case warrant a re-trial if not a conviction. Further, it was argued that the trial court denied the prosecution its right to call a rebuttal witness from KRA which prejudiced the prosecution's ability to prove its case leading to a miscarriage of justice. This Court was urged to allow a re-trial and the photographs of the exhibits can be used as evidence in the re-trial.

The Respondents' Submissions

20. The Respondents filed their written submissions dated 7th February, 2025 in opposition to the appeal. The Respondents maintain that the trial court rightly acquitted them for want of proof beyond reasonable doubt. Through their learned counsel, they argue the prosecution's case was speculative as no evidence showed that the money and gold were derived from an illegal source, nor that the 3rd Respondent "knew or ought reasonably to have known" that they were proceeds of crime. The Respondents argue that the Prosecution never demonstrated that the monies recovered actually formed part of the proceeds of crime within the statutory definition under section 2 of the *Proceeds of Crime and Anti-Money Laundering Act*. They contend that no tangible proof of tax evasion or other criminal source of the funds was presented.

21. It was submitted that the mere fact that the 3rd Respondent's name did not appear on single business permits does not, in itself, criminalize his business. The Respondents dispute the prosecution's invocation of Section 111 of the *Evidence Act*, contending that no credible threshold evidence was established to shift the evidential burden to them.

22. With regard to being in possession of a mineral, the Respondents counsel submitted that there was no evidence the gold was held unlawfully. The 3rd Respondent maintained he was an agent of Inktoming Gold Trading Company, and the Prosecution did not call any directors of that company or investigate its operations thoroughly to contradict the 3rd Respondent's claim. They emphasize that the 3rd Respondent claimed to be an agent of Inktoming Gold Trading Company. Although his name did not appear on the CR12, that alone, they maintained, is insufficient to prove criminal possession.

23. The Respondents further averred that the 1st and 2nd Respondents were simply bus crew who neither owned nor claimed the gold. The 4th Respondent merely handed over a package for transport on behalf of the 3rd Respondent. The 3rd Respondent asserts that he filed relevant returns and was in the

process of regularizing his tax obligations, producing a 2019 Tax Compliance Certificate as evidence of good standing and a prima facie proof of compliance, subject only to formal rebuttal by KRA. The Respondents further submitted that KRA took no proactive steps to assess or challenge the 3rd Respondent's returns from 2015–2018 at the time.

24. It was further submitted that the 4th Respondent's small-scale operations, being a casual self-employed "bodaboda" operator were never within the threshold requiring formal registration. Alternatively, he posits that no conclusive evidence was led that his operations indeed necessitated a KRA PIN or income declarations. The Respondents further defended the trial court's refusal to allow additional prosecution evidence, arguing that permitting the prosecution to reopen its case after the defence had closed would prejudice them and amount to filling gaps belatedly, and that since the trial magistrate disallowed the Prosecution's application for rebuttal, there was no evidence on record to impeach the certificate of compliance for 2019.

25. In a rejoinder to the Appellant's further written submissions, the Respondents filed their further written submissions dated 10th July, 2025 submitting that the evidence adduced by the Appellant's witness at trial court regarding the allegation on the 3rd Respondent's tax compliance status was not only unsupportive to the alleged tax evasion claims, but also full of weakness and vagueness from the beginning for want of thorough investigation. It was argued that failure to adduce relevant notices as required under the *Income Tax Act*, Cap 470 which was the prosecution's fault cannot be blamed on the trial court.

26. Relying on the decision of Republic vs Samuel Ongeri & Linah Mulaki Cheywe, Criminal Appeal No. 390 of 2018 at Eldoret, it was submitted that the Appellant failed to demonstrate the need to subject the Respondents for retrial and urged this Court not to grant that relief as prayed.

27. In the upshot, the Respondents argue that the Learned Trial Magistrate carefully analyzed the evidence, found no wrongdoing on their part, and that the acquittal was correct in law. They urge this Court to dismiss the appeal being devoid of merit and uphold the acquittal.

Analysis And Determination

28. As the first appellate court, the duty of this Court is to re-evaluate, re-analyze, and re-assess the evidence on record, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. See the time-honoured principle in Okeno v Republic [1972] E.A 32, that this Court must come to its own conclusions but make allowance for the fact that the trial court had the advantage of observing the demeanor of witnesses.

29. Similarly, in Gabriel Kamau Njoroge v Republic [1987] KECA 4 (KLR) it was stated that: -

> " it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.

30. Further in the case of Mark Oiruri Mose vs Republic [2013] eKLR Criminal Appeal No. 295 of 2012 the court of appeal stated: -

> " It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial court afresh, analyze it, evaluate it and come to its own

independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

31. In view of the above, I have considered the grounds of appeal against the record of appeal and the submissions of both parties, the authorities cited, and the proceedings and it comes out clearly that the issues for determination in this matter are:

    i. Whether the prosecution proved beyond reasonable doubt the offence of possession of proceeds of crime under Section 4(c) of POCAMLA.

    ii. Whether the respondents unlawfully possessed gold contrary to Section 203 of the *Mining Act*.

    iii. Whether there was deliberate default in filing tax returns by the 3rd & 4th respondents in violation of the *Income Tax Act*.

    iv. Whether the trial court erred in disallowing rebuttal evidence under Section 212 of the Criminal Procedure Code.

    v. Whether this Court should grant an order for re-trial

Whether the prosecution proved beyond reasonable doubt the offence of possession of proceeds of crime under Section 4(c) of POCAMLA.

32. Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act* defines 'proceeds of crime' as follows:

> " Proceeds of crime" means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed"

33. In the case of Schabir Shaik & others v State case CCT 86/06 (2008) ZACC 7 the court stated: -

> " One of the reasons for the wide ambit of the definition of "proceeds of crime" is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of camouflage"
>
> The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime."

34. The ambit of what constitutes proceeds of crime is therefore indeed wide and as both Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act* and the courts have given a straight forward definition of what constitutes proceeds of crimes I need not say more.

35. Section 4 (c) of POCAMLA on Acquisition, possession or use of proceeds of crime states that: -

> " a Person who has possession of, property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it or forms part of the proceeds of a crime committed by him or by another person, commits an offence."

36. The Appellant contends the subject money and gold bars were proceeds of crime, given that the 3rd Respondent could not credibly account for their source. Additionally, it was discovered that through the evidence of PW9 that the 3rd Respondent had not filed tax returns from the year 2015–2018. His inability to show business records, his lack of a name on the business permits, and his failure to file returns demonstrated a clear proof that the money and gold were proceeds of crime. On the other hand, the Respondents contended that the Prosecution never demonstrated that the monies recovered actually formed part of the proceeds of crime and that the prosecution's case was speculative as no evidence showed that the money and gold were derived from an illegal source, nor the 3rd Respondent "knew or ought reasonably to have known" that they were proceeds of crime.

37. Section 4(c) of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) necessitates proof that the accused person knew or ought to have known that the property in question constituted proceeds of crime.

38. It is not in dispute that the Respondents were found with a bag containing a significant sum of foreign currency in various denominations and 3,413.44 grams of gold. The 3rd Respondent ultimately asserted ownership of those items. The critical question is whether the prosecution established, beyond reasonable doubt, that this property represented "proceeds of crime" in connection with "tax evasion."

39. The trial court appears to have concluded that the alleged tax evasion was not properly quantified or proven by formal notices or tax assessments from KRA, thereby creating an evidentiary gap. However, I find that the learned Magistrate did not fully consider the interplay between (a) the totality of the circumstantial evidence pointing to the 3rd Respondent's inability to substantiate any legitimate source for the sums in question and (b) the effect of section 111 of the *Evidence Act*, which shifts an evidential burden to the accused once the prosecution establishes a prima facie case of possession of property under suspicious circumstances.

40. Section 111 of the *Evidence Act* provides:

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

41. As the Appellant rightly submitted, once an accused claims the bag and its valuable contents but fails to produce credible documentary evidence of a lawful source, since there were no sale records, no receipts, no valid licensees for gold transactions, and contradictory or absent proof of active business in his own name, the door opens for the court to invoke section 111 of the *Evidence Act*. This principle was clearly articulated in Mwingi v Republic (Criminal Appeal 36 of 2021) [2023] KEHC 1594 (KLR), where

the Court held that an accused person who asserts an "especially within knowledge" fact must offer proof. The court thus stated: -

> " Under the evidential burden principle (or the burden of adducing evidence as distinguished from the legal burden) the Appellant had an obligation to demonstrate by way of credible proof that she had a valid insurance cover in place for her lorry at the time the vehicle was impounded.....
>
> A matter pertaining to the existence of a valid licence is a matter that perfectly lies within the knowledge of the Appellant. She even asserted the existence of the same hence she had a duty to provide proof of its existence."

42. Here, the 3rd Respondent specifically asserted that the bag's contents were proceeds of his alleged clothing business and from legitimate gold trading on behalf of Inktoming Gold Trading Company. Yet, the documents from the Registrar of Companies indicated no directorship or agency linking the 3rd Respondent to that company, and none of the alleged clothing shop permits bore his name. In effect, these glaring inconsistencies rendered the Respondents' explanation untenable.

43. In Mohammed Hassan vs Republic [1955] 22 EACA 461, the court held that the existence of a valid certificate was a matter within the Appellant's knowledge hence the onus fell on him to provide proof of the same.

44. On the evidence, the prosecution provided a strong prima facie basis for suspecting that the sums in question were proceeds of some illicit activity, specifically the failure to comply with tax obligations or to declare significant income. It was then incumbent upon the 3rd Respondent to adduce credible exculpatory evidence to prove otherwise. He failed to do so. In Malingi v Republic [1988] KLR 225 the court stated that: -

> " Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession."

45. The learned trial court's conclusion that the lack of a detailed tax "assessment" necessarily vitiated the entire prosecution case was, in my view, a misdirection. The question at this stage was not the exact quantum of tax due but whether the large sum of money and gold in the Respondents possession had a legitimate or lawful origin. Given the standard set by section 111 of the *Evidence Act*, the trial court erred by disregarding that shift in the evidential burden.

46. Consequently, I am persuaded that the offence of being in possession of proceeds of crime was sufficiently established by the Appellant during trial.

Whether the respondents unlawfully possessed gold contrary to Section 203 of the *Mining Act*.

47. The 3rd Respondent laid claim to the gold bars weighing 3,413.44 grams, whose authenticity was confirmed by the Chief Laboratory Technologist (PW4).

48. The Appellant contends that the 3rd Respondent held the gold bars without valid authorization, thus violating Section 203 of the *Mining Act*. The Appellant further contended that the 3rd Respondent did not prove the claim that he was an agent of Inktoming Gold Trading Company thereby proving that he was in possession of the gold unlawfully. The 3rd Respondent on the other hand averred that he was an agent of Inktoming Gold Trading Company and no evidence was adduced by the prosecution to prove that the gold was held unlawfully.

49. Section 203 of the *Mining Act* prohibits unauthorized possession of minerals and criminalizes such possession if not in compliance with the Act or any other written law. PW4, a Chief Laboratory Technologist in the Ministry of Mining, testified that the bars tested were indeed gold.

50. The 3rd Respondent's claim that he was an "agent" of Inktoming Gold Trading Company was undermined by the Company's official CR12, which did not list him as a director or employee. He produced no written agency agreement or permit that would have legitimized his handling of gold. Further, transporting over 3,400 grams of gold surreptitiously in a bag raises a strong inference of unauthorized possession.

51. The trial court reasoned that the prosecution failed to prove lack of authorization. However, once the prosecution establishes that a person is in physical or constructive possession of a mineral, it becomes the accused's evidential burden to produce or point to a valid licence. The 3rd Respondent did not. Hence, there was enough evidence of unauthorized possession.

52. Moreover, the role of the 1st, 2nd and 4th Respondents in physically transporting or dispatching the bag containing gold also deserves more scrutiny than the trial court gave. Even if the 3rd Respondent claimed ultimate ownership, the law on possession contemplates that "possession" can be joint or constructive if persons knowingly aid or participate in moving or concealing illicit items. The totality of the evidence suggests all participated in handling the bag with knowledge of its contents. The learned Magistrate overlooked the principle that persons assisting in carrying such contraband can be deemed to have possessed it, especially when they are aware of what the bag contains.

53. While the trial court reasoned that further steps were needed to prove unauthorized possession, the burden once again shifted to the 3rd Respondent to show that he lawfully held the gold on behalf of a licensed entity or that he himself was duly licensed. He did not call any representative from that company or provide any credible documentary backing. As with the proceeds of crime count, the learned Magistrate failed to apply the effect of section 111 of the *Evidence Act*. In Assets Recovery Agency v Fisher Rohan and Miller Delores, Supreme Court of Jamaica, Claim No. 2007 HCV 003259 it was stated that: -

> " .....Even though these proceedings are quasi-criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized."

54. The trial court's acquittal was thus anchored on an erroneous conclusion that the state had to do more to rule out every possible but unsubstantiated claim of lawful possession. The evidence strongly suggested illegal possession of a mineral contrary to the Act.

Whether there was deliberate default in filing tax returns by the 3rd & 4th respondents in violation of the *Income Tax Act*.

55. *Income Tax Act* requires every individual or entity with taxable income to file returns within specified periods. Under Section 52B of the *Income Tax Act*, every individual is required to furnish to the Commissioner a return of income, including a self-assessment of his tax from all sources of income, not later than the last day of the sixth month following the end of his year of income, and Section 94 of the Tax Procedure Act, mandates that failing to submit returns or deliberately filing late can amount to an offence.

56. The Appellant, contends that the 3rd and 4th Respondents failed to file annual returns and had not declared any income source. PW9, testified that after going through the KRA systems, he established

that the 3rd Respondent had not filed his annual returns for four years and that the 4th Respondent was not registered as a tax payer. The Respondents submitted that the obligation imposed under tax law was not mentioned as there is no section of Income Tax pegged on the counts being the relevant written law. Further, the 3rd Respondent produced a 2019 Tax Compliance Certificate to buttress his case that he has complied with tax obligations and has no issues with KRA.

57. The learned Magistrate acquitted the 3rd and 4th Respondents of failing to file or submit returns under sections 97(e) and 94 of the TPA, largely due to the absence of a detailed tax assessment from KRA indicating how much tax was due. However, section 52 of the *Income Tax Act* as read together with the Tax Procedure Act places an obligation on every taxpayer to file annual returns where one has taxable income. The existence or absence of a formal demand notice or assessment is immaterial to the foundational obligation to file returns.

58. The 3rd Respondent admitted he ran a business for many years but offered no evidence of filing returns for the years 2015–2018. The 4th Respondent admitted he had never registered for tax; hence he obviously filed no returns. The belated production of a 2019 tax compliance certificate by the 3rd Respondent, without more, did not cure non-compliance in earlier years. Such a Tax Compliance Certificate is only prima facie evidence of compliance for the period in question and can be rebutted. The refusal to allow the state to call rebuttal evidence under section 212 of the CPC further obfuscated the issue.

59. It was therefore a misdirection for the trial court to hold that, absent a formal or specific assessment of tax owed, the element of tax default was unproven. The offences as drafted do not require the prosecution to produce the exact figure of unpaid taxes but to show non-filing or non-submission by the due date. The Respondents did not deny failing to file returns. Consequently, the acquittals on these tax default counts were erroneous.

Whether the trial court erred in disallowing rebuttal evidence under Section 212 of the Criminal Procedure Code.

60. Section 212 of the Criminal Procedure Code permits the prosecution to call evidence in rebuttal if the accused introduces a new matter in defence that could not have been foreseen with reasonable diligence. The 3rd Respondent produced a 2019 Tax Compliance Certificate at the defence stage, a document whose scope the prosecution contested. They sought to produce an officer from KRA to explain or challenge the Tax Compliance Certificate's authenticity or coverage.

61. Section 212 of CPC states that: -

> " If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter."

62. By disallowing the prosecution's application outright, the trial court limited the prosecution's ability to address a fresh item of evidence. It is trite that courts should conduct trials fairly, giving both sides an opportunity to respond to new, unforeseen evidence. The trial court's refusal unfairly prejudiced the prosecution's case, effectively allowing the 3rd Respondent's Tax Compliance Certificate to operate untested.

63. In Danmark Ochieng Otieno v Republic (Criminal Case 32 of 2015) [2017] KEHC 4644 (KLR), the purpose of Section 212 CPC is precisely to enable the Prosecution to rebut or clarify newly introduced evidence. The Court in that case observed that:

> "The drafters of the law in enacting Section 212 of the Criminal Procedure Code must have foreseen a situation where a party would raise new evidence that could not have been foreseen by the adverse party, the state is therefore within the law to apply to rebut the defence case.... The defence will not be prejudiced if new evidence is tendered for the reasons that it will have an opportunity to test its newness in cross-examination."

64. Similarly, in Mohamed Sanga Mwazombo v Republic [2015] KEHC 5215 (KLR) the court stated that: -

> "Under Section 212 of the Criminal Procedure Code the prosecution may be allowed to adduce more evidence in reply to the defence evidence so as to rebut what the accused would have stated in his defence. Under that Section, the court would consider whether the defence evidence could not have been foreseen by the prosecution by the exercise of reasonable diligence."

65. Had the learned trial magistrate permitted the Prosecution to call an officer from KRA, it might have been clarified whether a 2019 compliance certificate covered the earlier years from 2015–2018. Denying the Prosecution an opportunity to rebut that fresh evidence significantly affected the fairness of the proceeding and undermined the accurate determination of the case as it was a misdirection and contributed to the flawed acquittals of the Respondents.

Whether this Court should grant an order for re-trial

66. The law as regards what the Court should consider on whether to or not to order retrial is now well settled. In the case of Ahmed Sumar vs. Republic [1964] EA 481, the Court stated as concerns the issue of retrial in criminal cases as follows:

> "It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered."

67. The Court further stated: -

> "We are also referred to the judgment in PASCAL CREMENT BRAGANZA VS. R [1951] EA 152. In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."

68. That decision was echoed in the case of Lolimo Ekimat v. R, Criminal Appeal No. 151 of 2004 (unreported) when this Court stated as follows:

> " There are many decisions on the question of which appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where interests of justice require it."

69. In the present case, the Appellant places significant reliance on the decision in Pius Olima & Another v Republic (supra), which establishes that a retrial may be necessary if there has been a procedural mistake that compromises the trial's fairness. The Appellant contends that in this instance, the trial court's decision not to allow the KRA rebuttal witness resulted in the prosecution's inability to adequately counter the Respondents' defense, resulting in a miscarriage of justice.

70. The Respondents, on the other hand, relied on to the decision in Republic v Samuel Ongeri & Linah Mulaki Cheywe (supra), to argue that a retrial is unwarranted in circumstances where the prosecution has not established the need for such an action. Although the Court of Appeal in above cited authority determined that a retrial is not justified solely due to procedural errors, it is crucial to differentiate this case from the current situation. In that case, the court addressed a situation where the prosecution's case was simply diminished by irregularities, yet no significant injustice was present. In this instance, the Appellant claims that the decision to exclude the KRA rebuttal witness was a significant mistake that directly affected the prosecution's capacity to establish the tax compliance status of the Respondents, warranting a re-trial.

71. The removal of this rebuttal evidence was a serious mistake that compromised the trial's integrity rather than just being a technicality. The KRA rebuttal witness, was necessary to refute the Respondents' assertions that they were completely compliant with tax legislation. The courts have emphasized in decisions such as James Musyoka Muema v Republic [2018] KEHC 6708 (KLR) that denying a party the opportunity to present a full case amounts to denying procedural fairness.

72. By refusing to allow the KRA rebuttal witness, the trial court effectively deprived the prosecution of the opportunity to counter the Respondents' defense, creating a substantial imbalance in the proceedings that could not be cured by other means. In this regard, a re-trial would ensure that both parties have a fair opportunity to present their case fully, in accordance with the principles of natural justice.

73. In considering whether a re-trial is appropriate, it is necessary to take into account the potential impact of the trial court's error on the overall fairness of the proceedings. A re-trial is warranted when there is a reasonable belief that the trial was tainted by errors that undermined its fairness. The decision to order a re-trial is within the discretion of the appellate court, but it should be done with due consideration of the prejudice caused to the party who has been denied a fair opportunity to present its case. In this case, the denial of the KRA rebuttal witness was not a mere irregularity but a significant procedural defect that prejudiced the prosecution's ability to present a compelling case.

74. The trial court's decision to exclude the KRA rebuttal witness resulted in serious prejudice that affected the prosecution's ability to prove its case on the tax evasion charges, which is part of the basis for the appellant's appeal. Drawing from the principles articulated in Pius Olima & Another v Republic (supra) and other relevant case law, it is clear that a re-trial is warranted in order to ensure that the Appellant's right to a fair trial is upheld. The exclusion of crucial rebuttal evidence undermines the fairness of the trial, and a re-trial would afford both parties an opportunity to fully present their cases in accordance with the law and the principles of justice.

75. From the foregoing analysis, this Court finds that the trial court's acquittal of the Respondents on the charges of being in possession of proceeds of crime, possession of a mineral, and the tax-related offences was based on erroneous legal conclusions and a misapplication of both the burden of proof and the concept of possession and knowledge. The trial court also misdirected itself in refusing to allow the prosecution to tender rebuttal evidence under section 212 of the CPC.

76. Consequently, the Appellant's appeal against the acquittals is allowed. The orders acquitting the 1st, 2nd, 3rd, and 4th Respondents on the said charges are hereby quashed and set aside.

77. The prudent course in the interests of justice is to order a retrial before a different magistrate of competent jurisdiction, so that all the evidence including rebuttal evidence, may be tested and a fresh judgment reached on the merits.

78. In the upshot, this court makes the following orders: -

    i. The judgment of the lower court dated 11th October 2019 be and is hereby set aside;

    ii. The case is remitted to the Chief Magistrate's Court for retrial before a Magistrate of competent jurisdiction other than the one who heard and determined the original trial;

    iii. The Respondents shall appear before the Chief Magistrate's Court at Milimani on a date to be fixed forthwith for mention and taking of directions on retrial;

    iv. There shall be no costs of this appeal.

    It is so ordered. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF OCTOBER 2025.

BAHATI MWAMUYE

JUDGE

In the presence of:

Counsel for the Appellant – Mr. Mwandawiro

Counsel for the Respondents – Mr. Arika

Court Assistant - Ms. Lwambia