Republic v Masinde (Anti-Corruption Case E036 of 2024) [2025] KEMC 201 (KLR) (Anti-Corruption and Economic Crimes) (28 August 2025) (Judgment)

Neutral citation: [2025] KEMC 201 (KLR)

REPUBLIC OF KENYA

IN THE ANTI-CORRUPTION MAGISTRATE'S COURT

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION CASE E036 OF 2024

CN ONDIEKI, PM

AUGUST 28, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

LAWRENCE BARASA MASINDE ..... ACCUSED

JUDGMENT

Part I: Introduction

1. On 18th October 2024, the Accused was arraigned in Court and charged with 4 Counts of diverse offences as follows:

    i. Under Count I, the Accused was charged with the offence of fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003 (hereinafter "ACECA"). The particulars of the offence were that between August 2016 and November 2023 within Nairobi City County in the Republic of Kenya, being a public officer employed by Nairobi City Water and sewerage Company Limited (hereinafter "NCWSC") as an ICT Assistant, the Accused fraudulently acquired public property to wit Kshs. 7,173,963 being salary paid to him by NCWSC upon employment based on academic Certificates namely Diploma in Information Technology allegedly awarded by Eldoret National Polytechnic on 13th September 2010, a fact the Accused knew to be false.

    ii. Under Count II, the Accused was charged with the offence of forgery contrary to section 345 as read with section 349 of the Penal Code. The particulars of the offence were that on an unknown date and place within the Republic of Kenya, with intent to deceive, the Accused forged a Diploma in Information Technology Certificate awarded in the name Barasa M.

Lawrence purporting it to be a genuine document issued to him by the Eldoret National Polytechnic on 13th September 2010, a fact the Accused knew to be false.

iii. Under Count III, the Accused was charged with the offence of uttering a false document contrary to section 353 of the Penal Code. The particulars of the offence were that on or about the 7th day of October 2016 at NCWSC within Nairobi County in the Republic of Kenya, the Accused knowingly and fraudulently uttered a false document namely a Diploma in Information Technology Certificate purporting it to be a genuine document issued to the Accused by Eldoret National Polytechnic, a fact the Accused knew to be false.

iv. Under Count IV, the Accused was charged with the offence of deceiving a principal contrary to section 41(2) as read with section 48 of ACECA. The particulars of the offence were that on or about the 7th day of October 2016 at NCWSC within Nairobi County in the Republic of Kenya , being a public officer employed by NCWSC as an ICT Assistant, to the detriment of the said company, the Accused knowingly and intentionally deceived his principal by stating that he is a holder of professional qualification of a Diploma, grade pass, the Eldoret National Polytechnic information which the Accused filled in his personnel Record Form and submitted it to NCWSC for the purposes of updating his records.

2. The Accused denied the truth of each charge and consequently, the matter proceeded for hearing.

Part II: The Prosecution's Case (Summary of Evidence Presented and Written Submissions)

3. The prosecution called six (6) witnesses and produced twenty-seven (27) documentary exhibits in support of the prosecution case.

4. PW1, Titus Kibet Tuitoek, informed this Court that he serves the Nairobi City Water and Sewerage Company Ltd (hereinafter "NCWSC") as the Human Resources Manager (hereinafter "the HR Manager"). He recounted that the Accused herein presented a copy of a Diploma Certificate in Information Technology (hereinafter "IT"), purportedly issued by Eldoret Polytechnic but upon verification in writing, the said Polytechnic disowned the Diploma Certificate in IT. He recalled that the Accused was employed in 2017. He exhibited a letter of engagement dated 13/8/2016 and it was marked PMFI 1. He recounted that the Accused was put on a permanent employment on 15/6/2017 and in this connection, he exhibited the letter of appointment to permanent and pensionable terms marked PMFI 2. PW1 recalled that the Accused later filled a Personal Information Form (hereinafter "PIF"), giving his personal details. The PIF dated 7/10/2016 was marked PMFI 3. PW1 further testified that upon filling the PIF, the Accused submitted copies his KCSE Certificate, Diploma Certificate in IT from Eldoret Polytechnic and identity card (hereinafter "ID"). He informed this Court that the main requirement of the job was a Diploma in IT. The ID copy was marked PMFI 4; the copy of KCPE Certificate was marked PMFI 5; the copy of KCSE Certificate was marked PMFI 6; a copy of the Certificate in Computer Maintenance and Networking from Mombasa Technical Training Institute was marked PMFI 7; and the copy of the Diploma Certificate in IT from Eldoret Polytechnic of registration number 107P01501 was marked PMFI 8. PW1 testified that the main requirement as laid in the Job Description Form (hereinafter "JD") was a Diploma in IT and the JD was marked PMFI 9. PW1 testified that as a matter of policy, they were required to verify the qualifications claimed for all employees, a process he claimed to be continuous. In this connection, PW1 narrated that NCWSC addressed a letter to the Principal Eldoret Polytechnic to verify PMFI 8 and the said letter dated 8/5/2023 was marked PMFI 10. PW1 narrated that NCWSC received a response from Eldoret Polytechnic vide a letter dated 29/6/2023 and marked PMFI 11 in which the polytechnic disowned the diploma (PMFI 8). Further, PW1 narrated that polytechnic informed NCWSC that the Accused was admitted to the institution but under a different admission number 107P02137, which does not appear

in the Diploma Certificate (PMFI 8) and that the Accused on completed Module 1 of the Diploma in IT in July 2007 Kenya National Examinations Council (hereinafter "KNEC") exams and attained a Pass. The letter which provided further information dated 14/8/2023, from Eldoret Polytechnic, was marked PMFI 12. PW1 narrated that upon receiving further clarification that the Accused did not complete the course in Diploma in IT, NCWSC commenced disciplinary proceedings against the Accused by addressing a letter dated 8/8/2023 to the Accused, to show cause why disciplinary action should not be taken. The letter was marked PMFI 13. He narrated that the Accused responded to the show cause letter but the response was found unsatisfactory and he was thus suspended. The response dated 16/8/2023 was marked PMFI 14 and the letter of suspension dated 24/8/2023 was marked PMFI 15. PW1 narrated that between November 2016 and November 2023, the Accused earned a total salary of Kshs.7,173,963.60. In this regard, the payslips were collectively marked PMFI 16 and the tabulation of the earnings were marked PMFI 17. He produced the documents marked as the prosecution Exhibits 1-17.

5. In cross-examination, PW1 stated that he had worked as the HR Manager since 2017 and that the procedure of hiring the Accused arose when vacancies were declared on short-term basis of 6 months and a number of employees, including the Accused, were engaged in such terms. PW1 stated that he was not aware that the Accused was a casual employee of NCWSC before his engagement. He admitted that he is a custodian of records but he is not a custodian of casual employees which records are managed from the 39 stations of NCWSC by what he termed as BPO (Business Process Owners) in-charge of the 39 stations (the officers in-charge of IT, engineering, etc) were given opportunities to get the candidates for short-term engagements in 2016. He explained further that the records do not come to mainstream HR Records. He stated that the vacancies for short-term engagements were declared by NCWSC but there was no advertisement for the short-term engagement and the said BPOs were used to fill the vacancies. He denied the assertion that the casual employees were hand-picked. He explained that Exhibit 1 was issued to the Accused upon being engaged for 6 months contract. He explained at the time of engagement on short-term contracts, there was no requirement to apply because there was no advertisement. PW1 stated that the first time he interacted with the Diploma Certificate (Exhibit 8) was after the Accused was required to present his documents through the PIF. He explained that every time employees filled the PIF, they were required to submit copies of the documents and sign that they have submitted. He stated that he submitted on 7/10/2016 and he admitted Accused submitted the documents, he had been hired on 16/8/2016. He explained that employees were supposed to submit their documents after they were given a letter of engagement. He admitted that the letter of appointment did not indicate that the Accused was required to present documents after appointment but there was a requirement in the HR Manual that the documents be presented as much. He admitted that he had not presented the said HR Manual as an exhibit. When he was referred to Exhibit 2, he stated that it does not show that documents were to be presented at the time of hiring or after the appointment but argued that it incorporates the HR Manual into the appointment. He stated that the requirement of presenting documents is in the HR Manual and that it was mandatory for any staff to present documents to the company and if an employee fails, the engagement may be terminated. When he was referred to Exhibit 3 (the PIF), on the 'qualifications' column, he stated that the Accused indicated that he had a Diploma with a Pass. He stated that it does not require a complete Certificate because it indicates a start date and end date for the qualification. When he was referred to his witness statement, paragraph 2, page of this statement where he stated that "Lawrence Barasa Masinde presented during engagement ... which informed him to be engaged ..." he stated that he did not state that it was a pre-condition. He stated that the letter of engagement does not mean it is the end of the process. He stated that there was a team from HR which received the documents and he was the one who brought Exhibit 8 and signed for it. He stated that the PIF (Exhibit 8) was received by the HR office and a Diploma in IT was a requirement for the job. He stated

that at the time of engagement, he was given the job requirement and the job description. He stated that the job description form does not state that the job requirement was a Diploma. He admitted that there was was no advertisement. When he was referred to his witness statement, paragraph 6, page 2, he stated that they requested for certified copies of his documents in his file on grounds that he had all his documents. He stated that NCWSC uses various forms of communications namely email, website, and letters. He stated that NCWSC started using email communication a long time ago but he could not tell whether during his subsistence, NCWSC communicated to Lawrence via email. He stated that they submitted Exhibit 8 for verification.

6. In re-examination, PW1 stated that the Accused accepted the offer on 7/10/2016 and that he signed the PIF on 7/10/2016.

7. PW2, John Gitau, informed this Court that at the material time, he was the Academic Registrar of Eldoret National Polytechnic but now retired. He recounted that he received an invitation to attend Court in relation to the Diploma Certificate purportedly presented by the Accused to NCWSC. He admitted that the Accused was a student at Eldoret Polytechnic, and he enrolled for a Diploma in IT in January 2007. He explained that a Diploma in IT takes 3 years to complete, with three Modules numbered 1, 2 and 3. He explained that from the records of Eldoret Polytechnic, he finished Module 1 only. He recounted that on 6/3/2024, the polytechnic received from EACC a request to verify the Diploma Certificate (Exhibit 8). The letter from EACC dated 6/3/2024 to Eldoret Polytechnic was marked PMFI 18 and the response of the polytechnic dated 13/3/2024 was marked PMFI 19. He narrated that the Accused's admission number was 107PO2137. He recounted that the polytechnic conformed as follows:

   (i) that the Accused was a student admitted on 18/1/2007;

   (ii) that the Accused sat for Module 1 Diploma IT in July 2007, KNEC index number 509/02/136;

   (iii) that the Accused did not complete his studies at Eldoret Polytechnic;

   (iv) that the polytechnic Diploma Certificate purported to have been issued on 13/9/2010 by Eldoret National Polytechnic is fake;

   (v) that the reference letter of admission number 107PO2137 dated 13/8/2023 signed by Yebei S.K. is a genuine document;

   (vi) that the Diploma in IT takes 3 years and that Lawrence Masinde Barasa 107PO2137 did not graduate in the 6th graduation ceremony held on Saturday 17/7/2010;

   (vii) that in 2010, there was only one graduation ceremony of 17/7/2010;

   (viii) that the name of the Accused does not appear in the graduation booklet of 17/7/2010. The response letter dated 13/3/2024 was marked PMFI 19; the further response letter dated 9/4/2024 was marked PMFI 20. The graduation booklet for 17/7/2010 was marked PMFI 21. He acknowledged that the polytechnic received a letter from NCWSC dated 8/5/2023 (exhibit 10) and responded vide a letter dated 29/6/2023 (Exhibit 11) where they disowned the Diploma Certificate purportedly issued to Lawrence Barasa Masinde. He stated further that they gave further information to NCWSC vide a letter dated 14/8/2023 (Exhibit 12) where they confirmed that Lawrence Masinde Barasa was a student in the Department of IT pursuing a Diploma in IT and he did Module 1 of KNEC in July 2007 and attained a Pass. He produced the documents marked as Exhibits 19-21.

8. In cross-examination, PW2 stated that as per his result slip, the Accused's index number was 509102/136. He explained that this is a KNEC index number and should not be confused with the Accused's admission number. He stated that as per the result slip, the Accused completed Module 1 of the Diploma in IT and passed. The Result Slip was marked DMFI 1. He stated that the outcome can be described as a Pass on Diploma IT, Module 1. When he was referred to the letter dated 9/4/2024 (Exhibit 20), he stated that the polytechnic did confirm that the Accused was a student at Eldoret Polytechnic but he did not complete the Diploma studies for IT.

9. In re-examination, PW2 stated that the number put in the Diploma Certificate is the admission number. When he was referred to DMFI 1, he stated that the number used is the KNEC index number for the examination not the admission number and explained further that in the Diploma Certificates, the index number is not used or indicated. PW2 stated that the Diploma Certificate presented by EACC is for admission number 107PO1501, which they could not find in the system and that explains why they disowned it and that the different signature of the then Principal was different.

10. PW3, Engineer Nahashon Maingi Muguna, informed this Court that he is the Managing Director (MD) NCWSC. He informed this Court that he served NCWSC cumulatively for over 30 years in various capacities culminating to his appointment as the MD. He recounted that Public Service Commission issued a directive of verification of academic Certificates and in this connection, the Board of Directors of NCWSC directed that all Certificates of employees be verified and NCWSC wrote to all institutions where our employees attended and they received responses one of which concerned the Accused. He referred to exhibits 7, 10, and 11. He narrated that they received information that the Accused did not complete his Diploma in IT course and therefore he was not conferred with a Diploma in IT. He narrated that the Accused was therefore dismissed from NCWSC.

11. In cross-examination, PW3 stated that he started working at NCWSC in 1990 when it was a department of the City Council of Nairobi. He stated that he knows the procedure for hiring employees. He stated that prior to 2016, he may not tell whether the Accused was a casual employee of the NCWSC. He stated that he has records only for permanent and contract employees. When he was referred to exhibits 1 and 2, he stated one cannot tell whether there was an advertisement or not and it is not clear from the letter that there was an advertisement for the job. He stated that he was hired through the letters presented as exhibits 1 and 2 and that he may not be privy to the fact whether before he was hired, he was required to present his qualifications documents. He stated that when an employee is hired, he is required to present qualification documents and he believes that the Accused submitted documents. He stated that he was not sure whether the Accused was required to avail qualification documents before he was hired. He stated that casual workers are hired by supervisors. He stated that he may not tell whether interviews were conducted before the Accused was hired. He stated that presenting higher qualifications may earn an employee a salary increments and this encourages employees to further their academic qualifications. He stated that the Accused was hired on 13/8/2016. He stated that exhibits 1 and 2 do not reveal that the Accused submitted qualification documents and whether there was an interview. He stated that once an employee is hired, he is required to fill a PIF and this does not mean that the documents were not in the file or records. He stated that the Accused signed the PIF on 7/10/2016. He stated that the key requirement for his job IT Assistant is a Certificate in IT and one does not require a Diploma in IT. He stated that he did not know whether he was notified of the pre-qualification for the job of IT Assistant and whether he knew the qualifications for the job. He stated that he believed that the Accused knew of the job description before he was hired. He stated that it is not a must that very vacancy is advertised and a person can just apply to the employer and secure employment. He stated documents received are acknowledged by stamping.

12. In re-examination, PW3 stated that recruitment is governed by the MD and the HR Directorate is responsible for it. When he was referred to exhibit 9, he stated that it is about ICT Assistant, Grade 8 and a Diploma in IT was the minimum requirement. He stated that he accepted on 7/10/2016.

13. PW4, Maxwell Maina Gichinga, informed this Court that he works at NCWSC as a Payroll Officer. He produced the documents issued by the payroll section relating to the Accused. He narrated that the Accused was working under the ICT Department of NCWSC and he was earning a monthly salary. He referred to exhibit 16 (the payslips which were issued by the payroll section); exhibit 11 (the tabulation of the earnings which was prepared by the payroll section for November 2016 to November 2023). He stated that the cumulative salary was Kshs. 7,173,963.60.

14. In cross-examination, PW4 stated that his role was limited to processing the payroll only. He stated that for him to be paid, it connotes that he was an employee of NCWSC and that he must have been formally employed in order to qualify for a salary. He stated that the computation of the exhibit 16 does not necessarily mean that he received the total sum of Kshs. 7,173,963.60, which he described as the gross figure, with all the components in the payslip inclusive.

15. In re-examination, PW4 was referred to exhibit 17 and he stated that the total figure was Kshs. 9,304,575.60 and the net pay was Kshs. 7,173,965.60. He stated that the gross pay was Kshs. 9,304,575.50, less what he described as "money that went to the government."

16. PW5, Ivy Akinyi Scott, informed this Court that he is a qualified forensic document examiner of more than ten years' experience. PW5 stated that she is currently employed by EACC but was previously employed by the National Police Service, Directorate of Criminal Investigation, Forensic Department. She informed this Court that she holds a bachelor's degree of education from Maseno University and has been trained as a forensic document examiner at the Directorate of Criminal Investigations headquarter, Forensic Documents Examination Lab and further, she has been trained at the Regional Forensic Laboratory, that is in Khartoum, Sudan; and by Foster and Freeman Forensic Equipment Company, that is from UK, United Kingdom, in the operations of their equipment. PW5 recalled that on 7th May, 2024, EACC Forensic Examination Department received documents together with an exhibit memo, from Pius Ndiwa, the investigating officer (hereinafter "IO") attached to EACC Nairobi. She narrated that the exhibits were marked as follows:

    (i) Exhibit marked A1, identified as Nairobi City Water and Sewerage Company Limited, NCWSC/HRD/01 Personal records for Lawrence Masinde Barasa (Exhibit 3). The Exhibit Memo dated 6/5/2024 was marked as MFI 22(a);

    (ii) another document marked B1, the known handwritings of Lawrence Masinde Barasa;

    (iii) B2, the specimen signature of Lawrence Masinde Barasa. PW5 narrated that it was the IO's desire that it is ascertained whether the questioned handwriting on the document marked A1, from page 1 to page 2, excluding the official use section and the handwriting were made by the same author when compared to specimen signature and handwriting on B1 and B2. PW5 narrated that on 7/5/2024, she examined and compared the handwriting on the said documents and found out, that the handwriting is similar using the following considerations: the handwriting has similar character construction and connectivity; the spacing between characters; and similar diacritic and relative size. She narrated that she concluded that in her opinion, the same author made the handwriting on both the questioned document and known handwritings. PW5 narrated that the second request from the IO was to ascertain whether the questioned signature on document marked A1, pointed in red arrow was made by the same author, when compared to specimen signatures on document marked B2. She narrated

that she did examine the two said signatures namely the signature on A1 pointed in red arrow and the specimen on B2 and concluded that the signatures were similar using the following considerations: the signatures have similar character construction; the initial and terminal strokes; relative size; pen lift and pen movement and finally formed an opinion that they were made by the same author. Regarding the methodology deployed, PW5 narrated that during the examination, he analyzed, compared and evaluated the forensic evidence in the signature and handwriting by deploying the image enhancement, magnification procedures of between times one to times five using regular 4307, and infrared filters for better visibility and absolute identification of individual characteristics. Regarding characteristics and similarities, he considered the possibility of natural variation resulting from the writing instrument, natural pen failures and changing writing habits or disguise. She narrated that in addition, her opinion was based on the following peculiar characteristics in the handwriting and signature: like character initialization and their arrangements; pen pressure; pen speed; pen fluency; quality of the lines; and general resemblance. She produced the Forensic Examination Report as Exhibit 23.

17. In cross-examination of PW5, she stated that she read the exhibit memo. She states that under the part written, precise offence, the Memo indicates that there was an alleged forgery of a diploma Certificate in information technology. When counsel indicated that his understanding is that the subject document of forgery that was supposed to be examined is the diploma Certificate in information technology, PW5 stated that it depends with what the IO wants to prove. She stated that as an expert, she has no power to dictate the documents to be examined since it is within the power of the IO who peruses documents and knows what he wants. She stated that she is entirely bound to rely only on the documents provided by the IO at the time of instructions and she can only advise in a case where there are insufficient specimen signatures or handwritings, which may not give her an opportunity to give a conclusive opinion. When counsel asked why she examined the PIF and not the diploma Certificate, she responded that she did so because the IO wanted it examined. She stated that she believed that personal records have details which prove a specific academic field and there is therefore a relationship between the two.

18. In re-examination of PW5, she stated that in her opinion, the Accused filled that PIF and signed it.

19. PW6, Pius Ndiwa, an investigator attached to EACC was the IO. He recalled that around October 2023, he was allocated this case to investigate allegations of forgery of academic Certificates, by 18 employees of NCWSC and the Accused was one of them. He explained that the Accused was claimed to have forged a Diploma Certificate in IT from the Eldoret National Polytechnic. He recounted that he visited NCWSC offices and collected the personal file of the Accused among other documents including his engagement letter (Exhibit 1); letter of employment (Exhibit 2); PIF (Exhibit 3); copy of National ID card (Exhibit 4); KCPE Certificate (Exhibit 5); KCSE Certificate (Exhibit 6); a Certificate in computer maintenance and networking from Mombasa Technical Training Institute (Exhibit 7); a copy of Diploma Certificate in IT purported to have been issued by Eldoret Polytechnic (Exhibit 8). He narrated that the document of interest which led to the investigation was Exhibit 8, which upon verification, NCWSC found to have been forged. He narrated that upon undertaking independent verification by writing a letter to the principal Eldoret National Polytechnic (PMFI 18). He narrated that in the letter, he requested the Principal to confirm whether Lawrence Masinde Barasa, was enrolled in Eldoret National Polytechnic, in the course leading to the award of diploma in IT; and whether he completed his studies; and whether he was awarded with a Diploma Certificate in IT. He narrated that in the letter, he attached a copy of the diploma Certificate in question for the institution to verify whether it is genuine and confirm whether it was issued by Eldoret National Polytechnic. He narrated that on 13/3/2024, he received a response from Eldoret National Polytechnic (Exhibit 19) and that

the institution confirmed that Lawrence Masinde Barasa, was enrolled for a diploma program in IT on 18th January, 2007 and that he also sat for his Module 1 examination in July 2007, and there was no evidence whether he completed that programme. He further stated that the institution also confirmed that the diploma Certificate he had attached purported to have been issued on 13th September 2010, is fake and that the institution provided more information through a letter dated 9th April, 2024 (Exhibit 20) highlighting that the diploma programme takes a period of three years and that Lawrence Masinde Barasa, admission number 107P02137 did not graduate in the sixth graduation ceremony which was held on 17th July, 2010. He narrated that the institution also provided him with a copy of the graduation booklet that was held on 17th July, 2010 and the name of Lawrence Barasa Masinde is not on the list of graduates for the diploma programme. He narrated further that after gathering the said information and documents, he recorded statements of witnesses and summoned Lawrence Barasa Masinde to EACC offices at the Integrity Centre to record a statement over the said allegation and he complied on 6th May 2024. He stated that on that date, he took samples of his handwritings and signature and thereafter prepared an exhibit Memo dated 6th May, 2024 requesting the document examiner to examine them. He narrated that he also prepared a Miscellaneous Application, number E349 of 2024, to confirm that Lawrence Barasa Masinde, was earning a salary from NCWSC and he was provided with the personal account opening. The Miscellaneous Application dated 24th April, 2024 was marked PMFI 24. He stated that he was supplied with the account opening documents for Lawrence Barasa Masinde from Kenya Commercial Bank and the electronic Certificate. The personal account opening form was marked PMFI 25; the bank statements was marked as PMFI 26 and the bundle and the electronic Certificate was marked PMFI 27. He also stated that he collected the pay slips from NCWSC (Exhibit 16). He finally stated that he forwarded the file to the DPP with recommendations to charge Lawrence Barasa Masinde, with the offenses of forgery, uttering and fraudulent acquisition of public property and the DPP concurred with the recommendations and the Mr. Barasa was thus charged with the offences on record. He produced PMFI 18 as Exhibit 18; the Memo, A1, B1, B2 as Exhibits 22(a), 22(b), 22(c) and 22(d) respectively; PMFI 24-27 as Exhibits 24-27.

20. In cross-examination of PW6, he was referred to Exhibit 1 and confirmed that the Accused was engaged by NCSWC on 13th August, 2016. He was referred to Exhibit 22(b) and 3. He confirmed that the PIF was signed on 7th October, 2016. He also confirmed that the Accused was hired on 13th August, 2016. He confirmed that the position to which the Accused was hired was not advertised. He confirmed that according to the Accused's statement, he was hired on casual basis in 2013 before he was hired on contract in 2016 and permanent basis in 2017. When he was asked whether there was any other opportunity to supply documents except that time when it was hired in 2016, he stated that he was not aware. He stated that the only way he can tell how the Accused transitioned to the contract and permanent basis from casual is through the appointment letter because there was no advertisement at that time and so it was the discretion of the company to hire them the way they were hired based on their performance. He stated that he did not have a record of 2013, at the time he was being employed, only that when you see the exhibit number 1, which is dated 13th August, 2016, that's now after two months he filled the employee information form, and this is the only form that is in the file confirming that this is the information he had indicated. He stated that he sought clarification and he thought there is a letter of engagement of 2016, but he did not have any other information. He stated that from the pay slips, he requested to confirm when the Accused was on-boarded and going by the evidence of salary payment, he used it as the time he was on-boarded in 2016. He stated that casuals also not paid through the bank. He stated that the scope of investigations was to investigate forged academic Certificates by Lawrence Masinde. When asked why he then extended to investigating the PIF, which led to count number 4, he explained that the Accused having a forged diploma Certificate and to confirm that he actually is the one in possession of that Certificate, he filled the PIF since he had indicated in

the PIF that he has a diploma from Eldoret National Polytechnic and from his file, there was that diploma Certificate. He stated that the PIF was not the forged document but the copy of the diploma the Accused provided NCWSC was the subject. When he was asked the requirements for hiring on permanent and pensionable terms, he stated that one must possess a diploma, a KCSE Certificate and a diploma in information technology as per the job description form which was produced as exhibit 9. As to whether the Accused was aware of the qualifications for the job, PW6 stated that he was not aware when the information was brought to the attention of the Accused, but he believed that at the time of being engaged, this is the requirement that a person engaged at that position of the ICT must have a qualification of a diploma Certificate. He stated that in the Memo he stated the precise of offence and stated that it was forgery of a diploma Certificate from Eldoret National Polytechnic to secure employment in NCWSC. He stated that the IO does not need to have the original copy of the document to investigate whether it is a forgery.

21. In his written undated written Submissions filed on 27th June 2025, learned Prosecution Counsel Mr. Khatib instructed by the DPP, submitted that in order to prove the said charges, the Prosecution called a total of six (6) witnesses and produced twenty-seven (27) Exhibits in the matter.

22. For the state, it is submitted that the totality of the prosecution evidence presented, in view of the Accused's defence, has surmounted the standard of proof for criminal cases (beyond reasonable doubt).

23. In respect to Count I, it is argued that the evidence adduced by the prosecution is sufficient to prove that the Accused benefited to the tune of Kshs.7,173,963.60/= (Seven Million One Hundred and Seventy-Three Thousand Nine Hundred and Sixty-Three Shillings Forty-Sixty Cents) from the NCWSC, a public body, hence public funds. It is submitted that a computation of this amount was produced in Court (as P. Exhibits 16 & 17) confirmed by the evidence of PW1 and PW4. It is argued that the Accused did not deny the same.

24. In relation to Count II, it is argued that the prosecution proved beyond reasonable doubt, through the Document Examiner (PW5), that the Accused filled the personal form indicating that he had the Diploma in IT Certificate despite it being a forgery and the Accused therefore attained the employment by deceit.

25. Concerning Count III, it is argued that the prosecution proved beyond reasonable doubt that the Accused presented the said Diploma Certificate to NCWSC with the knowledge and intention that the institution relies on it in consideration of his employment application.

26. Regarding Count IV, it is contended that the prosecution proved beyond reasonable doubt that the Accused deceived NCWSC when he presented the said Diploma Certificate P. Exhibit 8 with the knowledge and intention that the institution relies on it in consideration of his employment application.

27. Consequently, this Court is urged to find that the prosecution has discharged its burden of proof by adducing evidence in support of all the four charges beyond reasonable doubt, and accordingly find the Accused guilty thereon.

Part III: The Defence (Summary of the Defence Presented and Written Submissions)

28. In his defence, the Accused was the only defence witness.

29. In his sworn statement, the Accused acknowledged that NCWSC was his employer and that he initially secured a casual job in 2014. He informed this Court that in 2014, the offer for a casual job was made

verbally and he was required to bring copies of his academic and professional documents. He narrated that he complied and provided NCWSC with:

(i) a copy of his KCSE Certificate;

(ii) copies of the School Leaving Certificates for his primary and secondary schools;

(iii) a copy of the July 2007 Result Slip for Module 1 of the Diploma in Information Technology at Eldoret National Polytechnic as provided by KNEC; and

(iv) a copy of his marriage Certificate. He narrated that when he provided copies of the above documents, he was advised to wait for a call and indeed, he did receive a call the following day that he had secured a casual job. He denied that at that point of securing a casual job in 2014, he presented a copy of the impugned Diploma Certificate in Information Technology from Eldoret National Polytechnic. He produced a bank statement in his name domiciled at KCB, bank account number 111xxx686 for the period spanning 1st January 2015 to 31st December 2016 to support the assertion that he was initially engaged by NCWSC as a casual worker. He produced the bank statement as the Defence Exhibit 2. From the said statement, he explained that as at 13th August 2016, he was serving as a casual labourer. He asserted that the same bank account was relied upon by the prosecution, making refence to the Prosecution Exhibit 16. He narrated that owing to his excellent performance, and on basis of the recommendation of his supervisor, on 13th August 2016, he was engaged by the management of NCWSC as an Information Technology Assistant (hereinafter "IT Assistant"), making reference to the Prosecution Exhibit 1. He asserted that at no point prior to his engagement, was he given the job description of an IT Assistant, but he was instead straight away given a letter of engagement. He stated that he first saw and signed the job description referenced by the prosecution as the Prosecution Exhibit 9 on 19th April 2023, long after engagement on 13th August 2016. He stated that he was not informed the reason for signing the job description form on 19th April 2023. Regarding the Prosecution Exhibit 3 (PIF), he admitted that he filled the form on 7th October 2016 but stated that the form required copies of the following documents to be attached: identification card; birth Certificates; pass-port size photographs; and Personal File Number. He stated that the PIF does not require attachment of academic and professional Certificates. He produced his own statement under caution as Defence Exhibit 3. In this connection, he stated that he did state in the statement that there was no advert for this job and there was no interview conducted in this regard. He produced his examination result in respect to Module 1 in the Diploma in IT as Defence Exhibit 1. He explained that the Diploma in IT had 3 modules and he finished module 1 and attained a pass. He argued that in the PIF, he recorded that he has "Diploma IT pass Module 1." He argued that what he declared in the PIF is not inconsistent with Defence Exhibit 1. He argued that he did not state that he has a Diploma Certificate in IT. He produced a letter from Eldoret National Polytechnic dated 15th September 2023 to prove that he was a student in the Diploma in IT and attained a pass in Module 1 thereof ad it was marked Defence Exhibit 4. He stated that the contents of Defence Exhibit 4 is similar to the Prosecution Exhibit 12 and not inconsistent with what he declared in the PIF.

30. In cross-examination, the Accused stated that he was initially engaged as a casual labourer on 13th August 2016, he was engaged as an IT Assistant which he accepted on 7th October 2016. He stated that in accepting the offer, he did not submit documents. He admitted that he filled the Prosecution Exhibit 3 (PIF) on 7th October 2016, the same day he accepted the offer. He stated that in the PIF, he indicated "Diploma in IT – pass – 2007-2010, Eldoret Polytechnic". He admitted that he wrote

Diploma in IT from Eldoret Polytechnic. When he was referred to the Prosecution Exhibit 8 (the impugned copy of a Diploma Certificate in IT) he stated that it indicated "pass". He denied that he presented the impugned copy of Diploma in IT. He stated that he wrote 2007-2010 in the PIF "because it is an ongoing course" and that he "was to start in 2007 and finish in 2010". He stated that there was no space to state "ongoing". He stated that he was supposed to finish in 2010. He stated that he did not complete studies leading to the Diploma in IT. He denied that he deceived NCWSC by that declaration. He stated that the PIF requires to be filed the next of kin and he was not required to give academic documents. He stated that he supplied HR with a copy of the transcript. He admitted that he supplied HR with copies of his KCSE Certificate and computer maintenance Certificate. He admitted that he was paid his monthly salary between 2016 and 2023.

31. In re-examination, the Accused stated that the documents on record were submitted when he was hired as a casual. He denied that he did not submit to NCSWC Prosecution Exhibit 8 on 7th October 2016. He denied that he submitted the impugned Certificate Diploma in IT.

32. In his compelling and meticulously articulated written Submissions dated 5th June 2025 and filed on 6th June 2025, learned Counsel Mr. Migele of Migele & Company Advocates, instructed by the Accused, submits that the Accused was the only defence witness and presented 4 Exhibits namely: (i) Defence Exhibit 1; Result Slip from Eldoret Polytechnic for Module 1 Diploma Pass in Information Technology; (ii) Defence Exhibit 2; Accused Person's Bank Statement Bank Statement for the KCB Account Number 1117392686 for the period of 1st January 2015 to 31st December 2016; (iii) Defence Exhibit 3;The Accused Person's witness statement dated 6th May 2024;and (iv) Defence Exhibit 4 being a letter dated 1st September 2024 from the Eldoret Polytechnic.

33. For the Accused, learned counsel proposed the following seven questions for determination, which I wish to quote verbatim seriatim:

    i. Has the prosecution adduced sufficient evidence to satisfy the charges against the Accused person beyond reasonable doubt?;

    ii. Did the Accused person submit whether physically, by email or at all, the forged Diploma Certificate P Exhibit 8 to Nairobi City Water and Sewerage Company at the time of employment as a casual employee or at all?;

    iii. Which documents were required to be attached by the express requirements of the Personal Records form P Exhibit 3?;

    iv. Was the declaration that the Accused Person made on part (e)(ii) of the Personal Records Form P Exhibit 3 any different from the express contents of the Accused Person's Defence Exhibit 1 and Defence Exhibit 4 which was the Module 1 Diploma Pass Result Slip?;

    v. With the job description form P Exhibit 9 being issued to the Accused Person only on 19th April 2023 almost 6 years after he accepted the appointment as an ICT Assistant, was there any intention and/or motivation on the part of the Accused Person to deceive principal at the time the Accused was employed as an ICT Assistant considering that he accepted the appointment on 17th July 2017 when there was no express requirement for a diploma in Information Technology prior to 19th April 2023?;

    vi. Without any evidence by records (Inventory of received documents) of receipt of a diploma Certificate by Nairobi Water and Sewerage Company from the Accused Person at the time of appointment as an ICT Assistant and further in the absence of document examination to

show that the Accused Person generated the alleged diploma Certificate P Exhibit 8, is there proof of forgery and uttering of the said document?; and

vii. Were any sums of money paid to the Accused Person during the period of employment based on fraud as a precondition for meriting the payments for work done in his various positions as a casual and as an ICT Assistant?

34. Turning to the first question whether the prosecution has adduced evidence to satisfy the charges against the Accused person beyond reasonable doubt, it is submitted that the substance of the prosecution's case against the Accused person was that the Accused person forged a Diploma Certificate P Exhibit 8 from Eldoret National Polytechnic and used it to get his employment at NCSWC. It is submitted that it is a common law principle that he who alleges must prove and to that effect it is required that the prosecution should prove their case beyond reasonable doubt, citing sections 107(a) and (b) of the *Evidence Act* and restatement of the principle in Pius Arap Maina vs. Republic [2013] eKLR, to buttress this proposition. It is submitted further that whenever it appears that any doubt has been cast in the mind of the Court, then it is improper to actually convict an Accused person and the Accused person needs not to speak as the evidence of the Prosecution should speak for itself beyond reasonable doubt that no matter what the Accused Person says, the evidence presented casts no doubt in the mind of the Court that the Accused really committed the crime he has been charged of. It is contended that based on the analysis of each element of the issues submitted for determination, it shall be clear beyond peradventure that serious doubts arise from the prosecution's case on all the 4 counts and the evidence adduced.

35. On the second question whether the Accused person submitted the Diploma Certificate, it is submitted that during the hearing, the forged Diploma Certificate was marked as P Exhibit 8 and that it was the Prosecution's case that the forged diploma Certificate P Exhibit 8 was submitted to NCWSC at the time of filling in the personal records form P Exhibit 3. It is argued that the prosecution produced Exhibit 8 stating that it was submitted by the Accused Person to his employer at the time of his employment as an ICT Assistant. It is argued that ana analysis of the testimony of PW1, the Human Resource Manager and P Exhibit 3 which is the Personal Records form, exonerates the Accused. It is submitted that PW1 testified on cross-examination that the Accused Person was among persons who were hired by NCWSC at the recommendation of the Business Process Owners (BPOs). It is submitted in this connection that it is therefore accurate to state that the Accused Person was hand-picked at the recommendation of the BPOs, for a six months contract hence there was no pre-hiring requirements as they were based on recommendation from BPOs. It is submitted that this mode of hiring was aalso confirmed during the Defence hearing where the Accused person confirmed that he started working at NCWSC as a casual worker in 2014 then later transitioned to the position he was serving before his suspension and ffurther, the Accused Person, in his witness statement, stated the documents that he submitted at the time of being engaged by Nairobi Water and Sewerage as a casual in 2014 as:

(i) KCSE Certificate;

(ii) Living Certificate for both Primary and Secondary School;

(iii) Result Slip for Diploma in Information Technology Pass Module 1(KNEC) July 2007. (Defence Exhibit 1); and Marriage Certificate. It is argued that the Accused Person's testimony of the documents that he submitted at the time of employment as a casual has not been challenged by the prosecution by way of alternative evidence that contradicts that position and, in any event, at no other time were any academic documents required to be produced for the position of an ICT Assistant at the time of employment of the Accused Person or during the employment period of the Accused Person. It is submitted that no inventory of records was

produced showing whether by physical receipt acknowledgement stamps or email, NCWSC ever received a diploma Certificate from the Accused Person as a prerequisite for recruitment as an ICT Assistant. It is argued that PW1, testified that there was HR manual that required academic documents to be presented but the same was not presented in Court. It is further argued that PW1 testified that the documents including P Exhibit 8 were to be received by the HR department of NCWSC and something called a presentation is signed at the point of receipt of documents. It is contended that no such presentation has been placed before this Court as an exhibit to show that indeed the Accused Person delivered P Exhibit Number 8 to NCWSC prior to being employed or during the subsistence of his employment. It is submitted that the Accused person filled P Exhibit 3 on 7th October 2016 and this was long after NCWSC had already engaged his services on 13th August 2016. It is submitted that the purpose of filling the personal records form in our view for administrative purposes since the Accused person had already started earning his salary as an ICT Assistant before he filled the personal records form and that this Court may note that from the evidence of PW1 that for the Accused person to be engaged by NCWSC in August 2016, there was neither advertisement made for the particular job position nor any interview towards establishing that a person is qualified for the particular position hence there is no way in which he could submit an application between 13th August 2016 when a decision was made to engage him as an ICT Assistant and 7th October 2016 when he filled the personal records form.

36. On the third question on which documents were required to be attached by the express requirements of the Personal Records form (PIF) P Exhibit 3, it is submitted that looking at the contents of P Exhibit 3, and there was nowhere the Accused was required to attach any academic Certificates and that PIF does not require at any part of it that the Accused was to attach any academic documents to the form hence there is no way whatsoever in which the purported Diploma in Information Technology Certificate could have been availed and/or been dispatched to NCWSC on 7th October 2016. It is submitted that the last part on page 2 of 2 of the of the PIF dated 7th October 2016 required the following attachments:

(i) Copies of identification cards for dependants over 18 years where children are above 18 years;

(ii) Proof that the declared dependants are in school;

(iii) Legal documents for adopted children; and

(iv) Birth Certificates and coloured passport size photos for all dependants with the names of the defendant at the back of the coloured passport size photo.

It is submitted that when PW1 was cross-examined on how documents are submitted to the institution, he responded that the office of the HR is the one that receives documents and that when PW3 was asked on how the company confirms that they have received documents, he stated that the institution stamps the cover letter and the annexures are not stamped. It is argued that in this case, there was no cover letter produced to show stamped acknowledgement for the receipt of P Exhibit Number 8 and in any event, the personal records form P Exhibit 3 only called for attachment of documents appertaining to dependents and not academic documents as already stated here above. It is further argued that at no point during the testimony of any of the Prosecution Witnesses, has it been brought clearly how Exhibit 8 was actually submitted to NCWSC for them to actually conclude that the Accused person actually submitted it to them or had it all. It is submitted that during the Defence hearing when the prosecutor asked the Accused person whether he submitted Exhibit 8 he categorically responded by saying that he did not submit it. Further, it is submitted that the Prosecution did not show the chain of custody of exhibit, since NCWSC has no clear way of how they received documents

hence have been unable to convince this Court that Exhibit 8 was actually given to them by the Accused person.

37. Regarding the fourth question whether the declaration that the Accused Person made on part (e)(ii) of the PIF, P Exhibit 3, was any different from the express contents of the Accused Person's Defence Exhibit 1 which was the Module 1 Diploma Pass Course Result Slip, it is submitted that the PIF was produced during hearing of the prosecution's case as P Exhibit 3 while the KNEC Result slip was produced during the defence hearing as Defence Exhibit 1 and that ana analysis of the of the PIF and Defence Exhibit 1, there are inconsistencies. It is submitted that the Accused person indicated that his professional qualification as "Diploma with a pass" as the professional qualification and pass as the grade and that in addition, the start date and the end date is 2007 and 2010 respectively and the institution is Eldoret Polytechnic. It is submitted that the Defence Exhibit 1 indicates that the Accused Person had a Diploma and scored a pass in module(1) 2007 and from a keen look at the details as captured on Defence Exhibit 1 and the details as filled out by the Accused Person on P Exhibit 3 in both documents, one can conclude that there is no discrepancy in the information in both of them and that the word 'Diploma' and the word 'Pass' appears on both documents, a true indication that there was no discrepancy in any information given by the Accused person and that in fact, it is a correct assertion of fact to state that the Accused Person was truthful and accurate in that regard. It is argued that this position was also confirmed by PW2 who confirmed that indeed the Accused person was a student at the Eldoret National Polytechnic and sat for module one in 2007 and that it is therefore inappropriate for the Prosecution to actually conclude that the intention of the Accused Person was to deceive any one from the institution by giving his details as required in the Personal Records Form when the details on the personal records are consistent with Defence Exhibits produced in Court and the Prosecution's own exhibits and testimony as well. In addition, it is argued that the PIF did not have a section for specificity and as a result, when the Accused Person was asked why he put 2010 as the end date he responded by saying that that was his expected end date as he enrolled for the course in 2007 and expected to complete in 2010. It is thus concluded that in both P Exhibit 3 and Defence Exhibit 1, there is no indication that the Accused Person declared that he had attained a diploma degree Certificate.

38. Turning to the fifth question (in respect to Count IV) which is whether, with the job description form P Exhibit 9 being issued to the Accused Person on 19th April 2023 almost 6 years after he accepted the appointment as an ICT Assistant, there any intention and/or motivation on the part of the Accused Person to deceive principal at the time the Accused was employed as an ICT Assistant considering that he accepted the appointment on 17th July 2017 when there was no express requirement for a diploma in Information Technology prior to 19th April 2023, it is argued that before concluding that a person deceived the other, it must be established that there was an intention and/or motivation to deceive and that the key exhibits to be considered on this issue is the letter of appointment dated 17th July 2017 and P exhibit 9 which is the job description form. It is submitted that it has already been established that for the Accused Person to have been employed at NCWSC as an ICT Assistant, there was no advertisement made to invite qualified applicants neither was there any interview conducted in order to disqualify the unqualified and get the best candidate and it is also important to note that there having been no advertisement, there is no way any potential candidate could have known any qualifications that were required. It is submitted that a keen look at the contents of both letters, there is nowhere NCWSC mentioned the qualifications of the position stated in both letters and that the first time the Accused Person interacted with a document that outlines the qualifications of the position he was occupying by virtue of employment at NCWSC, which is the Job Description Form was on 19th April 2023. It is argued that for it to be concluded that a person has deceived any other person, the person alleging that fact must prove that they have suffered any loss, injury or damage as a result of relying on that deceit and that the loss or damage in this case could be in the form of monies paid out to the Accused Person

as a result of the deceit. In this connection, it is argued that fortunately in this case, the record shows that the Accused Person signed the job description form exhibit 9 on 19th April 2023 which was close to 5 years after the Accused Person was employed. The issue of deceit therefore does not arise since the Accused Person had already been hired. Furthermore, it is argued that the job description form P Exhibit 9 that was raising the issue of the requirement for a diploma Certificate in IT for the position that the Accused Person was already holding for close to 6 years was introduced to the Accused Person for the first time ever on 19th April 2023.On 19th April 2023, the P Exhibit 9 was not a re-advertisement or an invitation to the Accused Person to re-apply for the said position and that on 24th August 2023, which is just shortly after the Accused Person signed the Job Description Form, he was suspended from work. Further, it is submitted that it is also important to note that the Accused person testified by stating that they were just asked to sign the Job Description form, no explanations were given as to the purpose of signing and that one can therefore conclude that the act of signing Job Description Form at Nairobi Water and Sewerage Company on 19th April 2023 was a mere an administrative activity.

39. Conceding the sixth proposed question whether any sums of money paid to the Accused Person during the period of employment based on fraud as a precondition for meriting the payments for work done in his various positions as a casual and as an ICT Assistant, it is submitted that it is impossible for one to deceive the other regarding facts only known to the person alleging to have been deceived and that the Accused person was employed on 13th August 2016 but only came to interact with the Job description on 19th April 2023, 5 years after he had diligently served NCWSC and earned all the income due to him on merit and for work done.

40. On the question of forgery, it is argued that the investigator failed to examine signatures on the alleged forged diploma Certificate against the signature specimen of the Accused Person or in any other way to ascertain whether the Accused Person forged it and that Count II thus fails on account of failing to meet the elements of the offence as set out in Caroline Wanjiku Ngugi v Republic [2015] KEHC 854 (KLR) namely:

    (i) False making of- The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated, printed or engraved;

    (ii) Material alteration -The person must have taken a genuine document and changed it in some significant way. It is intended to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine content of a document.

    (iii) Ability to defraud- The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine;

    (iv) Legal efficacy- The document or writing has to have some legal significance;

    (v) Intent to defraud- The specific state of mind for forgery does not require intent to steal, but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer. It is argued that at no point during the hearing were the above-mentioned ingredients adhered to by the Prosecution.

41. In closing, this Court is urged to find that the prosecution has failed to discharge its burden of proof beyond reasonable doubt and acquit the Accused under section 215 of the CPC.

Part IV: Points for Determination

42. I will set out the points for determination for each Count, distinctly. Commending themselves for determination, gleaning from the charge, defence and rival written Submissions, are the following charge-specific questions:

    I. In regard to Count I:

        i. Whether the prosecution has proved beyond reasonable doubt that the Accused acquired public property.

        ii. Whether the prosecution has proved beyond reasonable doubt that the Accused did so fraudulently or unlawfully.

    II. Relating to Count II:

        i. Whether the prosecution has proved beyond reasonable doubt that the Diploma in IT Certificate - exhibited as Prosecution Exhibit 8 – is a forgery (a false document).

        ii. Whether the prosecution has proved beyond reasonable doubt that the impugned Diploma in IT Certificate was forged by the Accused.

        iii. Whether the prosecution has proved beyond reasonable doubt that the forgery was driven with intent to defraud or to deceive.

    III. Concerning Count III:

        i. Whether the prosecution has proved beyond reasonable doubt that the Accused uttered the impugned Diploma in IT Certificate to NCSWC.

        ii. Whether the prosecution has proved beyond reasonable doubt that the impugned Diploma in IT Certificate uttered by the Accused is a false document.

        iii. Whether the prosecution has proved beyond reasonable doubt that the Accused uttered the false document namely a Diploma in IT Certificate knowingly.

    IV. Regarding Count IV:

        i. Whether the prosecution has proved beyond reasonable doubt that the Accused made a statement to NCWSC to wit that he was a holder of a Diploma in IT.

        ii. Whether the Accused knew it to be false or misleading in any material respect.

        iii. Whether the statement was to the detriment of NCWSC.

Part V: Analysis of the Law; Examination of Facts; Evaluation of Evidence; Determination; and Reasons for the Determination

43. Section 3(1) of the *Evidence Act* defines "evidence" as “the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by Accused persons, admissions, and observation by the Court in its judicial capacity.”

44. The legal burden of proof (onus probandi incumbit ei qui dicit, non ei qui negat) is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position taken. In criminal cases, this duty (otherwise originally known as brocard ei incumbit probatio qui

dicit, non qui negat) is on the shoulders of the prosecution. It essentially means that the legal burden of proof rests on who asserts, not on who denies. This said legal burden draws impetus from a fair hearing principle now enshrined in Article 50(2)(a) of *the Constitution* that a person Accused of an offence ought to be presumed innocent until proven guilty. See sections 107, 108 and 109 of the *Evidence Act*.

45. When is a fact deemed to have been proved? Put differently, what then amounts to proof? Section 3(2)-(4) of the *Evidence Act* speaks to circumstances when a fact is deemed to have been proved in the following terms:

"(2) A fact is proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.

(3) A fact is disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

(4) A fact is not proved when it is neither proved nor disproved." In this connection, in the Australian case of Britestone Pte Ltd vs. Smith & Associates Far East Ltd [2007] 4 SLR 855, which has been adopted in Kenya in inter alia Paul Thiga Ngamenya v Republic [2018] eKLR, V.K. Rajah, JA expressed a view that

> "The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved and not proved are statutory sdefinitions contained in the *Evidence Act*. The term proof whenever it appears in the *Evidence Act* and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact."

46. But not all facts require evidence to prove them. In restricted circumstances, the law permits a trier of fact to regard certain facts as proved until they are disproved or if the law so declares a certain fact to be conclusive proof of another, the Court shall upon proof of that fact, regard the other as proved in that event not permit evidence to be given for the purpose of disproving it. Whereas the former is a rebuttable presumption, the rather is an irrebuttable presumption. Section 4 of the *Evidence Act* provides that

"(1) Whenever it is provided by law that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

(2) Whenever it is directed by law that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

(3) When one fact is declared by law to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it." Enacted in various statutes - notably *the Constitution*, *Evidence Act*, the Penal Code, and the Criminal Procedure Code (hereinafter "CPC") - are diverse instances where proof is not necessary as follows:

(i) first, proof is not necessary in circumstances where the law permits the Court to make a rebuttable presumption of fact. See Articles 14(4) and 17(2) of *the Constitution*, read with section 7 (4) of the *Children Act*; sections 24, 27, 45, 77, 78, 78A (4), 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 106E, 106F, 106G, 106H, 106I, 118A and 119 of the *Evidence Act*. See also sections 11, 14 (2), 53 (2), 89 (3) and 248 of the Penal

Code. See also section 143(1)(b) of the CPC. See also section 166 (2) & (3), 187 2(a) & (b) and 221 (2) of the *Children Act*.

(ii) second, proof is not necessary in circumstances where the law permits the Court to make irrebutable presumption of law. See sections 44, 47A and 118 of the *Evidence Act*. See also sections 7, 12 and 14(1) of the Penal Code read with section 221 (1) of the *Children Act*. See also section 14(3) of the Penal Code; and

(iii) third, proof is not necessary in circumstances where either

(i) the facts are deemed to have been proven by consent of parties; or

(ii) matters which a Court is permitted by law to take judicial notice; or

(iii) facts admitted in civil proceedings. See section 59A, 60 and 61 of the Evidence.

47. The legal burden of proof in criminal cases never leaves the prosecution's backyard, except in very rare occasions. In fact, acts or conduct or even legislation which has attempted to do has been sternly frowned upon. In Senator Johnstone Muthama vs. Director of Public Prosecutions & 3 Others [2020] eKLR, J. Lesiit, L. Kimaru & J. M. Mativo, JJ frowned upon section 96(a) of the Penal Code for shifting the burden of proof to the Accused and consequently declared it as offending the fair trial principle of being presumed innocent until proven guilty as enshrined under Article 50(2)(a) of *the Constitution* and the Constitutional guarantee against self-incrimination as enshrined under Article 49(1)(a)(ii), which act is further in flagrant violation of *the Constitution* which exempts, under Article 25 thereof, from limitation contemplated under Article 24 thereof of inter alia the fair trial principles enshrined under Article 50 thereof. The Court explained that the right to a fair trial was a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which were the right to life and liberty of the person. It was guaranteed under article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of the right to fair trial was illustrated not only by the extensive body of interpretation it had generated worldwide but, by the fact that under article 25(c) of *the Constitution*, it was among the fundamental rights and freedoms that could not be limited or abridged.

48. Relatedly, see also the often-restated position, which was restated by the Court of Appeal (Kneller, Hancox and Chesoni, JJA, as they then were) in Ajwang vs. Republic [1983] KLR 337 (hereinafter "the Ajwang case"), that barring the facts which squarely fall under the purview of section 111 of the *Evidence Act*, the burden of proving the ingredients of the offence is entirely on the prosecution, and the Accused cannot be called upon to prove his innocence. See also the Court of Appeal decisions in both Douglas Thiong'o Kibocha v Republic [2009] eKLR (hereinafter "the Kibocha case") and Boniface Okerosi Misera & another v Republic [2021] KECA 840 (KLR) (hereinafter "the Okerosi case").

49. Before I invoke an old English decision, it's instructive to observe that our criminal justice system did not start on a clean slate. Kenya built its legal system on the English common law system. In Peter Wafula Juma & 2 Others vs. Republic [2014] eKLR, F. Gikonyo and A. Mabeya, JJ, had this to say about the legal burden of proof in criminal cases: "Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the Constitutional right of the Accused; presumption of innocence, not to give incriminating evidence and to remain silent..."

50. In the English cause celebre decision in Woolmington vs. DPP [1935] A.C 462, Lords Viscount Sankey, Hewart, Atkin, Tomlin and Wright laid the golden thread (presumption of innocence) principle in criminal cases. Reginald Woolmington had shot his wife after falling out and was therefore charged with murder of his wife. Wilmington's defence was that he did not intend to kill his wife and thus lacked the requisite mens rea. He told the jury that he had planned to scare her by threatening to kill himself if she refused to return and reunite with him and in the process, he had attempted to show her the gun which discharged accidentally, killing her instantly. Swift, J. ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental. He was convicted and sentenced to hang. It was upheld on appeal to the Court of Criminal Appeal on the premise of the statement of law in Foster's Crown Law that if a death occurred, it is presumed to be murder unless proved otherwise. He appealed to the House of Lords. The issue brought to the House of Lords was whether the statement of law in Foster's Crown Law, which the Court of Criminal Appeal applied, was correct when it said that if a death occurred, it is presumed to be murder unless proved otherwise. Viscount Sankey made a statement which was unanimously adopted by the rest in what has now come to be known as the 'Golden Thread' speech. At page 481, Viscount Sankey L.C. enunciated the law on legal burden of proof in criminal matters as follows: "Juries are always told that if conviction there is to be the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in R. v. Davies (8 C.A.R. 211) the head-note of which correctly states that where intent is an ingredient of a crime there is no onus on the Defendant to prove that the act alleged was accidental. Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

51. It bears underscoring that this golden thread principle is now enshrined in our Constitution of Kenya 2010, under Article 50(2)(a) thereof, as part of the wider package of fair trial principles and in that regard, the holding in that decision holds true in Kenya. In Mkendeshwo vs. Republic [2002] 1 KLR 46, the Court of Appeal enunciated thus: "In criminal cases the burden is always on the prosecution to establish the guilt of the Accused beyond any reasonable doubt and generally, the Accused assumes no legal burden of establishing his innocence."

52. However, in considerably limited instances, once the onus of proof placed on the shoulders of the prosecution by dint of sections 107, 109 and 110 of the *Evidence Act* and the incidence of burden contemplated by section 108 thereof, is discharged, the evidential burden of proof shifts to the Accused Courtesy of and the limited circumstances outlined under section 111 of the said Act. Section 111 of the *Evidence Act* provides thus:

> "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 defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence.

(2) Nothing in this section shall -

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person Accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or

(c) affect the burden placed upon an Accused person to prove a defence of intoxication or insanity."

53. What is the standard of proof in criminal cases? In English cases of Re H (minors) sexual abuse; standard of proof {1996} AC 563 and 505 for the Home Department vs. Rehman {2003} 1 AC 153, which was adopted in Kenya in inter alia Paul Thiga Ngamenya vs. Republic [2018] eKLR, the House of Lords laid down a series of guiding principles on standards of proof for civil and criminal cases and their purport as follows:

"(1) Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.

(2) The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred.

(3) The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than others."

54. The standard is elevated above the rest of the cases owing to the gravitas of the consequences, namely that the person Accused in a criminal matter risks the possibility of loss of his liberty with the attendant secondary consequence of stigma. See the United States Supreme Court decision In re Winship, 397 U.S. 358 (1970), where Brennan, J. (as he then was) rendered the following judicial view which has been widely embraced in Kenya and across the commonwealth as the true reflection of the law: "The Accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction.....Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"

55. The standard required to prove a criminal case is evidence which convinces the Court beyond reasonable doubt. The doubt referred to in this standard is the doubt that can be given or a reason assigned as opposed to speculation. A person Accused of an offence is the most favourite child of the law. Adverting to the standard of proof in criminal cases, Mativo, J. says in Philip Muiruri Ndaruga vs. Republic [2016] eKLR (hereinafter "the Ndaruga case") that

> "To give an Accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an Accused is sufficient. The Accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An Accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which,

after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

56. The purport of the words 'beyond reasonable doubt' which define the standard for proof of a criminal offence, has been attempted in manifold decisions of the superior Courts, locally and beyond. The locus classicus English case in this regard is the decision in Miller vs. Minister of Pensions [1947] 2 All ER 372, where Denning J. who holds that

> "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt . . . If the evidence is so strong as to leave only a remote possibility in the defendant's favour, which can be dismissed with the sentence, 'Of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt. But nothing short of that would suffice."

57. Also, in Walters vs. R [1969] 2 AC 26, approved in R vs. Gray 58 Cr. App. R. 177 at 183, Lord Diplock attempted to define 'reasonable doubt' as follows:

> "A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow you to influence you one way or the other."

58. What is the entry point in criminal trials? When hearing of the matter begins, the Court begins from a tabula rasa which is that the Accused is innocent and this state of affairs perpetuates itself throughout the trial proceedings until such time as the prosecution has put on the table evidence which satisfies the Court beyond reasonable doubt that the Accused is guilty. In 1997, the Supreme Court of Canada in R vs. Lifchus [1997] 3 SCR 320, suggested the following explanation:

> "The Accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the Accused is guilty. .....the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the Accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the Accused and acquit because the crown has failed to satisfy you of the guilty of the Accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the Court, you are sure that the Accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

59. The standard is such that, in William Blackstone's formulation (in his seminal work, Commentaries on the Laws of England, published in the 1765) states that

> "It is better that ten guilty persons escape than that one innocent suffer." Blackstone holds a thesis that "All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer." Benjamin Franklin (in Benjamin Franklin, Works 293 (1970), Letter from Benjamin Franklin to

Benjamin Vaughan [14 March 1785]), subscribes to the same school of thought (and thus echoes Blackstone's jurisprudence) and states that "It is better 100 guilty Persons should escape than that one innocent Person should suffer."

60. While defending British Soldiers who were charged with murder for their role in the Boston Massacre, John Adams also expanded upon the rationale behind Blackstone's Formulation when he stated that "It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished.... when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this were to take hold in the mind of the subject that would be the end of all security whatsoever."

61. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? S.C. Sarkar in Hints of Modern Advocacy and Cross-examination (7th Edition, 1954, at page 16) reasons that evidence is weighed and not numbered. He argues that it is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. Save for the requirement of corroboration under section 124 of the *Evidence Act*, this position ties well with section 143 of the *Evidence Act* which provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." Section 124 of the Evidence requires that before an Accused is convicted, the Court satisfies itself that the evidence of the victim is corroborated but in sexual offences, a window and exception to the general rule has been provided to take care of situations where the only evidence available is that of the alleged victim of the offence, in which case the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. The text of section 124 of the *Evidence Act* reads as follows: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

62. The standard of proof, as I discern it, is that though be some doubt, it should be of such measure that it cannot affect a reasonable person's belief regarding whether or not the Accused is guilty. It does not therefore mean that the proof must be beyond a shadow of a doubt. If it were so, it would be so high a standard as to be practically unattainable. It certainly does not mean that every peripheral fact has to be established up to this standard.

63. Having discussed the broad framework within which this case will be determined, it's now time to embark on analysis of the law, examination and interrogation of facts and evaluation of evidence on each of the four counts, in turn.

64. Commanded by the need for a logical flow of analysis, on account of the fact that Count I is heavily reliant on Count II and III, this Court will interrogate Count II and later turn to Counts III and I, closing with Count IV.

Analysis of the Law; Examination of Facts; Evaluation Of Evidence; Determination; and Reasons for the Determination of the Three Queestions Under Count II

(i) Whether the prosecution has proved beyond reasonable doubt that the Diploma in IT Certificate - exhibited as Prosecution Exhibit 8 – is a forgery (a false document)

65. Needless to mention, this is a question of law that it is a question of fact. In this connection, except facts which squarely fall under the purview of section 111 of the *Evidence Act*, I must stay cautioned and reminded that in keeping with the holding of the Court of Appeal in the Ajwang, Kibocha and Okerosi cases, the burden of proving the ingredients of the offence are entirely on the prosecution, and the Accused cannot be called upon to prove his innocence.

66. What amounts to a false document? Section 345 of the Penal Code defines forgery to mean "the making of a false document with intent to defraud or to deceive."

67. Although the Penal Code does not offer a conventional definition of a false document, deploying the inclusionary and exclusionary model, section 347 of the Penal Code presents debatably exhaustive circumstances which avail a document within the meaning of a "false document" and for a wholesome mental picture of a false document, I wish to reproduce the section seriatim verbatim as follows: "Any person makes a false document who —

(a) makes a document purporting to be what in fact it is not; or

(b) alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; or

(c) introduces into a document without authority whilst it is being drawn up matter which if it had been authorized would have altered the effect of the document; or

(d) signs a document —

(i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing; or

(ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing; or

(iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person; or

(iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be;

(e) fraudulently—

(i) makes or transmits any electronic record or part of an electronic record;

(ii) affixes any digital signature on any electronic record; or

(iii) makes any mark denoting the authenticity of a digital signature, with the intention of causing it to be believed that such record, or part of document, electronic record or digital signature was made, signed, executed, transmitted or affixed by or by the authority of a person by whom or whose authority he knows that it was not made, signed, executed or affixed;

(f) without lawful authority or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with a digital signature either by himself or by any other person, whether such person is living or dead at the time of such alter;

(g) fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of deception practised upon him, does not know the contents of the document or electronic record or the nature of the alteration."

68. The governing precept - which is now a watershed principle - is that the document must not only tell a lie, but also tell a lie about itself. In other words, telling a lie only by and in itself, does not amount to forgery but it must further tell a lie about its purport and not merely the information in it. This is what is strictly connoted as a false document. See Smith and Hogan, Criminal Law, 12th Ed., page 961.

69. The reigning judicial view is that falsity in this context should be construed to mean the purport of document, not contents. In other words, the document must tell a lie about itself. See In the case of Kilee v Republic [1967] EA 713 at p 717, per Sir John Ainley CJ and Chanan Singh J (as they then were); and Baigumamu v Uganda [1973] 1 EA 26, per Russel Ag. J. (as he then was).

70. If a document is not telling a lie about itself, about what it purports to be, then it is not a forgery. See the COA holding in Azolozo v Republic 1986 KLR 585, where it was held that a false statement in a genuine imprest warrant does not necessarily render a genuine imprest warrant a forgery. See also Kilee v Republic [1967] EA 713; and Baigumamu v Uganda [1973] 1 EA 26.

71. The offence of forgery - technically described as making a false document - is underlined by three principal ingredients which must be proved by the prosecution as follows:

(a) the document was false; in the sense that, it was forged;

(b) the Accused knew it was forged; and

(c) the utterer intended to defraud. See the Court of Appeal decision (by Kneller JA, Chesoni & Nyarangi Ag JJA, as they then were) in Joseph Mukuha Kimani v Republic [1984] KECA 36 (KLR) (hereinafter "the Kimani case").

72. Unrelatedly, in a decision which was rendered long after the Kimani case, the High Court expanded the three into five elements as as follows:

(i) False making of - The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated, printed or engraved;

(ii) Material alteration - The person must have taken a genuine document and changed it in some significant way. It is intended to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine content of a document;

(iii) Ability to defraud - The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine;

(iv) Legal efficacy - The document or writing has to have some legal significance; and

(v) Intent to defraud - The specific state of mind for forgery does not require intent to steal, but only intent to fool people. The person must have intended that other people regard something

false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer. See Caroline Wanjiku Ngugi v Republic [2015] KEHC 854 (KLR), per Mativo J. (as he then was).

73. Emerging from the foregoing are three principal questions, which this Court framed in relation to Count II as follows:

    I. Whether the prosecution has proved beyond reasonable doubt that the Diploma in IT Certificate - exhibited as Prosecution Exhibit 8 – is a forgery (a false document).

    II. Whether the prosecution has proved beyond reasonable doubt that the impugned Diploma in IT Certificate was forged by the Accused; and

    III. Whether the prosecution has proved beyond reasonable doubt that the forgery was driven with intent to defraud or to deceive.

74. I will start with the first question, whether the prosecution has proved beyond reasonable doubt that the Diploma in IT Certificate - exhibited as Prosecution Exhibit 8 – is a forgery (a false document).

75. It will be appreciated the word document is not a word of art. In law, it assumes diverse meanings in different contexts. What then constitutes a document in the context of section 345 of the Penal Code? Section 346 of the Penal Code is couched in a broad manner apparently informed by the fear of possible exclusion and it then defines a document using the following exclusionary terms: "In this division of this Code, "document" does not include a trade mark or any other sign used in connexion with articles of commerce though they may be written or printed or in electronic form."

76. However, section 3 of the Interpretations and General Provisions Act provides a broader definition of a document as follows: "any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter."

77. Upon subjecting the nature of the impugned Prosecution Exhibit 8 (the Diploma in Information Technology Certificate purportedly issued by Eldoret National Polytechnic) to the definition, being a matter written by means of both letters and figures and being intended to be used for the purpose of recording, this Court concludes that Prosecution Exhibit 8 amounts to a document within the meaning assigned thereto by section 346 of the Penal Code and section 3 of the Interpretations and General Provisions Act.

78. It is imperative, at the earliest, to settle the question whether Prosecution Exhibit 8 is a forgery, even before determining whether it was forged by the Accused.

79. Through PW1, PW2, PW3, PW5 and PW6, the prosecution led both oral and documentary evidence exhibited as Prosecution Exhibits 3, 8, 10, 11, 12, 18, 19, 20, 21, 22(a), 22(b), 22(c), 22(d) and 23 to the effect that Prosecution Exhibit 8 is a false document (a forgery).

80. In his defence, the Accused elected the path of nolo contendere, where he neither admitted nor denied the prosecution evidence in this regard. All the Accused did was to vehemently dissociate himself from either making or presenting it to NCWSC.

81. Against the overwhelming evidence adduced by the prosecution in this regard - that the subject Diploma in IT Certificate is a false document - no challenge was mounted by the Accused except the challenge that the Accused did not make it or present it to NCWSC.

82. Commanded by the circumstances and findings foregoing, this Court finds that the evidence in support of the prosecution case that impugned Diploma in IT Certificate is a forgery (a false document) is so overwhelming as to leave only a remote possibility in the Accused's favour and this Court, therefore, reaches a conclusion that the prosecution has proved beyond reasonable doubt that the impugned Diploma in IT Certificate - exhibited as Prosecution Exhibit 8 – is a false document.

(ii) Whether the prosecution has proved beyond reasonable doubt that the impugned Diploma in IT Certificate was forged by the Accused

83. This is a question of fact. In Daniel Manuthu vs. Republic, High Court Criminal Case Number 9 of 1998 (UR) (hereinafter "the Manuthu case"), Onyango Otieno J. (as he then was) cited in approval the principles in Ramanlal Bhatt vs. Republic [1967] EA 332 (hereinafter "the Ramanlal case"), and hastened to add that a nexus between the charge and the Accused must be laid by the prosecution, invariably beyond reasonable doubt. Principles governing criminal liability – in keeping the principles of fair trial now enshrined under Article 50(2)-(8) of *the Constitution* – fasten an obligation upon the Court to only act upon persuasion beyond reasonable doubt, when the arduous burden of presenting evidence on specificity of the identity of the perpetrator of an offence in question has been discharged by the prosecution. In this scheme of things, cautionary principles have been developed to guide Courts of law in handling evidence purporting to lay a nexus between the charge and the Accused. Before criminal liability attaches, consequently, the Court must caution itself accordingly and be satisfied beyond reasonable doubt that the perpetrator of the offence set out in the charge has been properly and sufficiently identified. It is in this connection, since identification evidence stand between the Accused and his hallowed liberty, should never be of such weight as to effortlessly impeach. As already discussed, of course, this justifiably burdensome onus lies on the shoulders of the prosecution.

84. No particular number of witnesses is required to prove a charge. Section 143 of the *Evidence Act* provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

85. However, proceeding on the edict of criminal law that it is better that ten guilty persons escape than that one innocent suffer, section 143 of the *Evidence Act* notwithstanding, corroboration is required in all criminal cases except decidedly limited instances, notably in sexual offences only, where the only evidence is that of the alleged victim of the offence and the Court may proceed to convict only on basis of the evidence of the alleged victim on condition that the Court is satisfied that the alleged victim is telling the truth. See the Proviso to section 124 of the *Evidence Act*.

86. In this regard, the manner of approaching evidence of visual identification was enunciated by Lord Widgery C.J, in the case which has now become the locus classicus in this regard, of R vs. Turnbull [1976] 3 All E.R. 549 at page 552 where his Lordship expressed himself as follows: "Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." This test was adopted in Anjononi vs. Republic [1980] KLR 59, where it was held that recognition is better than identification of a stranger.

87. However, although recognition is stronger than identification of a stranger, its strength may also be diminished and compromised by an honest mistaken identity or honest error. And cognitive of this, a cautionary principle on this was laid down in Wanjohi & 2 others vs. Republic [1989] KLR 415, at pages 418-419, Platt, Gachuhi & Masime JJA (as they then were) rendered themselves as follows:

> "In these circumstances, where the attack was swift rendering Nelson unconscious, the possibility of correct recognition is remote. It may well be that Nelson appeared to be an

honest witness, and that his failure to identify the appellants David and Peter indicated that he was not prone to exaggeration. But that was the situation in Roria v Rep [1967] E.A. 583 where at page 584 the Court of Appeal remarked: -

"In the present case the learned trial Judge thought Samaji an honest witness. We do not quarrel with his assessment of her honesty, but a witness may be honest yet mistaken, and in excluding the possibility of a mistake on her part, the learned Judge, with respect, erred in our view." It will be said that recognition is stronger than identification. That may be so; but an honest recognition, but yet be mistaken. The trial Court did not observe this distinction. The Court was impressed by the demeanour of Nelson, and although the "identification" was made at night, the Court had no hesitation in accepting that evidence. The trial Court approached the problem from the wrong angle. The High Court set out all the principles laid down in Abdullah Bin Wendo v R (1953) 20 E.A.C.A 166; Roria v Rep. (supra) and Turnbull v Reg C.A.R. (1976) Vol. 63, P. 1132 at P. 1137 and thus realized that the vital question upon which there is special need for caution is the correctness of the identification, i.e excluding any mistake. Unfortunately, the High Court devalued this principle in the following passage:

"The trial magistrate was impressed by the quality of this evidence and therefore omitted any reference to the possibility of the appellants' identification as mistaken, though such a reference might have been desirable. We do not think that the omission or error resulted in any failure of justice. That is, with respect, wrong. It is not that a reference to mistaken identification is desirable. It is the vital question. It is the vital question which has to be answered beyond reasonable doubt. Was the appellant recognized beyond reasonable doubt? Whether the error caused a failure of justice is the next step."

88. In the foregoing connection, before convicting an Accused, a Court should warn itself against the danger convicting on uncorroborated identification evidence of a single witness, especially if it is oral evidence. See Marie & 3 others vs. Republic [1986] eKLR; Gikonyo Kuruma & Another vs. Republic [1977] eKLR and Njeri vs. Republic [1979] eKLR. The need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo vs. R 20 EACA 166 at page 168, where the Court expressed the following empathic view:

"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

89. Further, in the Court of Appeal decision in Wamunga vs. Republic [1989] KLR 424 at pages 426-427, Masime JA, Gicheru & Kwach Ag JJA (as they then were) laid the following test of identification evidence:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

90. Further, but not in derogation from the test laid in the Wamunga case, the Court of Appeal laid down guidelines to be applied in analysing identification evidence in Richard Mwaura Njuguna & Another vs. Republic [2019] eKLR, Karanja, JA, Visram & Koome, JJ.A (as they then were) while quoting with approval the locus classicus case in this regard of R vs. Turnbull & Others [1976] 3 All ER 549, stated: "First, wherever the case against an Accused depends wholly or substantially on the correctness of one or more identifications of the Accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the Accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the Accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the Accused before? How often? If only occasionally, had he any special reason for remembering the Accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the Accused given to the police by the witness when first seen by them and the actual appearance?" See also Evans Odhiambo Anyanga vs. Republic [2015] eKLR, per Majanja, J.; Mwenda vs. Republic [1989] KLR 464, Masime JA, Gicheru & Kwach Ag JJA (as they then were); and Osiwa vs. Republic [1989] KLR 469, per Masime JA, Gicheru & Kwach Ag JJA (as they then were).

91. In determining this particular question, it is important to discuss the persons deemed by law to be principal offenders. Section 20 of the Penal Code makes provision for principal offenders. In order to be deemed a principal offender, the Accused person must have either committed or omitted any of the four acts or omissions namely:

(i) doing or omitting to do; or

(ii) aiding or enabling another to commit the offence; or

(iii) abetting another to commit the offence; or

(iv) procuring or counselling another to commit the offence. It provides thus:

"(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say —

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission."

92. Granted that the acts or omissions contemplated under section 20 of the Penal Code are questions of fact and in keeping with section 3 of the *Evidence Act* which defines "evidence" as "the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by Accused persons, admissions, and observation by the Court in its judicial capacity", forgery is a question of fact which of necessity requires evidence to prove the fact.

93. When is a fact deemed to have been proven? Section 3(2)-(4) of the *Evidence Act* provides as follows:

"(2) A fact is proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.

(3) A fact is disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

(4) A fact is not proved when it is neither proved nor disproved."

94. The contemplation of section 3 of the *Evidence Act* is that the evidence can come in any form including statements by Accused persons, admissions, and even observation by this Court in its judicial capacity. The observations contemplated by section 3 include but not limited to taking judicial notice under sections 59 and 60 of the *Evidence Act*; making presumptions premised on the primary facts adduced by a party including presumptions of existence of any fact which the Court thinks is likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case under section 119 of the *Evidence Act*; observing the demeanour of a witness, et alia.

95. All classes of evidence expected in this regard must avail the Accused within one or a combination of any of the four limbs of principal offenders that the Accused:

(i) made the false document (exhibited as Prosecution Exhibit 8); or

(ii) aided or enabled another to make the false document; or

(iii) abetted another to make the false document; or

(iv) procured or counselled another to make the false document.

96. It is in Republic v Eyangan & 2 others (Criminal Case E003 of 2022) [2024] KEHC 1040 (KLR) (8 February 2024) (Ruling), at paragraph 3, where R. Nyakundi, J., in construing the legal effect of sections 107-108 of the *Evidence Act*, restated the principle that "... the legitimacy of a verdict is always based on evidence."

97. And the Court of Appeal did remind us in the Ajwang, Kibocha and Okerosi cases, that except facts which squarely fall under the purview of section 111 of the *Evidence Act*, the burden of proving the ingredients of the offence is entirely on the prosecution, and the Accused cannot be called upon to prove his innocence.

98. It is Jeremy Bentham who elegantly said that "Witnesses are the eyes and ears of justice." Inexcusably, none of the 6 witnesses adduced evidence of any class - including circumstantial evidence - to avail the Accused within any of the four limbs of principal offenders contemplated by section 20 of the Penal Code, that he either made the false document (exhibited as Prosecution Exhibit 8); or that he aided or enabled another to make the false document; or that he abetted another to make the false document; or that he procured or counselled another to make the false document. At the most defining moment, this Court was left to its own devices, to perhaps descend into the arena of imagination of what could have possibly happened and create its own evidence. I find no more elegant words to invoke that those selected and applied by Onyango Otieno J. (as he then was) in the Manuthu case, where His Lordship expressed himself that "without their evidence the Court is being asked to imagine what could have happened and thus create its own evidence." Since even the observation by the Court in its judicial capacity - as contemplated by section 3 of the *Evidence Act* - cannot be made in vacuo, without a sound basis laid by one or more prosecution witness(es), it is instructive to underscore the obligation fasted to the shoulders of the prosecution to place before this Court for judicial consideration evidence on any of the four limbs to enable it make its own observations. The principles which govern criminal liability by embrace certainty, precision and specificity of the identity of the perpetrator of the offence in question. Ultimately, the threshold of identification evidence on record failed to rise to an altitude incapable of being effortlessly impeached, having laid no sufficient nexus between the undeniable forgery afore-concluded and the Accused herein as to rise to the threshold of evidence satisfactory to this Court that the perpetrator of the forgery was properly and sufficiently identified.

99. Remembering that the standard required to prove a criminal case is evidence which convinces the Court beyond reasonable doubt, in keeping with the principle in the Ndaruga case, to give an Accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s) and a single circumstance creating reasonable doubt in a prudent mind about the guilt of an Accused is sufficient and that the Accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. Limited to this question, hence, this Court found the defence cogent, compelling, irresistible and ultimately plausible, ultimately extricating the Accused herefrom.

100. Reasons wherefore this Court concludes that the prosecution failed to prove beyond reasonable doubt that the impugned Diploma in IT Certificate - exhibited as Prosecution Exhibit 8 - was forged by the Accused.

(iii) Whether the prosecution has proved beyond reasonable doubt that the forgery was driven with intent to defraud or to deceive

101. Having answered question (b) under Count I in the negative, this question has effectually been rendered not only moot but also academic.

Analysis of the Law; Examination of Facts; Evaluation Of Evidence; Determination; and Reasons for the Determination of the Three Queestions Under Count III

(i) Whether the prosecution has proved beyond reasonable doubt that the Accused uttered the impugned Diploma in IT Certificate to NCSWC

102. This too is a question of fact. This Court did state and I reiterate that except facts which squarely fall under the purview of section 111 of the *Evidence Act*, this Court must stay cautioned and reminded that in keeping with the principle in the Ajwang, Kibocha and Okerosi cases, the burden of proving

the ingredients of the offence are entirely on the prosecution, and the Accused cannot be called upon to prove his innocence.

103. Section 353 of the Penal Code provides that "Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question."

104. Section 4 of the Penal Code defines "utter" to mean and include "using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with, or act upon the thing in question."

105. And so, the question to pose is whether the Accused induced NCWSC to use, deal with, or act upon the said forged Diploma in IT Certificate.

106. The offence of uttering a false document is underpinned by three principal ingredients which must be proved by the prosecution as follows:

(i) uttering;

(ii) a false document;

(iii) knowingly. See Esther Nyambura Thongori v Republic [2020] KEHC 5406 (KLR); and Republic v Zachariah & 2 others (Anti-Corruption Case 35 of 2011) [2020] KEMC 11 (KLR) (16 October 2020) (Judgment), at paragraph 180, where the Court stated as follows:

> "Arising from the reading of section 353 of the Penal Code above, it is obvious that to prove the offence, the prosecution must establish the following three elements:
>
> 1) That the document is false.
>
> 2) Knowledge by the person uttering i.e. (the Accused) of its falsity, and;
>
> 3) He/she uttered it fraudulently i.e. the intention of deceptively making the other person act on it."

107. In determining question (a) under Count II above, this Court did reach a conclusion that the impugned Diploma in IT Certificate, Prosecution Exhibit 8, is a forgery (a false document). I now turn to consider whether the Accused uttered the forged Diploma in IT Certificate, exhibited as Prosecution Exhibit 8.

108. Through PW1, PW3 and PW6, the prosecution led both oral and documentary evidence to the effect that the Accused, upon filling the PIF which was exhibited in evidence as Prosecution Exhibit 3, the Accused uttered to NCWSC the forged Diploma in IT Certificate, exhibited in evidence as the Prosecution Exhibit 8.

109. In his defence, the Accused vehemently refuted the assertions by PW1, PW3 and PW6 that he presented to NCWSC the copy of the forged Diploma in IT Certificate, exhibited as the Prosecution Exhibit 8, upon filling the PIF which was exhibited in evidence as Prosecution Exhibit 3.

110. In order to unravel this controversy, this Court must of necessity determine the question whether the Accused did fill the PIF as is. Through PW1, PW5 and PW6, it was asserted that the PIF was filled by the Accused. In his defence, the Accused admitted as much. This Court thus reaches a conclusion that the prosecution has proved beyond reasonable doubt that the Accused did fill the PIF.

111. The next question to determine is whether the Accused presented the forged Diploma in IT Certificate, exhibited as the Prosecution Exhibit 8.

112. Through Prosecution Exhibit 1, the letter of engagement, it was asserted and the Accused did admit that he secured the job of an IT Assistant on 13th August 2016, initially for a contractual period of 6 months before he was finally confirmed to permanent and pensionable terms. It is not evident from the letter of engagement that before engagement, the Accused knew or informed about the job academic and professional qualifications. Through the Prosecution Exhibit 9, the Job Description (JD) for an ICT Assistant which provides for a Diploma in Information Technology or Computer Science, it was asserted that the Accused was served with the JD on 19th April 2023, long after engagement on 13th August 2016. However, the tale-tell signs emerge from the PIF, exhibited in evidence as Prosecution Exhibit 3, which PW1, PW5 and PW6 asserted to have been filled by the Accused and in his defence, the Accused admitted as much. In the said PIF, Part (e) provides for Qualifications and section (ii) under Part (e) requires the employee to fill Professional qualifications. Required to be filled as part of the Professional Qualifications under section (ii) thereof, are six columns as follows:

I. column 1 requires the employee to fill the "Education Level" and in this column, the Accused filled "Diploma";

II. column 2 requires the employee to fill the "Professional Qualification" and in this column, the Accused filled "Pass";

III. column 3 requires the employee to fill the "Grade" scored and in this the Accused filled "Pass";

IV. column 4 requires the employee to fill the "Start Date" and in this, the Accused filled "2007";

V. column 5 requires the employee to fill the "End Date" and in this, the Accused filled "2010"; and

VI. the last column 6 requires the employee to fill the "Institution" and in this column, the Accused filled "Eldoret Polytechnic".

113. Invoking the plain or literal meaning rule, unless a technical meaning has been assigned and defined by the author thereof and except where it would import an absurdity or repugnancy, the plain meaning rule dictates that words ought to be interpreted using the ordinary meaning of the language. This rule is significant since it shuns the possibility of multiple interpretations of the same plain words.

114. What then is the ordinary construction of the form as filled by the Accused? In his defence, the Accused denied that he deceived NCWSC in the said declaration of his Professional Qualifications in the PIF. The Accused advanced a thesis that in the declaration, by stating that he had a "pass", he meant that he attained a pass in Module 1 of the Diploma in IT. In buttressing this thesis, the Accused exhibited Defence Exhibit 1 (the KNEC result slip for Module 1 of the Diploma in IT); Defence Exhibit 3 (the statement under caution he recorded at EACC); Defence Exhibit 4 (the letter from Eldoret National Polytechnic to the effect that he sat and attained a pass in Module 1 of the Diploma in IT).

115. Connected to that question, when the Accused was pressed in cross-examination to explain why he handwrote in the PIF that studies which led to the conferment of the qualification occurred between 2007-2010, he answered "because it is an ongoing course" and that he "was to start in 2007 and finish in 2010". He stated that there was no space to state "ongoing". The Accused admitted that he was supposed to finish in 2010 but he did not continue with the studies beyond the Module 1 he sat for in 2007. Needless to restate, like night and day, there is a significant difference between a declaration reading "Diploma – Pass – 2007-2010 - Eldoret Polytechnic" and a declaration reading "a pass in Module 1 of the Diploma in IT". Whereas the former connotes a pass in the Diploma in IT, the latter connotes a pass in Module 1 of the Diploma in IT.

116. Having read the declaration made by the Accused - "Diploma – Pass – 2007-2010 - Eldoret Polytechnic" - I entertain have no doubt in my mind that the Accused desired the reader to pick the former meaning (that he had a pass in the Diploma in IT).

117. Accordingly, the form as filled must ordinarily be construed to mean that the Accused informed NCWSC that he was a holder of a Diploma from Eldoret Polytechnic, which he studied for between 2007 and 2010 and that he attained a Pass. There is no alternative construction of the data as filed in the PIF. The Accused's thesis cannot hold water, therefore.

118. Tellingly, in the afore-concluded forged Diploma in IT Certificate, exhibited as the Prosecution Exhibit 8, it is indicated that 13th September 2010, Barasa M. Lawrence was conferred a Diploma by Eldoret Polytechnic, in which he attained a Pass. The data appearing in the said Prosecution Exhibit 8 is consistent with the data the Accused conveyed to NCWSC vide the PIF, Prosecution Exhibit 3.

119. I must underline from the onset that there was no direct evidence in support of this element. The prosecution relied on the foregoing circumstantial evidence as laid by PW1, PW5 and PW6.

120. In such circumstances, a Court of law is permitted to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. See section 119 of the *Evidence Act*. In the face of section 3(1) of the *Evidence Act*, such observations by the Court in its judicial capacity also constitute evidence. See section 3(1) of the *Evidence Act* which defines "evidence" as "the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by Accused persons, admissions, and observation by the Court in its judicial capacity."

121. It should be noted that despite the clear provision of section 143 of the *Evidence Act*, traditionally, corroboration was required in all criminal cases except a few sui generis cases notably sexual offences, in the context afore-discussed.

122. In this connection, it is now trite law that where circumstances are such that it will be unsafe to convict premised on uncorroborated evidence of the Complainant, the Court should warn itself of the danger of acting on the uncorroborated testimony of the Complainant such circumstances strongly demand corroboration. Otherwise, it will lead to a miscarriage of justice.

123. In now turn to consider the principles governing circumstantial evidence. In R vs. Taylor, Weaner & Donovan (1928), 21, C.A., APP. R. 20, the Court came to a conclusion that circumstantial evidence is the best evidence. The Court went ahead to attempt a definition of circumstantial evidence as the "evidence of the surrounding circumstances which, by intensified examination, is capable of proving a proposition with mathematical accuracy and that it is no derogation of evidence to say that it is circumstantial."

124. What test must be surmounted to justify acceptance of circumstantial evidence? In R vs. Kipkering Arap Koske & Another [1949] Volume 16 at page 135, the Court of Appeal for Eastern Africa laid the following test of circumstantial evidence: "That in order to justify, on circumstantial evidence, the inference of guilt, the inculputory facts must be incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the Accused." Further, speaking of the test of circumstantial evidence, in the Court of Appeal decision in Bernard Otieno Okello vs. Republic [2019] eKLR, Koome, Sichale, Kantai, JJ.A., echoed the tests laid in the decision of Abanga alias Onyango vs. Republic CA CR. A No 32 of 1990 (UR) to guide a case

determinable on circumstantial evidence as follows: "[18] The tests to be applied in a case determinable on circumstantial evidence were set out in the case of; Abanga alias Onyango vs. Republic CA CR. A No 32 of 1990 (UR) as follows; "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused; and iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else."

125. However, when faced with circumstantial evidence, caution is urged. In R vs. Mdoe Gwede (2004) eKLR, Maraga, J. (as he then was) took a view that "circumstantial evidence must, however, be thoroughly examined as it is the kind of evidence that can be fabricated..." It follows that if a Court must convict purely on basis of circumstantial evidence, then the Court should warn itself first as to be sure that there are no other co-existing circumstances which could weaken or destroy the inference. Evidence can only pass the test of circumstantial evidence if the incriminatory facts point conclusively to the guilt of the Accused and is incompatible with any reasonable hypothesis of his innocence. In Simoni Musoke vs. R (1958) EA 715, the Court quoted with approval the decision of the Privy Council in Teper V R (2), [1952] AC 480 at Page 489 where that Court stated thus: "It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which could weaken or destroy the inference." See also the trial of Nahashon Isaac Njenga Njoroge over the murder of Thomas Joseph Mboya, where Simpson, J. (as he then was) convicted Nahashon purely on circumstantial evidence, in Nahashon Isaac Njenga Njoroge vs. Republic (1969) eKLR, and in dismissing the appeal, Newbold, P., Duffus and Spry JJ.A. (as they then were) had this to say: "In this case the other evidence, that is the evidence of possession so shortly after the shooting of the gun used for the murder, was such as in the circumstances to leave no doubt in the mind of the trial judge of the guilt of the appellant. The explanations given by the appellant were so contradictory, in one respect admittedly false and in the other not accepted by the trial judge, that these contradictory explanations cannot but have had the effect of confirming the irresistible impression created by the evidence of the prosecution. We are satisfied, therefore, that in all the circumstances the trial judge was correct in coming to the conclusion that the evidence showed beyond reasonable doubt the guilt of the appellant and that none of his explanations raised any reasonable hypothesis which would shake in any way whatsoever this certainty, this sureness, in the mind of the trial judge of the guilt of the appellant." {Emphasis supplied}

126. Do circumstances in this case – where the afore-concluded forged Diploma in IT Certificate (exhibited as the Prosecution Exhibit 8) it is indicated that 13th September 2010, Barasa M. Lawrence, was conferred a Diploma by Eldoret Polytechnic, in which he attained a Pass, in circumstances where the data appearing in the said Prosecution Exhibit 8 is consistent with the data the Accused conveyed to NCWSC vide the PIF (Prosecution Exhibit 3) - support a proposition that the Accused presented the said prosecution Exhibit 8? Do the circumstances point to the direction that all the incriminatory facts are pointing conclusively to the guilt of the Accused and incompatible with any reasonable hypothesis of his innocence, as the person who presented Prosecution Exhibit 8?

127. Although the Accused denied presenting the Prosecution Exhibit 8, the Accused having admitted that he filled the PIF in the manner he did, this Court having construed the data filled in the PIF to mean that the Accused informed NCWSC that he was a holder of a Diploma from Eldoret Polytechnic, which he studied for between 2007 and 2010 and that he attained a Pass, a fact he knew to be false, and that tellingly, in the Prosecution Exhibit 8, it is indicated that 13th September 2010, Barasa M. Lawrence was conferred a Diploma by Eldoret Polytechnic, in which he attained a Pass consistent with the data the Accused conveyed to NCWSC vide the PIF, this Court finds that the prosecution's circumstantial

evidence that the Accused presented the Prosecution Exhibit 8 to support his declaration in the PIF is so overwhelming as to drown the mere denial of the Accused that he did not present the Prosecution Exhibit 8. The prosecution's circumstantial evidence has not been displaced by the Accused's defence. It is on the foregoing basis that this Court finds all the said inculputory facts (adduced by the prosecution), are incompatible with the innocence of the Accused and that they are incapable of any explanation upon any alternative reasonable hypothesis, than the guilt of the Accused. This Court finds no other co-existing circumstances arising from either the prosecution's circumstantial evidence or the defence, which can possibly weaken or destroy the inference that it was none but the Accused who presented the Prosecution Exhibit 8 to NCWSC.

128. Commanded by the foregoing findings, this Court reaches a conclusion that the prosecution has proved beyond reasonable doubt that the Accused uttered the forged Diploma in IT Certificate – presented as Prosecution Exhibit 8 - to NCSWC.

(ii) Whether the prosecution has proved beyond reasonable doubt that the impugned Diploma in IT Certificate uttered by the Accused is a false document

129. This too is a question of fact.

130. Having reached a conclusion under question (i) under Count II above, that the impugned Diploma in IT Certificate, exhibited as Prosecution Exhibit 8, is a forgery (a false document), it follows that this question must be answered in the affirmative.

(iii) Whether the prosecution has proved beyond reasonable doubt that the Accused uttered the false document namely a Diploma in IT Certificate knowingly

131. On this point too, this Court underscores the fact that there was no direct evidence in support of this element. The prosecution relied on the foregoing circumstantial evidence as laid by PW1, PW5 and PW6.

132. Section 4 of the Penal Code supplies the context of the word "knowingly" as follows: "used in connexion with any term denoting uttering or using, implies knowledge of the character of the thing uttered or used."

133. This Court did say herein above and it bears repeating that in such circumstances – sanctioned by section 119 of the *Evidence Act* and principles which govern circumstantial evidence - a Court of law is permitted to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case and that in the face of section 3(1) of the *Evidence Act*, such observations by the Court in its judicial capacity also constitute evidence.

134. Invoking section 119 of the *Evidence Act* and the principles which govern circumstantial evidence, what would be the observation and conclusion of any Court properly directing its judicial mind in regard to the manner the Accused filled the PIF to convey a message to NCWSC that he was a holder of a Diploma from Eldoret Polytechnic, which according to his declaration he purportedly pursued in Eldoret National Polytechnic between 2007 and 2010 and that he attained a Pass, in circumstances where the Accused knew too well that he was not a holder thereof and that he had no such qualification but boldly declared it in the PIF nevertheless, and further, when the Accused did so in a manner consistent with the Professional and Academic requirement of a Diploma in IT or Computer Science for the job of an IT assistant as set out in the Prosecution Exhibit 9?

135. Through the lens of section 119 of the *Evidence Act* and principles which govern circumstantial evidence, was it merely coincidental that the Accused declared in the PIF the qualifications consistent with the Professional and Academic requirement of a Diploma in IT or Computer Science for the job of an IT assistant as set out in the Prosecution Exhibit 9?

136. Having subjected these circumstances to section 119 of the *Evidence Act* and principles which govern circumstantial evidence discussed herein above in R vs. Taylor, Weaner & Donovan (1928), 21, C.A., APP. R. 20; R vs. Kipkering Arap Koske & Another [1949] Volume 16 at page 135; Bernard Otieno Okello vs. Republic [2019] eKLR; Abanga alias Onyango vs. Republic CA CR. A No 32 of 1990 (UR); R vs. Mdoe Gwede (2004) eKLR; Simoni Musoke vs. R (1958) EA 715; Teper V R (2), [1952] AC 480 at Page 489; and Nahashon Isaac Njenga Njoroge vs. Republic (1969) eKLR, the Accused having admitted that he filled the PIF in the manner he did, this Court having construed the data filled in the PIF to mean that the Accused informed NCWSC that he was a holder of a Diploma from Eldoret Polytechnic, which he studied for between 2007 and 2010 and that he attained a Pass, a fact he knew to be false, and having done so in a manner consistent with the Professional and Academic requirement of a Diploma in IT or Computer Science for the job of an IT assistant (as set out in the Prosecution Exhibit 9) which striking consistence – invoking section 119 of the *Evidence Act* and principles which govern circumstantial evidence - this Court does not find merely coincidental, this Court finds that the prosecution's circumstantial evidence that the Accused presented the Prosecution Exhibit 8 knowingly to support his declaration in the PIF, is so overwhelming as to drown the mere denial of the Accused that he was not aware of the qualifications for the job as set out in the Prosecution Exhibit 9. The prosecution's circumstantial evidence has not been displaced by the Accused's defence. It is on the foregoing basis that this Court finds all the said inculputory facts (adduced by the prosecution), are incompatible with the innocence of the Accused and that they are incapable of any explanation upon any alternative reasonable hypothesis, than the guilt of the Accused. This Court finds no other co-existing circumstances arising from either the prosecution's circumstantial evidence or the defence, which can possibly weaken or destroy the inference that the Accused did present the Prosecution Exhibit 8 to NCWSC knowingly.

137. In this regard, this Court observes that the Accused, discernibly, found himself between Scylla and Charybdis, leaving him in a situation where avoiding one danger inevitably led to encountering another danger, leaving him with a difficult choice between two unfavourable outcomes. If indeed the Accused was minded of conveying a clear and true message to NCWSC that he secured a pass only in Module 1 of the Diploma in IT, nothing would have been easier than to do so in the PIF, followed by providing a copy of Defence Exhibit 1, the Result Slip from Eldoret Polytechnic for Module 1 Diploma Pass in Information Technology. Granted the fact that the Accused knew so well that he had no such qualification but boldly declared it in the PIF nevertheless, this Court found his defence - which majorly revolved around the assertion that he meant that he secured a pass only in Module 1 of the Diploma in IT, supported by Defence Exhibit 1, Result Slip from Eldoret Polytechnic for Module 1 Diploma Pass in Information Technology; Defence Exhibit 3, The Accused Person's witness statement dated 6th May 2024; and Defence Exhibit 4 being a letter dated 1st September 2024 from the Eldoret Polytechnic - implausible and consequently, unpersuasive.

138. Ultimately, this Court concludes that the prosecution has proved beyond reasonable doubt that the Accused did utter the forged Diploma in IT Certificate – presented as Prosecution Exhibit 8 - to NCSWC knowingly.

Analysis of the Law; Examination of Facts; Evaluation Of Evidence; Determination; and Reasons for the Determination of the Two Questions Under Count I

(i) Whether the prosecution has proved beyond reasonable doubt that the Accused acquired public property

139. This is a question of both fact and law. In keeping with the threshold which was laid by the Court of Appeal in the Ajwang, Kibocha and Okerosi cases, I stand reminded that except the facts within the contemplation of section 111 of the *Evidence Act*, the burden of proving the ingredients of the offence are entirely on the prosecution, and the Accused cannot be called upon to prove his innocence.

140. ACECA is home to both corruption and economic crimes. All offences defined by section 45 of ACECA are classified as economic crimes. Section 2 of ACECA defines an economic crime to mean:

"(a) an offence under section 45; or

(b) an offence involving dishonesty under any written law providing for the maintenance or protection of the public revenue;

(c) an offence involving the laundering of the proceeds of corruption." The primary aim of an economic crime is to protect public revenue or public property from being fraudulently or unlawfully acquired and alleviate laundering of proceeds of crime. Just like corruption offences, economic crimes are scattered across diverse statutes including ACECA (under section 45) as well as other statutes which have defined offences in relation to dishonesty under any written law providing for the maintenance or protection of the public revenue and offences involving the laundering of the proceeds of corruption such as the Penal Code, the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA).

141. Section 45(1)(a) of ACECA provides that

"(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully —

(a) acquires public property or a public service or benefit."

142. There are two elements underpinning the offence of fraudulent acquisition of public property as follows:

(i) acquisition of public property;

(ii) through fraudulent or unlawful actions. See Rebecca Mwikali Nabutola & 2 others v Republic [2016] eKLR, per G.W. Ngenye, J. (as she then was). In this case, it was observed that "The subject in question was the Ksh. 8,925,444/- and Ksh. 400,000/- paid from the Kenya Tourism Board through CTDLT and the Tourism Ministry respectively. This monies fall within the category of public property being monies drawn from public bodies. It is also not in dispute that the monies were paid to Maniago Safaris in which the 2nd appellant is a director."

143. The purport of 'public property' in the context of section 45 of ACECA is enacted under section 45(3) of ACECA to mean "real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body."

144. The meaning of a 'public body' in the context of ACECA is enacted under section 2 of ACECA to mean

SUBPARA "(a) the Government, including Cabinet, or any department, service or undertaking of the Government;

(b) the National Assembly or the Parliamentary Service;

(c) a local authority;

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition."

145. It was not and it is not contested that NCWSC is a public body. And so, the question in plain terms, is whether the Accused acquired real or personal property including money of a public body or under the control of or consigned or due to a public body namely NCWSC.

146. In order to prove this fact, as a matter of absolute necessity, the prosecution must prove that the Accused did acquire public property and in this particular case, salaries and allowances, during the period in question spanning 13th August 2016 and November 2023. See Erick Otieno Oyare v Republic [2022] eKLR (hereinafter "the Oyare case"), at paragraph 28, where L. Njuguna, J. expressed the judicial view that

> "... He further claimed that the prosecution's burden of proof was never dislodged since the prosecution never adduced enough evidence to prove the specific amounts alleged to have been fraudulently acquired or amounting to specific amounts indicated in the respective counts. It is of importance to note however that, what the prosecution needed to prove was that the appellant herein fraudulently acquired public property notwithstanding the amounts involved therein." {Emphasis supplied}

147. In this regard, the prosecution based its case on documentary evidence which was exhibited by PW4, a Payroll Officer at NCWSC, who testified that the Accused was working under the ICT Department of NCWSC and he was earning a monthly salary. He exhibited a bundle of payslips which were produced as Prosecution Exhibit 16 and a Tabulation of the earnings of the Accused for the months spanning November 2016 and November 2023 which were produced as Prosecution Exhibit 17. He testified that under the said period, the Accused earned a gross amount of Kshs. 9,304,575.60, less statutory deductions for the peiod in the sum of Kshs. 2,130,612.00, leaving net earnings of Kshs. 7,173,963.60. The testimony of PW4 was corroborated by PW6.

148. In his defence, this fact was not denied. In fact, through Defence Exhibits 2, the Accused admitted that he acquired public property.

149. However, this Court observed that the salary for the period 13th August 2016 and October 2016 were not factored. Having adduced no evidence thereon, it cannot form part of the money claimed and proved beyond reasonable doubt. But in keeping with the holding in the Oyare case, all the prosecution is required to prove is the fact that the Accused acquired public property of any value and in this case, this burden has already been discharged.

150. Accordingly, this Court reaches a conclusion that the prosecution has proved beyond reasonable doubt that the Accused acquired public property in form of salaries and allowances amounting to Kshs. 7,173,963.60.

(ii) Whether the prosecution has proved beyond reasonable doubt that the Accused so acquired public property fraudulently or unlawfully

151. This is a question of law. Suspicion alone, however strong cannot provide a sound basis for conviction and in this connection, the burden to proof that the said acquisition of public property was fraudulent lies on the shoulders of the prosecution. See Chacha v Republic (Anti-Corruption and Economic Crimes Appeal E013 of 2022) [2023] KEHC 18971 (KLR) (Anti-Corruption and Economic Crimes) (22 June 2023) (Judgment), at paragraphs 54-55, where PN Gichohi, J. held that "54. The burden lay on the Prosecution to prove that this receipt was not genuine and to do so, the Prosecution ought to have produced the alleged genuine receipt from the hotel for comparison. Failure to do so left only a demonstration, through PW29 and PW47, a strong suspicion that the Appellant falsified documents and in an attempt to show how the said Ksh. 54,000/= was spent. 55. Such suspicion cannot suffice however strong. Indeed, the Court of Appeal in Joan Chebichii Sawe v Republic [2003] eKLR had this to say on the value of suspicion as evidence: - "The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the Accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."

152. See also Stephen Mboguah v Republic [2017] KEHC 628 (KLR), at paragraphs 64 and 65, where Ong'udi, J. expressed the frustration of the Court regarding failure by the prosecution to discharge its burden in this regard as follows: "64. I have also indicated that credit ought to have been given for the amounts that had been genuinely paid. This may not be possible because not all the persons whose names appear in the schedules testified for purposes of confirming who had been genuinely paid and who the impostors were for purposes of surrender. 65. Only PW2, PW7, PW8, PW9, PW13 and PW14 out of the many people who were each paid Kshs.10,000/= and those who attended the workshop at Lakers were called to testify. It is not for this Court to do these calculations. This should have flowed from the evidence. Without such detail it is impossible to state exactly how much was fraudulently acquired by the appellant save for the fictitious payments at Kisumu Polytechnic."

153. Although applied by ACECA, the term "fraudulently" or that which is "fraudulent" is not defined thereby.

154. Section 268 (2) of the Penal Code outlines pointers to a fraudulent intent. It provides that a person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents:

(a) an intent permanently to deprive the general or special owner of the thing of it; and/or;

(b) an intent to use the thing as a pledge or security; and/or;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform; and/or;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion; and/or;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

155. It is fraudulent that conduct driven by bad faith, dishonesty, lack of integrity, lack of moral turpitude, or intent to deceive. In John Faustin Kinyua v Republic [2020] KEHC 9202 (KLR), at paragraph 86,

Onyiego, J. adopted the meaning of fraudulent as defined in the Black's Law Dictionary, 10th Edition as follows:

> "The act of fraud is evident from the fact that Rockhound did not pay any money yet benefited from the transfer of the property into its name. As defined in the Black's Law Dictionary 10th Edition, fraudulent act means;
>
> "1. Conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude.
>
> 2. Conduct satisfying the element of a claim for actual or constructive fraud-also termed dishonest act: fraudulent or dishonest act."

156. In Rebecca Mwikali Nabutola & 2 Others v Republic [2016] eKLR, Ngenye, J. had this to say about a fraudulent conduct in the context of section 45(1)(a) od ACECA: "Fraudulent actions introduce the element of deception purposed at gaining a benefit."

157. It has thus been deemed fraudulent that act of receiving public funds meant for public purposes without a legal justification for the receipt. See the Court of Appeal (RN Nambuye, AK Murgor, S ole Kantai, JJA) in Boniface Okerosi Misera & another v Republic [2021] KECA 840 (KLR), where it was held as follows:

> "Turning to proof of the prosecution case to the required threshold, the two Courts below made concurrent findings of facts based on both oral and documentary exhibits albeit in a summary form that NCC desired to acquire land for a public cemetery at the material time. It set in motion tendering processes for the anticipated purchase. The one that triggered the criminal prosecution resulting in this appeal was the one that was "purportedly" successful. We have deliberately used the word "purportedly" because as we shall demonstrate shortly it was nothing but a fraud involving public funds. Funds were released by the parent Ministry of Local Government. The release of those funds by the Ministry is what necessitated the opening of an escrow account in the names of three law firms variously acting for their respective clients involved in one way or the other in the fraudulent transaction. The escrow account was opened for purposes of receiving and disbursing funds towards the named public purpose. It is from this same escrow account that funds were paid out to the 1st appellant through PW14 whose evidence the two Courts below found truthful and therefore credible, a position we have affirmed above. The two Courts below found no justification for the 1st appellant's receipt of part of funds meant for a public purpose. There is nothing to suggest that there was a misapprehension of those facts. There is, therefore, no basis for us to interfere with the two Courts below concurrent findings of facts with regard to the 1st appellant's culpability in the commission of the offence charged." {Emphasis supplied}

158. In this scheme of things, mens rea, therefore can only be answered by gathering and drawing inferences from the circumstances of the case springing from the conduct by both words and action of the Accused person.

159. One of the practical guiding rays in determining whether the conduct is fraudulent is to comb the surrounding tell-tale signs and circumstances (circumstantial evidence).

160. And so, in this case, the prosecution bears the plausibly heavy burden to prove that the fraudulent act existed at the time or throughout the period of acquiring the public property. In other words, there was a current or pre-existing dishonest or fraudulent intention of the Accused herein from the onset,

as opposed to being futuristic or promisory. Most importantly, the prosecution bears the burden of proving that the basis upon which the property was acquired was non-existent.

161. For the Accused, learned Counsel Mr. Migele advanced an articulate thesis to the effect that granted the undisputed fact that the Accused was not hired through the conventional means of advertisement and interview but "hand-picked", the advertisement which would have offered the Accused notice of the academic requirements was absent and the Accused therefore had no notice of the requirements for the job and consequently, he cannot be found guilty since the requisite mens rea - of acting fraudulently or unlawfully - was absent.

162. I discern the thesis of the defence to mean that an Accused person cannot be held to have acted fraudulently, unless it is proved that he had prior notice of the qualifications for the position but proceeded to deceive the employer about his true qualifications. I entirely subscribe to this proposition.

163. It follows that if an Accused must be found to have been driven by the requisite men rea of acting fraudulently, the doctrine of 'but-for test' also known as the 'had-not test' must necessarily apply. Henry Black, in his magnum opus work known as The Black's Law Dictionary, Ninth Edition (hereinafter "the Black's Law Dictionary"), at page 228, defines the doctrine 'but-for test' as follows: "The doctrine that causation exists only when the result would not have occurred without the party's conduct. — Also termed (in criminal law) had-not test."

164. In this connection, deploying the but-for test, acquisition of public funds can only be fraudulent if the job of the ICT Assistant required a Diploma in IT. The determinative question, thus, is whether the job of an ICT Assistant required a Diploma in IT? Put differently, was the qualification - asserted by the prosecution and fortified vide the JD exhibited as Prosecution Exhibit 9 - a requirement ab initio, capable of availing the conduct of the Accused within the tenor of being fraudulent?

165. This Court must, of necessity, take a deep dive into the circumstances surrounding the declaration in the PIF by the Accused. It will be prudent to invert the determinative question and pause a question: "if the job did not require a Diploma in IT, and if indeed the Accused was unaware that it did not require a Diploma in IT, how come he declared the very qualification the job of an ICT Assistant in the PIF?" "What the declaration of the Accused merely coincidental?"

166. In this regard, facts and circumstances necessary to anchor an inference on the state of mind of the Accused in line with sections 7, 8, 9, 14 and 119 of the *Evidence Act* become sine qua non. From the circumstances of this case, the Court having entered a finding that:

(i) that impugned Diploma in IT Certificate (Prosecution Exhibit 8) is a forgery (a false document);

(ii) that the Accused uttered the said forged Diploma in IT Certificate to NCSWC;

(iii) that the Accused did utter the forged Diploma in IT Certificate to NCSWC, knowingly; and

(iv) that on basis of the foregoing, the Accused acquired public property in form of salaries and allowances amounting to Kshs. 7,173,963.60, driven with intent of not only permanently depriving NCWSC of the money (without animus revertendi) but also with intent to use it at his will, with or without intention to afterwards repay NCWSC, this Court finds the Accused's conduct fraudulent. Even if he was "hand-picked" as asserted by learned counsel representing the Accused, this Court having been persuaded beyond reasonable doubt that the Accused was aware of the qualifications requisite for an ICT Assistant and evidently, he was appointed on basis of the qualifications he professed in the PIF, the Accused would have shunned the possibility of crossing the fraudulent Red Rubicon by exercising the option of declining the

appointment and maintaining his casual job, on account of lack of the primary academic requirement of a Diploma in ICT. Needless to belabour, had the Accused maintained his casual job, he would have effectually shunned these charges granted the fact that the academic papers he originally presented ahead of absorption as a casual labourer were adequate therefor.

167. The alternative to acquisition fraudulently is the analysis whether the Accused acquired the public property in form of salaries and allowances amounting to Kshs. 7,173,963.60, unlawfully.

168. This too is a question of law. Although applied by ACECA, the term "unlawfully" or that which is "unlawful" is not defined thereby.

169. Similarly, although applied by the Penal Code, the definition and/or meaning of "unlawful" or "unlawfully" has not been assigned by the Penal Code. The Interpretations and General Provisions Act, too is of no help.

170. Since this is not a word of art, it may not be safe to construe it in accord with its ordinary and natural meaning. I thus resort to secondary sources of law including decisional law.

171. The Black's Law Dictionary, Ninth Edition, at page 1678, defines the term "unlawful" in the following words:

> "...
>
> 1. Not authorized by law; illegal... in some cities, jaywalking is unlawful
> 2. Criminally punishable ... unlawful entry
> 3. Involving moral turpitude ... the preacher spoke to the congregation about the unlawful activities of gambling and drinking..."

172. Evidently, ACECA suggests that there are lawful ways of acquiring public property. The prosecution having charged the Accused under section 45(1)(a) of ACECA, upon discharging the burden of proof that the Accused acquired public property in the sum of Kshs. 7,173,963.60, the evidentiary burden of proving that the acquisition was lawful shifted to the Accused, Courtesy of section 111 (1) of the *Evidence Act* which provides that "When a person is Accused of any offense, 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 defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence."

173. Having addressed my judicial mind to the evident fact that the manner which was employed by the Accused in acquisition of the Kshs. 7,173,963.60, in form of salaries and allowances, is not sanctioned by any law in Kenya including ACECA, the Accused having acquired it in circumstances where:

(i) the Diploma in IT Certificate (Prosecution Exhibit 8) was a forgery (a false document);

(ii) the Accused uttered the said forged Diploma in IT Certificate to NCSWC; and

(iii) the Accused uttered the said forged Diploma in IT Certificate to NCSWC, knowingly, and the Accused having failed to discharge the said evidential burden (to the effect that the acquisition

of Kshs. 7,173,963.60, was sanctioned by law) under section 111 of the *Evidence Act*, this Court concludes that the acquisition was unlawful.

174. Consequently, the foregoing findings lead this Court to the inevitable conclusion that the prosecution has not only proved beyond reasonable doubt that the acquisition of Kshs. 7,173,963.60 was fraudulent, but also unlawful.

Analysis of the Law; Examination of Facts; Evaluation of Evidence; Determination; And Reasons for the Determination of the Three Questions Under Count Iv

(i) Whether the prosecution has proved beyond reasonable doubt that the Accused made a statement to NCWSC to wit that he was a holder of a Diploma in IT

175. This is a question of fact. I remain reminded of the threshold which was laid by the Court of Appeal in the Ajwang, Kibocha and Okerosi cases, that except the facts within the contemplation of section 111 of the *Evidence Act*, the burden of proving the ingredients of the offence are entirely on the prosecution, and the Accused cannot be called upon to prove his innocence.

176. Section 41(1) of ACECA provides that "(1) An agent who, to the detriment of his principal, makes a statement to his principal that he knows is false or misleading in any material respect is guilty of an offence."

177. There are three elements underpinning the offence of deceiving principal as follows:

(i) making a statement by an agent to the principal;

(ii) which the agent knows it to be false or misleading in any material respect;

(iii) to the detriment of the principal. See Stephen Mboguah v Republic [2017] KEHC 628 (KLR); John Gakuo (Deceased) & 3 others v Republic [2020] eKLR; Erick Otieno Oyare v Republic [2022] eKLR; and Dorothy Ndia & Another v Republic [2017] eKLR.

178. The meaning of an "agent" and "principal" in the context of section 41(1) of ACECA is enacted under section 38 of ACECA as follows:

"(1) In this Part — "agent" means a person who, in any capacity, and whether in the public or private sector, is employed by or acts for or on behalf of another person; "principal" means a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent acts.

(2) If a person has a power under *the Constitution* or an Act and it is unclear, under the law, with respect to that power whether the person is an agent or which public body is the agent's principal, the person shall be deemed, for the purposes of this Part, to be an agent for the Government and the exercise of the power shall be deemed to be a matter relating to the business or affairs of the Government.

(3) For the purposes of this Part —

(a) a Cabinet Minister shall be deemed to be an agent for both the Cabinet and the Government; and

(b) the holder of a prescribed office or position shall be deemed to be an agent for the prescribed principal.

(4) The regulations made under this Act may prescribe offices, positions and principals for the purposes of subsection (3)(b)."

179. It was not and it is not contested that NCWSC, a public body as afore-concluded, was the employer of the Accused. In this connection, the Accused was an agent of NCWSC and conversely NCWSC was the principal of the Accused, within the meaning assigned thereto by section 38 of ACECA.

180. In order to so conclude, as a matter of absolute necessity, the prosecution must prove beyond reasonable doubt that the Accused did make a statement to NCWSC to wit that he was a holder of a Diploma in IT. See Stephen Mboguah v Republic [2017] KEHC 628 (KLR); John Gakuo (Deceased) & 3 others v Republic [2020] eKLR; Erick Otieno Oyare v Republic [2022] eKLR; and Dorothy Ndia & Another v Republic [2017] eKLR.

181. Having reached a conclusion under the first question for determination under Count III, to the effect that the prosecution has proved beyond reasonable doubt that the Accused uttered the forged Diploma in IT Certificate – exhibited as the Prosecution Exhibit 8 - to NCSWC, derivatively, it follows that this question must be answered in the affirmative.

(ii) Whether the Accused knew it to be false or misleading in any material respect

182. In order to so conclude, as a matter of absolute necessity, the prosecution must prove beyond reasonable doubt that the Accused did make a statement to NCWSC to wit that he was a holder of a Diploma in IT. See Stephen Mboguah v Republic [2017] KEHC 628 (KLR); John Gakuo (Deceased) & 3 others v Republic [2020] eKLR; Erick Otieno Oyare v Republic [2022] eKLR; and Dorothy Ndia & Another v Republic [2017] eKLR.

183. Having reached a conclusion in question (ii) under Count III, to the effect that the prosecution has proved beyond reasonable doubt that the Accused uttered the said forged Diploma in IT Certificate – exhibited as the Prosecution Exhibit 8 - knowingly, derivatively, it follows that this question must be answered in the affirmative.

(iii) Whether the statement was to the detriment of NCWSC

184. In order to so conclude, as a matter of absolute necessity, the prosecution must prove beyond reasonable doubt that the Accused did make a statement to NCWSC to wit that he was a holder of a Diploma in IT.

185. Although applied by ACECA, the term "detriment" is not defined thereby. The Interpretations and General Provisions Act, too is of no help.

186. Since the word is not a word of art, it would not be safe to construe it in accord with its ordinary and natural meaning. I thus resort to secondary sources of law including decisional law.

187. The Black's Law Dictionary, Ninth Edition, at page 515, defines the term "detriment" in the following words: "... 1. Any loss or harm suffered by a person or property. 2. Contracts. The relinquishment of some legal right that a promisee would have otherwise been entitled to exercise. — Also termed legal detriment. Cf. BENEFIT (2)."

188. What, then, is the loss or harm which was suffered by NCWSC?

189. Having reached a conclusion under Count I, to the effect that the prosecution has proved beyond reasonable doubt that the Accused acquired public property in form of salaries and allowances

earned from NCWSC amounting to Kshs. 7,173,963.60, and that the Accused so acquired not only fraudulently but also unlawfully, it follows that the statement was to the detriment of NCWSC.

Part VI: Disposition

190. The prosecution having failed to prove beyond reasonable doubt, this Court finds the Accused person not guilty of the offence described under Count II as forgery contrary to section 345 as read with section 349 of the Penal Code. Accordingly, the Accused is acquitted therefrom under section 215 of the Criminal Procedure Code.

191. The prosecution having proved beyond reasonable doubt, this Court finds the Accused person guilty of and accordingly convicted therefor, under section 215 of the Criminal Procedure Code for the offence described as:

    i. Fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, as charged under Count I.

    ii. Uttering a false document contrary to section 353 of the Penal Code, as charged under Count III.

    iii. Deceiving a principal contrary to section 41(2) as read with section 48 of ACECA, as charged under Count IV.

192. Thus, both the bond and bail to which the Accused was hitherto admitted, are hereby abrogated. This Court directs that the Accused be held in police custody, until such date and time appointed for delivery of the attendant Sentence.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT THE MILIMANI ANTI-CORRUPTION COURT THIS 28TH DAY OF AUGUST, 2025

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

In the presence of:

The Accused

Advocate for the Accused: Mr. Migele

Prosecution Counsel: Mr. Khatib

Advocate Watching Brief for EACC: Ms. Makori

Court Assistant: Ms. Mutave