



**Republic v Githaka & another (Anti-Corruption Case 6 of 2009) [2019] KEMC 6 (KLR)
(Anti-Corruption and Economic Crimes) (8 April 2019) (Judgment)**

Republic v Johnson Jackson Githaka & another [2019] eKLR

Neutral citation: [2019] KEMC 6 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE 6 OF 2009**

F KOMBO, SPM

APRIL 8, 2019

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHNSON JACKSON GITHAKA 1ST ACCUSED

EDWARD MURIU KAMAU 2ND ACCUSED

JUDGMENT

1. Two persons are charged in this old case first presented to Court way back on 5/2/2009. They are Edward Muriu Kamau (hereinafter '1st Accused' or 'Advocate Muriu') and Johnson Jackson Githaka (Hereinafter '2nd Accused')
2. The record shows that the 1st Accused, then represented by Mr Kilukumi, advocate pleaded to the charges on 6/2/2009, while the 2nd accused, represented by Mr Wandugi to date, pleaded on 13/2/2009.
3. It further shows that on 6/3/2009, Mr Okello who represented the State informed the then trial court as follows;

‘...I am a state counsel. It is a mention today. We had a consent order before Judge Wendoh on the 5.3.2009. The Attorney General has directed that the charges against the 1st accused person Mr. Edward Muriu Kamau have been terminated. We tender a nolle prosequi. A substituted charge sheet will be filed in due course...’



4. As a result, the trial court terminated the charges against the 1st accused. He thereafter featured in the trial as a State witness.
5. Whereas as seen above the State had made an undertaking in Court to substitute the charge sheet, that was not done and the trial therefore proceeded to conclusion on the basis of the initial charge sheet dated 5/2/2009.
6. The defence partly contends that the omission rendered the charges legally untenable. I will consider this submission in due course.
7. According to the charge sheet on record, a total of four Counts are preferred against the Accused persons as hereunder;

Count 1

8. Fraudulent acquisition of public property contrary to Section 45(1) (a) as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003.
9. Section 45(1)(a) of the *Anti-Corruption and Economic Crimes Act* (Hereinafter ‘the ACECA’) provides as follows;
 45. Protection of public property and revenue, etc.
 - (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;
 - (b) ...
10. Section 48 of the ACECA is a punishment section.
11. The Particulars to Count 1 are as follows;
 1. Edward Muriu Kamau
 2. Johnson Jackson Githaka
12. On the 28th day of January 2006 in the city of Nairobi within Nairobi area of the Republic of Kenya, jointly and fraudulently acquired public property, to wit, Kenya shillings 7,260,000 being part of the funds realised from the sale of property number LR 209/7594 more particularly known as the United Insurance Towers, that were due to Kenya Reinsurance Corporation Limited as the Statutory Manager of United insurance Company Limited (under statutory management) on the pretext that the aforesaid sum was commission for agency services rendered to United Insurance Company Limited (under statutory management).

Count 2

13. Fraudulently making payment from public revenue for services not rendered contrary to section 45(2) (a)(iii) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003.
14. Section 45(2)(a)(iii) which relates to this Count and (b) which relates to Count 3 also based on the same section of the ACECA read as follows;
 45. Protection of public property and revenue etc.
 - (1)



- (2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—
- (a) fraudulently makes payment or excessive payment from public revenues for-
 - (i) ...
 - (iii) services not rendered or not adequately rendered,
 - (b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures;

15. Particulars to Count 2 are as follows;

Johnson Jackson Githaka

On the 27th day of January 2006 in the city of Nairobi within Nairobi area of the Republic of Kenya, being the Managing Director of Kenya Reinsurance Corporation Limited, a person whose functions concerned the custody of public property, fraudulently made payment of Kenya shillings 7,260,000/-being part of the funds realised from the sale of property number LR 209/7594, more particularly known as United Insurance Towers, that were due to Kenya Reinsurance Corporation Limited as the Statutory Manager of United insurance Company Limited (under statutory management) on the pretext that the aforesaid sum was commission for agency services rendered to United Insurance Company Limited (under statutory management).

Count 3

16. Failure to comply with the law relating to disposal of public property contrary to section 45(2)(b) as read with section 48(1) of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003.

17. Particulars in support of this Count are as follows;

Johnson Jackson Githaka

On or about 27 January 2006 in the city of Nairobi within Nairobi area of the Republic of Kenya, being the Managing Director of Kenya Reinsurance Corporation Limited, a person whose functions concerned the custody of public property, namely the provisions of section 67C (4) and (5) of the [Insurance Act](#) Chapter 487 laws of Kenya, by failing to manage the funds realised from the sale of property number LR 209/7594 more particularly known as United Insurance Towers, in accordance with sound financial principles in that he authorised payment of Kenya shillings 7,260,000/-from sums due to Kenya Reinsurance Corporation Limited as the Statutory Manager of United Insurance Company Limited (under statutory management) on the pretext that the aforesaid sum was for commission for agency services rendered to the United Insurance Company Limited (under statutory management) thereby disregarding the interests of the insurer, United Insurance Company Limited (under statutory management) and its policy holders.

Count 4

18. Conspiracy to defraud contrary to section 317 of the Penal Code Chapter 63 of the Laws of Kenya.



19. Section 317 of the Penal Code provides as follows;

317. Conspiracy to defraud

Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.

20. Particulars in support of the charge are as follows;

1. Edward Muriu Kamau
2. Johnson Jackson Githaka

On the 28th day of January 2006 in the city of Nairobi within Nairobi area of the Republic of Kenya, by deceit, jointly conspired together to defraud the Kenya Reinsurance Company Limited by representing that public property in the sum of Kenya shillings 7,260,000 being part of the funds realised from the sale of property number LR 209/7594, more particularly known as United Insurance Towers, that was due to Kenya Reinsurance Company Limited as the Statutory Manager of United Insurance Company Limited (under statutory management) was payable as commission for agency services rendered to the United Insurance Company Limited (under statutory management).

21. The record shows that the Accused denied all the charges at plea. Thereafter a trial followed spread across four special magistrates, by the time I took over the matter on 25/6/2015.
22. On that date I issued pre-trial directions in which the 2nd Accused elected under section 200(3) CPC, to have his trial proceed from the point previously reached.
23. By this time the trial was already at defence stage and after some back and forth, the 2nd Accused finally re-took the stand to complete his Defence from 26/8/2016, and continued on 5/4/2017, 21/3/2018, 11/6/2018 and 9/7/2018. He did not call any other evidence.
24. At close of evidence, Mr Warui, then on record for the State and Mr Wandugi filed final written submissions which were orally highlighted on 4/1/2019. By this date Ms Samita had come on record on behalf of the State.
25. Defence has made a contention generally, that the charges herein are no longer valid against the 2nd Accused, and specifically in view of the termination of the case against the 1st Accused by way of nolle prosequi and the failure to amend or substitute them.
26. It is apt to address this submission at this stage.
27. According to Mr Wandugi the undertaking by the State to substitute the charge, was an acknowledgment of defect in the charge. According to him therefore, there is no charge sheet before the Court. Counsel therefore submits that owing to that failure, the entire trial was rendered a nullity and nothing can cure the defect.
28. Specific to the charges, He points the Court to the 'joint' nature of the Charges in Count 1 and 4. He submits that termination of the charge against the 1st Accused and the failure to amend or substitute the charge sheet on record means that the charge is incurably defective.
29. Counsel submits on the same ground in relation to Count 4, that a charge of conspiracy entails a 'meeting of minds' and that 'one cannot conspire alone'. For that reason Count 4 is equally fatally



defective. For this submission, he placed reliance on the decision in Christopher Wafula Makokha v Republic [2014] Eklr.

30. In a passage at page 4 of this decision, Mabeya, j quotes Archibold: Writing on Criminal Pleadings, Evidence and Practice, 3rd Edition, 1999 as follows;

... The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons....so long as a design rests in intention only, it is not indictable. There must be agreement....Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them...'

31. He then observes as follows in reference to the quotation;

....From the foregoing it is clear that the prosecution must prove the existence of an agreement between the Accused and some other person to do the Act complained of...'

32. I have examined both the record and Counts 1 and 4 in light of the above submission.

33. It is true that Mr Okello who represented the State at the initial stages of these charges did not amend or substitute the charges as he had indicated in Court.

34. That indication as observed by Counsel for the Accused, may have been from a realization that the termination of charges against the 1st Accused would somewhat affect the remaining charges.

35. However in my view the mere removal of a party to a charge per se should not necessarily warrant an amendment or substitution of the charge.

36. An amendment is only necessary to cure defects in the charge, and the material question is whether the charges were rendered defective in any way by the termination of the 1st Accused's case.

37. Having given the defence submission due consideration, I am for a start, not in agreement with the general assertion that there is no longer a charge sheet before the Court. There is indeed a charge sheet barring any alleged defects it may have.

38. Relating to the specific Counts, starting with Count 1, it is correct that the charge alleges that the Accused 'jointly fraudulently acquired' the sum of ksh 7,260,000/- which it is further alleged was public property due to Kenya Reinsurance Corporation.

39. Defence argument proceeds on the basis that because the charge is 'joint', then the removal of the 1st Accused renders it incurably defective.

40. I do not agree with defence counsel that the charge is incurably defective merely for the reason that either the name of the 1st Accused is still on it, or that the particulars indicate that the alleged fraudulent acquisition was 'joint'.

41. Joint action is not an ingredient of the offence charged, and if it helps at all, the allegation that the offence was jointly committed is a matter of proof.

42. More importantly as the record reflects, the Court was involved in the process of termination of the charges against the 1st Accused and did grant the request and discharged him. While an amendment or substitution would have made for a neater state of affairs, the Court may not in default, close its eyes to the fact that one of the partakers of the alleged joint criminal enterprise in Count 1 is no longer in the trial and continue to read the un-amended charges before it as if nothing happened.



43. It must be and I so find, that the charges herein were deemed altered or amended to the extent of the Order removing the 1st Accused from the case and must be so read. It is of course another matter if any or all of them were rendered defective in any way by that fact.
44. I am therefore unable to agree with Counsel for the 2nd Accused that Count 1 is incurably defective purely on the basis that it was un-amended.
45. As regards Count 4, it is clear that the particulars allege a specific conspiracy between the two named Accused persons. The language used is 'jointly conspired together'. The substance of the charge is the alleged 'conspiracy'.
46. I am in full agreement with the defence submission and based on the cited authorities, that the termination of the case against one of the alleged conspirators rendered this particular charge incurably defective.
47. It is clear that the defect goes to the substance of the charge in that it no longer discloses the intended offence. In this case the failure to amend has occasioned a defect in the charge.
48. As such I find that Count 4 was rendered incurably defective by the termination of the case against the 1st Accused.
49. I have also considered Count 3 and I find that the same is bad on its face and its particulars do not disclose the intended offence. The particulars describe the alleged public property as 'the provisions of section 67C (4) and (5) of the Insurance Act Chapter 487 laws of Kenya...' which does not make sense. Whereas the charge relates to failure to comply with the law relating to disposal of public property, the particulars describe a 'failure to manage funds realized from the sale of property number LR 209/7594'. Trying to understand the charge from manner in which it is drawn sends the head into a spin and it is not clear to me that the Accused persons understood its nature, substance and ingredients at plea.
50. A common allegation running through all the counts in the charge sheet is that Kenya Re was a Statutory Manager of United Insurance Company Ltd.
51. Mr Wandugi has submitted against the charges on this ground, which if true, would suffice by itself to dispose them off. Having considered the submission, it is my view that it raises a mixed issue of law and fact and should be best addressed alongside the evidence, which I next set out.
52. I find the facts in this trial to be uncontroverted as follows;
53. The 1st Accused whose charge was terminated by way of nolle prosequi is an Advocate of the High Court of Kenya and was managing partner at the law firm of Muriu Mungai & Co. Advocates.
54. The 2nd Accused who this judgment relates to was at the time material to the charges, the Managing Director of Kenya Reinsurance Corporation Limited. (Hereinafter 'Kenya Re').
55. Kenya Re is a public- owned limited liability company incorporated under Section 3 of the Kenya Re-Insurance Corporation Act- No. 7 of 1997.
56. Two transactions relating to two properties namely LR No. 209/7594 (Hereinafter- 'United Insurance Towers' –and Nairobi Block 90/258 situated at Loresho in Nairobi (Hereinafter- 'the Loresho Property' lie at the heart of this case.
57. Both Transactions were undertaken by the law firm of Muriu Mungai & Co. Advocates. The transaction relating to the United Insurance Towers was handled by Mr Edward Muriu Kamau, (PW



- 1- Hereinafter 'Advocate Muriu') acting for the vendor, while that relating to the Loesho property was handled by Ms Esther Omulele (PW 2), then a senior partner at Muriu Mungai & Co. Advocates, acting for the purchasers. In this latter case the purchasers were the 2nd Accused Johnson J. Githaka and his wife Eunice Wamaitha Githaka.
58. Both transactions were completed and there is produced before the Court, a bunch of correspondence and other transaction documents related thereto, some of which I will refer to herein below as necessary.
59. The sale of United Insurance Towers was undertaken following the appointment of a Statutory Manager for the then ailing United Insurance Company Limited, which was a company incorporated under the *Companies Act*- Cap 486, Laws of Kenya. The appointment is contained in a letter dated 15/7/2005 (Pros Exh 31) addressed to the 2nd Accused and signed by Mr Sammy Makove (Not a witness), who was then the Commissioner of Insurance.
60. Attached to the letter is a document detailing the terms of reference of the appointment.
61. The appointment was addressed to the 2nd Accused in the following terms;
- Mr Johnson Githaka
Managing Director
Kenya Reinsurance Corporation
Box.....
Nairobi.
Dear Sir,
Appointment of a Manager-United Insurance Company Limited.
In accordance with the provisions contained in the section 67C(2)(i) of the *insurance act*, Cap 487 you have been appointed to manage the affairs of United Insurance Company Ltd in accordance with the terms of reference enclosed herewith, with effect from 15th July 2005.
In order to facilitate your carrying out the management, please look into the provisions contained in the *insurance act* and its regulations and in particular section 67(C).
Your appointment is for a term not exceeding 12 months with effect from the date of this letter. During this period you shall be required to prepare and submit to the Commissioner a report on the financial position of the insurer with appropriate recommendations on whether the company may be revived or should be liquidated.
It shall however be appreciated if you may be able to accomplish the action and your terms of reference within the shortest possible time.
(signed)
Sammy Makove
Commissioner of Insurance
62. Annexed to the letter are Terms of reference, one (Number 5) of which was in the following terms;



5. Sell-off immovable property and invest the proceeds in government securities to improve the company's liquidity with a view to handing over the company back to the shareholders once the solvency and liquidity of the company has improved to a reasonable level.

Term of Reference No. 10 is as follows;

10. Based on the findings of the above, submit a report to the Commissioner as required under section 67(C)(6).
63. Counsel for the 2nd Accused submits, inter alia, relying on the manner the letter is addressed and its paragraph one, that the appointment of the 2nd Accused as Statutory Manager was in his individual capacity and not institutional. I will address the submission later.
 64. Following the appointment, an advertisement inviting bids was placed in the Daily Nation Newspaper of 18/7/2005. The advertisement, under the letter head of United Insurance Company Limited invited bids for purchase of the property and is signed by one Samuel C. Mweni.
 65. Three firms namely ZEP-RE PTA Reinsurance Company (Hereinafter 'ZEP-RE'), Fidelity Shield Insurance Company Limited and Uzuri Foods Limited placed bids, following which the Bid of ZEP-RE in the sum of ksh 242,000,000/- was accepted.
 66. Following this, the 2nd Accused wrote Pros Exh 1(a), a letter appointing Advocate Muriu as the advocate for the transaction. According to a letter dated 17/10/2005, (Pros Exh 36), ZEP-RE appointed the firm of Okwach and Company Advocates represented by Joe Wandagi Okwach (PW 4) as its transaction advocates.
 67. Amongst documents prepared in the course of the transaction is a Sale Agreement (Pros Exh 39) showing that it is entered between United Insurance Company Limited as Vendor and ZEP-RE as purchaser. It confirms at clause 1, that the purchase price was agreed at ksh 242,000,000/- and at clause 2.1, provides as follows;
 - 2.1 Kenya shillings twenty four million two hundred thousand (Ksh 24,200,000) ('the deposit') shall on or before the execution of this agreement be paid to the vendors advocates (hereinafter defined) to hold as stakeholder pending completion of this transaction.
 68. The Agreement is executed and affixed with the seals of ZEP-RE and Kenya Re.
 69. Transfer of the property to ZEP-RE was completed as evidenced in Pros Exh 41- a certified copy of the certificate of Title.
 70. The other transaction involved the purchase of the Loresho property by the 2nd Accused and his wife Eunice Wamaitha Githaka.
 71. There is also produced in this trial in relation to this transaction, a bunch of correspondence and other documents. I will also refer to some of them herein below as necessary.
 72. According to a Sale Agreement (Pros Exh 5) dated 20/9/2005, the 2nd Accused and his wife agreed to purchase the Loresho property from one Grace Nyakianda Mwangi at a price of ksh. 6,700,000/-.
 73. Under Clause 1 of the Sale agreement, the sum of ksh 670,000/- was to be paid as deposit and the balance of ksh 6,030,000/- was to be paid within seven days of registration of the transfer. The vendor was represented at completion by the law firm of Njiiri Kanyiri and Thuku Co. Advocates.



74. According to Pros Exh 6- a copy of a cheque drawn by Muriu Mungai & Company Advocates, dated 16/9/2005 a sum of ksh 670,000/- was paid to Grace Nyakianda Mwangi. This debit is confirmed in an Account Statement for the said firm's Account at Stanbic Bank (Pros Exh 19)
75. Further according to pros Exh 26, a letter by the firm of Muriu Mungai & Co Advocates addressed to its bankers Southern Credit Banking Corporation, the firm issued instructions for the issuance of a Bankers Cheque in the sum of ksh 6,030,000/- in favour of Grace Nyakianda Mwangi. The cheque was issued and is produced herein as pros Exh 27.
76. Entry 5 in Pros Exh 48, an extract from the Land Register shows that a transfer was effected in favour of purchasers. The document also shows that the same property was later transferred by the purchasers on 19/2/2008 to Samuel Mwita Gitwekere and Pauline Mukohi Gitwekere as joint tenants for a sum of ksh 20,500,000/-.

The two transactions were completed. So how did this case come about?

77. The prosecution case as explained in the evidence of Eva Wachuka Thingire (PW 12- hereinafter 'the investigator') is well described in the following paragraph from her testimony;

...I found out that kshs. 7,260,000/= was part of the proceeds from the sale of United Insurance Towers belonging to United Insurance Co. Limited under the Statutory Management of Kenya Re...'
78. The investigator testified that she was detailed to conduct an investigation in which the allegation was that the sum of ksh 7,260,000/- allegedly paid by United Insurance Company Limited to 'some agency' had been misappropriated.
79. During investigation, she interviewed witnesses, recorded statements and collected documents.
80. One of her findings, was that Kenya Re, had through the approval of the Ministry of Finance in a letter (Pros Exh 49), been appointed as the Statutory Manager of United Insurance Company Limited, which at the time was undergoing 'liquidation' problems.
81. Pros Exh 49 which she relied on is a letter addressed to Mr Sammy Makove-Commissioner of Insurance by Ms Esther Koimett- the Investment Secretary, Ministry of Finance. Its body text is as follows;

Ref: United Insurance Company Limited

Reference is made to your Memorandum Ref: CONF/INS/00/038/01 dated 1st July 2005 in which you recommended to the Minister for Finance the appointment of a Statutory Manager for United Insurance Company.

This is to confirm that the Minister has considered and approved the recommendation to appoint Kenya Re- Insurance Corporation as Statutory Manager for United Insurance Company Limited.

You may not go ahead and take the necessary action.

Yours sincerely,

(signed)

Esther Koimett

Investment Secretary



82. The Investigator stated that she also established that ZEP-RE, the winning bidder for the purchase of the United Insurance Towers had paid the law firm of Muriu Mungai & Co Advocates, the sum of Kenya shillings of 24,200,000/-as 10% deposit for the agreed purchase price of ksh. 242 million.
83. Her further finding was that after the payment of this deposit, on 27/1/2006, the accused held a meeting with Advocate Muriu, which meeting the advocate said he documented in a handwritten note (Pros Exh 3). Further thereafter, the accused wrote a letter (Pros Exh 2) dated the same day 27/1/2006 addressed to Advocate Muriu, authorising him to release a commission of 3% of the sale price to 'agents'.
84. I have considered the contents of both the handwritten note (Pros Exh 3) and the letter dated 27/1/2006 (Pros Exh 2). I think it is important to reproduce them in this judgement for their full tenor and effect.

85. The handwritten note in its body reads as follows;

Mr Githaka brought a note dated 27 January 2006, authorising us to pay the agents a 3% commission for procuring a buyer for the UIC Towers.

I enquired for the names of the agents and he told me he's the one personally.

He advised me that he sits on the board of ZEP-RE. He has been able to convince the board to purchase UIC Towers which they have. Therefore he is entitled to a sum of ksh 7.26m being the 3% commission.

He gave us full instructions to transfer the said ksh 7.26m to his file Ref No.CU/ENO/073/05 where he and his wife are buying a property.

Signed

27/1/2006.

86. The letter Pros Exh 2 is written under the letterhead of Kenya Re. It is a one -line letter which reads as follows

Our Ref : KR/MD/07/12

27 January 2006

M/s Muriu Mungai & Co Advocates

Britak centre

Box ...

Nairobi

Attn Mr Muriu

Dear Sirs

Re: United Insurance Towers

You may now release the commission at 3% of the sales price to the agents.

Yours faithfully

Signed

J.J. Githaka Statutory Manager



87. Further according to the investigator, Advocate Muriu confirmed and effected instruction through a letter of his own (Pros Exh 4). The letter is dated 30/1/2006.
88. This further letter addressed to Kenya Re-Insurance Corporation by Advocate Muriu reads as follows;

Our Ref:

Your Ref:

30th January 2006

Kenya reinsurance Corporation Ltd

Statutory manager UIC

Reinsurance Plaza

Box...

Nairobi.

Attn: J.J Githaka

Dear Sirs,

Ref: United Insurance Towers

We refer to the above matter, your letter dated 27 January 2006 and the subsequent meeting on the material day between Your Mr Githaka and the undersigned.

We wish to confirm that, we shall proceed to transfer a sum of ksh 7.26 million being the 3% of the purchase price to your file reference number CV/ENO/073/05 being your agent fees, in order to complete the purchase of L.R Nairobi/ Block 90/ 258, Loresho as requested.

Yours faithfully

E. Muriu Kamau

Muriu Mungai & Co. Advocates.

89. The investigator further testified that she established that the firm of Muriu Mungai & Co Advocates paid a 10% deposit for the property in the sum of Ksh. 670,000/- on 16/9/2005.
90. Further she established that the purchase price balance of ksh 6,030,000/- was paid by the same law firm to the property vendor Grace Nyakianda Mwangi by cheque drawn on the fixed deposit account holding the United Insurance Property transaction deposit. She identified the cheque as Pros Exh 27.
91. This letter (Pros Exh 26) written by Muriu Mungai & Co Advocates is addressed to Southern credit Banking Corporation and reads as follows in its body text;

Dear Sir/ Madam

Re: Bankers Cheque

We hereby request you to draw a bankers cheque in favour of Grace Nyakianda Mwangi of a sum of ksh six million, thirty thousand (6,030,000/=) from our fixed deposit account of sum of ksh twenty four million(Ksh 24,000,000/-)

The balance to remain in the same account under the same terms and conditions.

Yours faithfully



E. Muriu Kamau-(signed) Nani Njoroge Mungai -(signed) P.Munge Murage-(signed)
Esther Ndegi Njiru-(signed)

92. The investigator then summed up her testimony in the following words;

...The sum of Kshs. 7,260,000/= released by Muriu Mungai & Co. Advocates was released from the proceeds of sale of United Insurance Company. The proceeds went to purchase a house on behalf of J.J. Githaka. That money was public money. I have exhibit No.2. Githaka authorized the release of 3%. He did that on his behalf as Statutory Manager of United Insurance Co. Limited. There were no agency for the Sale of United Insurance Towers between Kenya Re- Corporation and PTA Insurance Company (Zebri)...'(sic)

93. Under Cross examination by Mr Wandugi, the investigator agreed that she had not presented Ms Esther Koimett who signed Pros Exh 49 or Mr Sammy Makove as witnesses. She agreed that Advocate Muriu (PW 1) was an accused person in this case but was made a state witness. She maintained that the sum of ksh 7,260,000/- was money due to Kenya Re. She agreed that the deposit for the United Insurance Towers was received on 23/12/2005 while that (ksh 670,000/-) for the Loresho Property was paid on 16/9/2005. She stated that she was satisfied Advocate Muriu had paid the stamp duty sum of ksh 268,000/- for the Loresho property. She stated that Advocate Muriu had told her that his firm still held an amount of ksh 154,356/- on his client account. She maintained that based on Pros Exh 31, Kenya Re was the Statutory Manager. In reference to this letter, she maintained that the 2nd accused's appointment was in his capacity as the Managing Director of Kenya Re. She agreed that the amount of ksh 6 million for the Loresho property was paid before completion of sale of the United Insurance Towers. She agreed that pros Exh 1(a) referred to agents but stated that the letter did not confirm that agents were used. She agreed that Kenya Re had no interest in the United Insurance Towers.

94. Under re-examination, she stated that Pros Exh 32 showed the contact person as Samuel Mweni, an employee of Kenya Re. She reiterated that no agents were used to invite bids in the advertisement. She noted that pros Exh 2, a letter written by the 2nd Accused was in the letter head of Kenya Re.

95. Advocate Muriu (PW 1) and his partner Esther Omulele (PW 2) testified in substantial agreement with the Investigator.

96. Advocate Muriu told the Court that he received instructions to conduct the sale of the United Insurance Towers through the 2nd Accused's letter dated 10/10/2005 (Pros Exh 1(a).

97. He confirmed that the agreed price was ksh 242,000,000/- and that there was no mention of agents in the transaction. He confirmed that his firm received 10% deposit of ksh 24.2 million from ZEP-RE, in accordance with the agreement, to hold as stakeholders, awaiting completion.

98. He identified Pros Exh 2 as a letter he personally received from the 2nd accused. He testified that because the letter was not clear he made an enquiry about the 'agents' from the 2nd Accused who told him that he was the agent.

99. He described the 2nd accused's explanation in detail as follows;

...When I asked of the identity of the agent to be paid, Githaka told me that the agent was himself. Mr. Githaka did not show me the agency agreement but he qualified the statement and advised me by virtue that he was the Managing Director of Kenya Re-Insurance and Kenya Re-Insurance was a major shareholder in PTA Re- Insurance who were purchasers he was able to convince the Board where he sits as a member of PTA Re-Insurance to buy United Insurance Towers and he convinced the Board of Kenya Re- to sale and he was



entitled to 3% commission of the purchase price. He told me that he himself was entitled to that commission. Githaka did not show me Board Meeting Minutes making reference to the commission i.e.3%...' sic

100. He stated that he hand-wrote a file note of that meeting which he identified as Pros Exh 3.
101. His further evidence is that he acted on the 2nd Accused's instructions to credit 3% commission, an equivalent of ksh 7,260,000/- to File No. CV/ENO/073/05 where the 2nd Accused was buying a property with his wife.
102. He further stated that he passed the file note to Esther Omulele (PW 2) the partner handling the transaction. He also confirmed that he wrote Pros Exh 4 confirming the instruction.
103. He confirmed that his firm paid 10% deposit for the 2nd Accused in the sum of ksh 670,000/- and identified the entry in the firm's Bank account statement (Pros Exh 19).
104. His further testimony is that the balance of the purchase price in the sum of ksh. 6,030,000/- was paid by cheque- Pros Exh 27 drawn on the firm's bankers Southern Credit Banking Corporation Ltd.
105. Further that later, his law firm sent a fee note through a letter dated 31/6/2006 (Pros Exh 10(b)) indicating that it had recovered its fees in the sum of ksh 115,400/- '...from the 3% commission in the Client's Account.
106. He concluded his testimony by stating that he had been charged alongside the 2nd accused and was later the beneficiary of a nolle prosequi. He stated as follows;

...I had not given a comprehensive statement to the investigations at the time I was charged. I was the beneficiary of nolle prosequi filed in court on 5.3.2009. My testimony has not been influenced by the fact that I was a beneficiary of nolle prosequi. I just stated the facts as they were...'

107. Under cross examination, he stated that he knew the Statutory Manager of United Insurance was Kenya Re. He was shown Pros Exh 31 and stated that he did not know if the 2nd Accused was appointed as an individual. He agreed Pros Exh 2 mentioned agents but names were not disclosed. He agreed that Kenya Re-had not raised any complaints in the transaction. He agreed that the deposit for the Loresho property was paid earlier than the deposit for the United Insurance Towers. He stated further that his law firm paid stamp duty in the transaction. He could not recall receiving a banker's cheque from the 2nd Accused for ksh 268,000/-. He was shown letter- Defence Exh 1- and indicated that his firm had not dealt with the property referenced in the letter as NAIROBI BLOCK 90/258. He stated that his law firm lend and paid the 10% deposit for the Loresho property to the Accused who was a personal friend. He was shown a letter dated 4/8/2005 (Defence Exh 1) and denied ever seeing it terming it a forgery.
108. This letter is in the following terms;

M/S Muriu Mungai & Co Advocates

Britak Centre

Upper Hill

Att: Muriu 4th August 2005

Dear Sir,

Re: Nairobi Block 90/258



I am in the process of purchasing the above property whose further details will be available to you by the vendors advocates. Kindly utilize the value of my shareholding in Mayfair insurance Co Ltd to settle.

I will make arrangements to reinstate my shares as soon as possible.

Yours sincerely

(signed)

J.J Githaka

109. The witness agreed that a professional undertaking in relation to the Loresho property was made on 5/12/2005 while the United Insurance Towers deposit was made on 23/12/2005. He stated that it was regular to make undertaking before funds were paid.
110. In relation to stamp duty, he stated as follows;
- ...Our firm paid the stamp duty. I do not know where the funds came from. I leave that for Miss Omulele...'
111. In relation the payment, he stated as follows;
- ...We were given instructions in writing to pay the agents. Those were the instructions. It says you may now pay 3% to the agents. I was under obligation to pay. The 10% was supposed to be held pending completion of the transaction...'
112. He agreed that he was to make a full and frank statement under the consent order. He denied the suggestion that he turned away from his client. He referred to pros Exh 10(c) as the statement of the account. He agreed there was a balance of ksh 154,356/- due for collection by the 2nd accused.
113. Under re-examination, he stated that he was a director and shareholder at Mayfair Insurance Company Ltd. he denied ever seeing Defence Exh 1, adding that it had no stamp indication of having been received at his firm.
114. He further stated as follows;
- ...The 3% Agency fees was paid on a transaction to which accused person was a beneficiary. I have told the court nothing but the truth...'
115. On her part, Esther Omulele (PW 2) confirmed that she handled the transaction relating to the Loresho property, describing her role in detail.
116. In relation to the 10% deposit in the sum of ksh 670,000/-, she stated that her law firm paid the same to the vendor at the request of the 2nd accused.
117. It is her testimony that in the course of the transaction, around 18/10/2005, the 2nd accused requested the transaction to be slowed down. She made a handwritten note to that request which she identified on pros Exh 21.
118. According to her after this note, on 5/12/2005 the vendors' advocates called for completion of the transaction as they had all the documents, upon which she requested them to send the documents on the firm's undertaking to pay the balance of the purchase price-namely ksh 6,030,000/- within seven days of the registration of the transfer.



119. She identified her letter in this regard as pros Exh 22, addressed to Njiiri Kanyiri & Thuku Advocates, dated 5/12/2005.

120. She confirmed that she thereafter received the completion documents and then went on as follows;

...On 27.1.2006, my partner Edward Muriu gave me a file note. He had recorded a conversation he had had with Mr. Githaka. He informed me that the purchase price was to be paid from amounts from file we were handling relating to the sale of United Insurance Company Towers. The date of file No. is dated 27.1.2006 Exhibit 3. Githaka was the agent for the sale of United Insurance Company Towers...'

121. She added that she made a file note of the same, which she identified in Pros Exh 24.

122. She identified pros Exh 26 as the letter of instruction by her firm to their bankers, as a result of which Pros Exh 27- a bankers cheque in the sum of Kenya shillings 6,030,000/- was drawn.

123. She identified Pros Exh 10(a) as the letter she wrote forwarding completion documents to the 2nd accused. The documents included a fee note (Pros Exh 10(b) and a statement of account (Pros Ex 10(c)

124. Under cross-examination by Mr Wandugi, she explained that she was aware that the United Towers deposit had been held by the firm as a stakeholder. She agreed that the sale agreement between United Insurance Company Limited and ZEP-RE had no provision for payment by the law firm, of the deposit Amount. She was shown Pros Exh 26 and stated that she received instructions from Advocate Muriu, who according to her, was the contact person for the 2nd accused. She explained that her law firm raised the 10% deposit for the 2nd accused, who was a client known to it. She stated that stamp duty was paid from the client's account. She did not have a copy of the cheque. She was shown Defence Exh 12, a bank statement in the name of the 2nd accused from Barclays bank, showing that a bankers cheque for ksh 268,600/- had been issued from the account. She stated that she could not recall the accused paying the bankers cheque for stamp duty. She explained that she gave the professional undertaking because the 2nd accused was known to her law firm, and further that payment would have happened after transfer. She was referred to Pros Exh 10(c) and agreed that it showed that an amount of ksh 154,356/- was due to the 2nd accused. He had not been asked go and collect it.

125. Under re-examination, she stated that it was upon the 2nd accused to go and collect the balance. She also stated but there was no clause in the agreement that the deposit could not be released in any circumstances. According to her a professional undertaking could come earlier than the deposit. She was shown Defence Exhibit 12 and stated that it did not show who the cheque was drawn in favour of.

126. Samwel Kyalo Mweni (PW 3) testified that he was a retired insurance manager, previously based at Kenya Re where he had worked for 29 years. In the year 2005, he was based at United Insurance Company Ltd as a Statutory Manager.

127. He identified Pros Exh 32- an advertisement placed in the Daily Nation of July 18 2005 and testified as follows;

...All enquiries were to be directed to the statutory manager's attention Samuel C. Mueni who was myself. The notice was from Kenya Re- as the statutory manager. The notice was from Kenya Re, the ones who were appointed statutory manager. My duties entailed the running of day to day activities of United Insurance Company...'

128. His further evidence is that he was not involved by the 2nd Accused in the sale of United Insurance Towers.



129. He identified letters Pros Exh 34, which he said he wrote to Muriu Mungai & Co Advocates after the departure of the 2nd Accused relating to the sale of United Insurance Towers and their response dated 21/2/200, Pros Exh 33, to which was annexed Pros Exh 34, a statement of account. He identified an endorsement on Pros Exh 33 to the then acting Managing Director for comment, as his own.
130. Under cross examination, he stated that he only knew of the agency issue when he was questioned by KACC officers. He stated that there had been no discussions of agency with Muriu Mungai & Co Advocates.
131. He stated further that follows;
- ...In all the correspondences I wrote, I referred to myself as Statutory Manager. It was not a mistake. The Statutory Manager was Kenya Re. I was also a Statutory Manager as I was the contact person at United Insurance Company and I was from Kenya Re. who were Institutional Statutory Manager. Managing Director was the Statutory Manager and I was a Statutory Manager in person. The advert MFI 32 was put by Kenya Re as the Statutory Manager...'
132. He agreed that United Insurance Towers was not one of the properties of Kenya Re.
133. Under re-examination, he stated as follows;
- ...Johnson Jackson Githaka stopped being Managing Director of Kenya Re and Kenya Re continued being the Statutory Manager of United Insurance Company...'
134. He stated there could have been agencies and professionals involved in the sale of United Insurance Towers but he did not know who they were. Joe Wandagi Okatch (PW 4) and Jerry Evans Sogori (PW 5) testified in relation to ZEP-RE, the purchaser of United Insurance Towers.
135. Mr Sogori confirmed that his firm successfully made a purchase bid. He also testified that the 2nd accused was both the Managing Director Kenya Re and also a member of the ZEP-RE Board. His further evidence was that ZEP-RE appointed Joe Wandagi Okatch-PW 4 as the transaction advocate in relation to the purchase. According to him, ZEP-RE had not encountered any agents in relation to the transaction.
136. On his part, Mr Okwath confirmed the testimony by Mr Sogori, adding that he dealt with Advocate Muriu in the transaction. He confirmed that the transaction was completed and transferred through Pros Exh 40- Grant of Title. He identified and produced Pros Exh 36 as the letter of instruction.
137. Under Cross examination, he stated that he was not aware of any agency in the transaction. He confirmed that ZEP-RE paid the 10% deposit required under clause 2 in the sale agreement. It was to be held until completion of the transaction. He added that Muriu Mungai & Co. Advocates had not sought any consent to disburse it.
138. Under re-examination, he stated that where an advocate pays the deposit, that is a risk. He stated further follows;
- ...As long as the transaction is completed, the money belongs to the vendor. The vendor was the statutory manager of United Insurance Company which was Kenya Re- Insurance Corporation...'
139. Thomas Karanja Thuku (PW 6) testified that he was the advocate representing the vendor-Grace Nyakianda Mwangi in the Loesho property transaction. He confirmed that the transaction was



- completed. He confirmed receipt of a 10% deposit in the sum of ksh 670,000/- and identified Pros Exh 6- Copy of a cheque dated 16/9/2005 drawn by Muriu Mungai & C Advocates as the payment. He confirmed receipt of payment of the balance in the sum of ksh 6,030,000/- through check pros Exh 27. He dealt with Esther Njiru Omulele as the purchaser's advocate.
140. Susan Wambui Daya (PW 11) and John Baptist Gitisha Waciuri (PW 9) both testified they were officials based at Southern Credit Bank.
 141. In 2005, Susan was a Customer Service Officer at the bank. She testified that one of their clients was the law firm of Muriu Mungai & Co Advocates who held fixed deposit accounts.
 142. According to her on 23/12/2005, her bank received a cheque of ksh 24,200,0000/- into the fixed deposit account of Muriu Mungai & Co. Advocates. On 28/1/2006 through pros Exh 48, her bank received instructions from the law firm to issue bankers cheque in the sum of ksh. 6,030,000/- in the name of Grace Nyakianda Mwangi, which instructions she effected. She identified the cheque she drew as Pros Exh 27.
 143. John Baptist Gitisha, an IT Officer on his part testified that pursuant to a request by KACC officers, he printed and furnished Pros Exh 46- a statement of Muriu Mungai & Co Advocates Account held at the bank, and signed the requested certificate under Section 65(8) of the Evidence Act (Pros Exh 47), which he identified in court.
 144. In his defence, the 2nd accused testified at length stating that he was the Managing Director of Kenya Re which is owned by the Government, through the National Treasury, at the time material to these charges.
 145. He made reference to the charges, indicating that the 1st accused had been charged alongside him but the charges were withdrawn. He referred to Exhibit 41, a certificate of title and stated that in accordance with it, United Insurance Towers did not pass to Kenya Re.
 146. In relation to his position a Statutory Manager, his evidence was that he was approached by the Commissioner of Insurance Mr Sammy Makove (not a witness) to take charge of United Insurance Company Limited under statutory management. He testified that he developed the Terms of Reference together with Mr Makove, and identified Pros Exh 31 as his letter of appointment. Based on the letter, he denied that he was appointed by virtue of being the Managing Director of Kenya Re.
 147. According to him therefore, the body corporate has never been appointed as the Statutory Manager for Kenya Re, and it would also not have accorded with the market trend where such managers were appointed in their personal capacity. Further from his experience and reading of the Companies Act, corporate entities do not qualify for such appointment.
 148. He added in this regard that when he left Kenya Re, the Commissioner of Insurance initiated proceedings-Winding Up Cause No.22/2006 seeking to replace him with another individual Abdul Zahir Sheikh.
 149. He sought to refer to the affidavit in support of those proceedings to which the state through Mr Kiage-Special Prosecutor (as he then was) vehemently opposed, but the court overruled the objection and admitted the affidavit.
 150. It is further his testimony therefore, that United Insurance Company Limited is a private company and United Insurance Towers was not public property. According to him, in disposing it, he was not obliged to follow public procurement and disposal law.



151. He further stated as follows;

...I was replaced by a Mrs Mbogo at Kenya Re. If I was appointed by virtue of being Managing Director at Kenya Re, it would follow that the new Managing Director would have taken over. I would want to believe that Mr. Zahir was appointed but I did not follow the matter...'

152. He further testified that he signed all documents as a Statutory Manager, identifying and producing inter alia in this regard, defence exhibit 13, -a Gazette Notice which imposed a moratorium, and his Statutory Management Report – Defence Exh 16.

153. He confirmed that the United Insurance Towers was disposed off at a price of Kenya shillings 242,000,000/-, and denied taking any part of the proceeds. He stated as follows in relation to the amount of Ksh. 7,260,000/-;

...I did not fraudulently acquire Kshs 7, 260,000/= as alleged in count I. This amount was the commission payable to the transaction agents...'

154. He referred to Pros Exh 1(a) and stated that the document was clear that there were agents involved, adding as follows;

...We engaged them to market the properties and identify where some of them were located...'

155. He agreed that he wrote the letter Pros Exh 1(a) to Muriu Mungai & Co. Advocates, adding that the letter was clear that agents were used, terming it as acceptable commercial practice. He also indicated that he had informed Advocate Muriu of the agents.

156. According to him, two of the agents engaged were Muigai Commercial Agencies and Pastel Property Consultants. It is his evidence that the agents marketed the properties amongst the contacts, and that ZEP-RE was introduced by Muigai Commercial Agencies, who also prepared the advertisement for the United Insurance Towers.

157. He further went on as follows;

...We agreed on 3% as the commission due to the Agents on successful sale of the property. This was 3% of the total consideration of kshs.242 Million...'

158. He referred to Advocate Muriu's testimony and stated he (Mr Muriu) had acted in accordance with his instructions. He added that Advocate Muriu's case was withdrawn with a condition that he testified against him. According to him, advocate Muriu refused to acknowledge that the transaction involved agents even when the letter to him was clear about it. He called it a 'claim' by Advocate Muriu, that he had presented himself as the agent, stating that Advocate Muriu had forgotten his instructions.

159. He added that Advocate Muriu was not 'very truthful' in his testimony and denied that the File Note-Pros Exh 3 contained what he had alleged. According to him, Advocate Muriu 'padded' documents to demonstrate the figure of 7.26 million against him.

160. One of the documents he referred to in this regard is Pros Exh 10(c) which according to him that was transferred from the United Insurance account to his account on 26/1/2006, but according to Advocate Muriu, he had gone to his office on 27/1/2005, which is also the date of his handwritten note. He also stated in reference to the amount of ksh 154,356/-, that he only became aware of it in



court, and that the only reason why Advocate Muriu indicated the amount in pros Exh 10(c) was to justify the amount of ksh 7,260,000/- in the charge.

161. He denied personally presenting the letter pros Exh 2 to Advocate Muriu, stating that Kenya Re was a large institution and the letter had followed normal channels.
162. He referred to Count 1 and stated that the amount was debited to United Insurance Company Limited. He referred to Pros Exh 10 (b), a fee note as basis for saying that the amount was debited on 31/1/2006. He then referred to the amount of ksh 268,100/- reflected as stamp duty and stated that he had paid the amount based on his letter Defence Exh 5 and bank statement Defence Exh 12.
163. He then referred to the amount of ksh 760,000/- which was 10% deposit payment for the Loresho property, and stated that Advocate Muriu's evidence was that he paid the amount, yet the amount is included as part of the 7,260,000/- in the charges. He agreed with Advocate Muriu's testimony that his law firm lend him the money. Further according to him, the deposit was paid on 16/9/2005, while that for the United Insurance Towers was paid on 23/12/2005, and therefore there was no nexus between the transactions.
164. Further in relation to the amount in the charge sheet, he referred to the amount of ksh 154,356/- which he stated Advocate Muriu had not made him aware of. According to him, this amount was also part of that in the charge sheet.
165. The 2nd accused's attempt to produce copies of alleged correspondence between him and Muigai Commercial Agencies and Pastel Property
166. Consultants (DMFI 17(a) and (b) were rejected by the court on grounds that he had not demonstrated sufficient effort to warrant admission of secondary evidence of the documents under section 68 of the Evidence Act.
167. Under cross examination, the 2nd accused confirmed his appointment and terms of reference under Pros Exh 31, and confirmed that he sold United Insurance Towers. He maintained the property was advertised by his Agent Muigai Commercial Agencies, but was shown the advertisement Pros Exh 32 and agreed that it referred to the Statutory Manager, Kenya Re as contact. He agreed that he had not produced any correspondence with Muigai Commercial Agencies. He also confirmed that none of the bidders had addressed their bid to Muigai Commercial Agencies. He agreed that one of these bidders was successful.
168. He was referred to Pros Exh 1(a) and 38 and agreed there was no mention of agents. He further stated as follows in relation to Pros Exh 1(a);

...We had informed the Advocate about the agents in a separate letter. Muriu Mungai advocate was to pay the agents 3% commission. They had done a road show and evaluation had been done. I referred to 'Agents...''.
169. He denied that there had been no agents in the sale. He was referred to Pros Exh 3 and stated that it was a forgery by Advocate Muriu, intended to fix him. He was also referred to Pros Exh 4 which he also referred to as a forgery created by Advocate Muriu to validate the handwritten file note. He confirmed that Muriu Mungai & Company were his advocates in the Loresho property transaction. He was shown Pros Exh 33 and agreed that he was not the Managing Director of Kenya Re when it was written. He maintained that the amount of ksh 7.2 million shown in the document was paid to the agents in the transaction and not to him.



170. Under re-examination, he stated that Pros Exh 10 was a forgery by Advocate Muriu to cover his tracks when he agreed to become a state witness. Further that Pros Exh 3 was a forgery pursuant to that undertaking. That his property cost ksh 7,030,000/- and figures making a payment to him of the amount 7.26 million are fictitious.
171. I have carefully considered the foregoing evidence alongside submissions by Counsel.
172. All the charges in this trial are premised on the assertion that Kenya Re was an institutional Statutory Manager for United Insurance Company Limited.
173. I therefore start by considering this issue.
174. From the evidence I have highlighted, the State has placed reliance on Pros Exh 49-a letter in which the then Commissioner of Insurance Mr Sammy Makove was informed by the Ministry of Finance through the Investment Secretary Ms Esther Koimett, that his recommendation for appointment of Kenya Re-as the Statutory Manager of United Insurance Company Limited, had been approved.
175. Defence in its submissions has taken issue with the failure to call both Mr Makove and Ms Koimett as witnesses to confirm the fact. I do not however think this failure has any effect because Exhibit 49 on its own should suffice to prove the fact. There is no challenge to the authenticity of this exhibit by the defence, which is properly admitted in this trial.
176. The State also called Advocate Muriu (PW 1), and Samuel Kyalo Mweni (PW3) whose testimony is in agreement that Kenya Re- as an institution, was the Statutory Manager for United Insurance Company Limited.
177. From his own evidence, Mr Mweni was an official of Kenya Re based at United Insurance Company Limited. He referred to himself in correspondence as ‘Statutory Manager’ and justified it by stating that his employer Kenya Re was the Statutory Manager and that he was the official physically present in that regard at United Insurance Company Offices, undertaking day to day affairs of the company.
178. For the same apparent reason, the advertisement for sale of United Insurance Towers (Pros Exh 32) pointed prospective bidders to his address and contacts. It is notable that this advertisement is under the letterhead of United Insurance Company Limited.
179. In his defence, the accused vehemently denied that Kenya Re was an institutional Statutory Manager insisting that according to his letter of appointment- Pros Exh 31, his appointment was individual, and was not by virtue of his position as the Managing Director of Kenya Re. He also stated that the terms of reference required him to report to the Commissioner of Insurance and produced what he referred to as a Report-Defence Exhibit 16. I have examined this Exhibit and it is neither signed nor does it show any indication that it was submitted to the Commissioner of Insurance as the 2nd Accused claimed. Although it has a page with a detailed table of contents, those actual contents are not in the document.
180. Examination of the appointment letter-Pros Exhibit 31 shows that it is addressed to the 2nd Accused in his official designation and address at Kenya Re. I find it unlikely, even after having regard to the language in paragraph one of that letter, that Mr Sammy Makove would have made the appointment against the tenor of the approval that he sought and obtained through Pros Exh 49, which is clear that Kenya Re was the intended Statutory Manager, for which approval was sought.
181. An examination of both the sale agreement relating to the United Insurance Towers (Pros Exh 39) and the transfer thereof (Pros Exh 40), shows that the seal of Kenya Re-was affixed on the documents and witnessed by the signature of the 2nd Accused. The language especially of the transfer leaves no doubt about that.



182. I have considered a contention by the defence that Kenya Re being a corporate body could not be appointed as a Statutory Manager. Mr Wandugi in this regard referred to a decision by Mary Ang'awa, j in *Kensilver Express Limited and 3 others v the Commissioner of Insurance and 4 others-Misc Civil Suit No. 1345 of 2005* (OS –unreported).
183. I have carefully considered the decision, which I have found useful for it seems to derive from the same factual background as this case.
184. The decision in large part concerned itself with the validity of the appointment of Kenya Re-as a Statutory Manager for United Insurance Company Limited, which the applicants challenged. This by itself seems to go against the grain of defence argument that Kenya Re was not the Statutory Manager of United Insurance Company Limited.
185. From the decision in the end, the learned judge declared that the appointment of Kenya Re was void ab initio. Effectively this brought to an end the role of Kenya Re and by extension, that of the Managing Director who was the 2nd Accused as Statutory Manager. It should be this, and not any other reason in my view, why the Commissioner of Insurance sought to appoint another Statutory Manager.
186. The decision did not turn on the submission by Mr Wandugi that Kenya Re was disqualified from such appointment by virtue of Section 345 of the old *Companies Act*. It appears to me that the law governing the appointment of statutory managers for companies carrying out insurance business is in the *Insurance Act*.
187. While the decision invalidated the appointment of Kenya Re, it does not contain anything relating to the prior acts that had already been undertaken under the statutory management, including the sale of United Insurance Towers that is the subject of this trial.
188. In my humble view therefore, the decision reached by Ang'awa j has no effect on this trial.
189. From the totality of the foregoing, it is difficult for this Court to agree with the contention by the 2nd accused that Kenya Re was not the Statutory Manager of United Insurance Company Limited, notwithstanding that it was later faulted and nullified. It would be difficult to explain the role of Samwel Mweni (PW3) in the statutory management and the transaction if that were not the case. There is no possibility that the 2nd Accused was not aware of that role as he was personally driving the sale.
190. I find that Kenya Re was the Statutory Manager for United Insurance Company Limited at the time of the transaction relating to the sale of United Insurance Towers. In those circumstances, the 2nd accused, just like Samuel Mweni (PW 3) was nothing more than its agent in the transactions relating to that statutory management.
191. To the extent therefore that the charges against the 2nd Accused state so, they cannot be faulted.
192. As already seen from the evidence, United Insurance Towers was disposed of for a sum of Ksh 242 million, of which an amount of Ksh. 24,200,000/- was received by Muriu Mungai & Company Advocates as 10% deposit pending completion of the transaction. This deposit was in the circumstances, received and held on account of Kenya Re, as Statutory Manager.
193. An amount of ksh 7,260,000/- was paid by the Muriu Mungai & Co. Advocates from this deposit as 'agent fees'. This amount is reflected in Pros Ex 34- a statement of account prepared by them.
194. There are questions raised by the defence relating to the propriety of making this payment from money held as deposit on stakeholder account, pending completion of the transaction. Advocate Muriu



- explained that he acted on the instruction contained in Pros Exh 2. He also stated that he considered the position of the 2nd Accused as both Managing Director of Kenya Re and a Director at ZEP-RE. This is also confirmed by Jerry Evans Sogori (PW 5) the Company Secretary of ZEP-RE.
195. I do not think this defence contention has any effect on the case, seeing that the Accused does not contest that the payment was made anyway. Looking at the explanation and the circumstances, though as an advocate he should perhaps have known better, Advocate Muriu's explanation could be believed.
196. That said, in my view the only dispute on the matter then relates to who was paid.
197. According to the State, this amount went to the personal benefit the 2nd accused for purchase of the Loresho property, which he later sold. The 2nd Accused himself has confirmed the transaction relating to this property.
198. In his defence he has maintained that the payment was made under his instruction to Muriu Mungai & Advocates, to transaction agents whom he identified as Muigai Commercial Agencies and Pastel Property Consultants.
199. According to Advocate Muriu and Ms Esther Omulele-both of Muriu Mungai & Co. Advocates, the firm acted on the direct instructions of the 2nd Accused who told Advocate Muriu that he was the agent entitled to the payment. They identified documents in the two transactions including -Pros Exh 2, 3 and 4, 6, 10(a)-(c), 19, 22,26,27,28, and 34 in support of their testimony.
200. Their testimony also has support from that of Samwel Mweni (PW 3) and that of Joe Wandagi Okwach-(PW 4) and Jerry Evans Sogori (PW5) from ZEP-RE. These two testified that no agents were involved in the United Insurance Towers transaction, a conclusion that was also reached by the Investigator.
201. The Accused relied on his instruction letter to Advocate Muriu (Pros Exh 1(a), for his assertion that agents were involved in the United Insurance Towers transaction. He also stated that he had informed Advocate Muriu of the agents through a separate letter, but did not produce it. He also relied on his letter - Pros Exh 2 in which he instructed Advocate Muriu that a Commission of 3% of the sale price to be paid to 'agents'.
202. An examination of Pros Exh 1, the letter which instructed Advocate Muriu, the transaction only makes reference to 'estate agents' as the persons from whom bids were to be received. None of the bids attached to the letter is addressed to any estate agent.
203. The advertisement itself- Pros Exh 32, does not show that it is made by an Agent and shows the transaction contact person as Samuel C. Mweni (PW 3) who was an official of Kenya Re. The 2nd Accused was made to acknowledge this during cross examination.
204. The annexures to Pros Exh 1, which are the three bids submitted do not make any reference to an agent. One of them Pros Exh 1(c), is in fact directly addressed to Samuel C. Mweni, the person named in the advertisement as the contact person.
205. During his testimony the Accused was given time to avail evidence relating to the two agents he named, namely Muigai Commercial Agencies and Pastel Property Consultants. He was unable to produce any evidence on the same.
206. The version given by Advocate Muriu and Ms Omulele was that in fact, the Accused presented himself as the agent and beneficiary of the instruction he gave in his letter Pros Exh 2. Advocate Muriu produced pros Exh 3 and 4 in support of his testimony in this regard, which the 2nd Accused dismissed as forgeries.



207. Interestingly the 2nd Accused did at a point during his testimony, agree that he wrote Pros Exh 2 which he later also surprisingly referred to as a forgery. The only matter he denied initially in relation to it, was that he had delivered it personally, which was in my view, meant to show that the meeting recorded in the handwritten note- pros Exh 3 had not happened. Advocate Muriu's letter to the 2nd Accused Pros Exh 4 made direct reference to Pros Exh 2.
208. From the foregoing and the totality of the evidence, I have reached the conclusion that in fact no agents were involved in the United Insurance Towers transaction.
209. The evidence of Advocate Muriu is that the 2nd Accused was the agent whom he paid ksh. Pros Exh 2, and which amount of ksh. 7,260,000/- is reflected in his Client Account statement- pros Exh 34.
210. The evidence of Advocate Muriu was generally strenuously challenged by the 2nd Accused who accused him of not telling the Court 'the whole truth', and of 'padding' documents in order to fix him. According to the 2nd Accused, Advocate Muriu set out to do this when he agreed in a consent order, to become a state witness. The 2nd Accused referred the Court to an undertaking by Advocate Muriu to make a full and frank disclosure, and accused him of stating matters at that point that were not in his initial statement, when they were both charged herein.
211. The 2nd Accused referred to documents relied on by Advocate Muriu in Court – namely Pros Exh 2, 3 and 4 stating that they were forgeries. He pointed to an inconsistency in pros Exh 10(c), which according to him showed the alleged transfer of money to his Loresho property client account by Advocate Muriu was made on 28/1/2006, whereas Advocate Muriu testified that he met with him on 27/1/2006, when he also made Pros Exh 3. He also pointed to Pros Exh 6 – a cheque relating to the 10% deposit for the Loresho property, indicating that it came way before the deposit for the United Insurance Towers.
212. In relation to a stamp duty item of ksh 268,100/- reflected on pros Exh 10(b), he refuted the claim by Advocate Muriu, that his law firm had paid the amount, and produced Defence Exh 5 and a Bank Statement – Defence Exh 12 in support.
213. In relation to the source of funding for the Loresho Property transaction, he produced Defence Exh 1 which he says is a letter he wrote to Advocate Muriu in relation to the transaction. On his part, Advocate Muriu denied that his firm ever received such a letter, terming it a forgery.
214. I have considered the circumstances under which Advocate Muriu became a witness in this matter, noting that he was initially charged alongside the 2nd Accused. In those circumstances, I must examine his evidence pretty much as that of a possible accomplice, and subject it to the required test.
215. In Joseph Njenga Ngethe v Republic [2013] eKLR The Court of Appeal expressed the following principle in relation to the evidence of an accomplice citing Rex v Ndara s/o Kariuki and six Others [1945] 12 EACA 84;

A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence; and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment



whether or not it regards the accomplice as worthy of belief". (See also *Kinyua vRepublic* [2002] 1 KLR 256)" ..."

216. As a principle, therefore, accomplice evidence is admissible and the Court must decide whether a witness who may have been or indeed is an accomplice, is credible. Their evidence must be corroborated by other independent evidence. Having applied these principles, I find that Advocate Muriu's testimony has ample support not only in the evidence of his junior partner Ms Omulele who handled the Loresho property transaction, but also the testimony of other witnesses and the many documents produced herein.
217. For a start, there is no question that the Loresho property transaction was undertaken by the same law firm on behalf of the 2nd Accused. That transaction was completed and the 2nd Accused and his spouse obtained title. There is therefore support in the evidence for the contents of Pros Exh 4, which was written by Advocate Muriu, and which the 2nd Accused refers to as a forgery. Pros Exh 4 was written after, and references Pros Exh 2, a letter by the 2nd Accused. This letter was delivered by the 2nd Accused on the same day- 27/1/2006 when a meeting, whose contents were recorded in Pros Exh 3 by Advocate Muriu was held.
218. A look at Pros Exh 2 shows that it is vague and does not amount to a proper instruction. It does not name the 'agents' that were to be paid and the amounts. There was good basis therefore for advocate Muriu to make an enquiry from the 2nd Accused in this regard as he testified he did, The explanation given by the 2nd Accused is well captured in his testimony and his hand written record of the meeting- Pros Exh 3. Ms Omulele confirmed receiving Pros Exh 3 from Advocate Muriu as she undertook the Loresho transaction.
219. Further, the amount of ksh 6,030,000/- which completed the Loresho property transaction was drawn from an Account of Muriu Mungai & Co. Advocates at Southern Credit Bank, where the deposit for sale of United Insurance Towers had been banked. This is evident from the cheque itself-Pros Exh 27, the instructions to the Bankers to issue the cheque 9 Pros Exh 26), the statement of account from the Bank- Pros Exh 46, and a schedule that shows the cheque was delivered to the advocates for the vendor- Pros Exh 28.
220. The information in the documents was further confirmed by witnesses from Southern Credit Bank, namely Susan Wambui Daya (PW 11) and John Baptist Gitisha Waciuri and the advocate for the vendor Mr Thomas Karanja Thuku (PW 6), amongst others.
221. The Loresho property Sale Agreement (Pros Exh 5) confirms that the sum of ksh. 6.030,000/- was payable to complete the transaction from an agreed purchase price of ksh 6,700,000/-, after payment of ksh. 670,000/- as 10% deposit.
222. I have examined the inconsistencies pointed out by the 2nd accused in Pros Exh 10(c) and on the dates when deposit for the Loresho property was paid. I do not find that much turns on the indication of the date in Pros Exh 10(c) as 28/1/2006. The date in the document in my view needed not accord with the date when the 2nd accused met with Advocate Muriu.
223. The inconsistency relating to the date when the 10% deposit for the Loresho Property was paid and the date when the United Insurance Towers deposit was received, is not an issue, as it is not in contest that Muriu Mungai & Co. Advocates paid the deposit amount of ksh 670,000/- on behalf of the 2nd Accused. Pros Exh 10 (c) shows that this amount was recovered from the sum of ksh 7,260,000/-.
224. I have considered defence Exhibits 5 and 12. I find that it is impossible to tell what the reflected amount of 268,600/- in Defence Exh 12 was for, as the exhibit does not show any such particulars. Moreover,



- according to pros Exh 10(b), a fee note and pros Exh 10(c), a statement of account, payments in relation to the Loresho property transaction were debited from the amount of ksh. 7,260,000/- transferred to the property account.
225. The letter forwarding the documents indicates that it was written on 31/1/2006 and hand delivered. The Accused has not denied receiving this letter. There is no indication by the accused querying its contents earlier.
226. I am in the circumstances, compelled to conclude that the belated querying of the statement of account (Pros Exh 10(c)) from Muriu Mungai & Co. Advocates by the 2nd Accused during the trial, is an afterthought and the 2nd Accused cannot be believed on his claim relating to Defence Exh. 12.
227. Moreover, Advocate Muriu denied receiving and queried the letters- Defence Exh 1 and 5. He pointed specifically that Defence Exh 5 did not show that it was received at his firm. There is no evidence before the Court or by the 2nd Accused to show that the two letters were delivered or received at the law firm of Muriu Mungai & Co. Advocates.
228. The effect of defence Exhibit 1 is to attempt to show that the funds for the Loresho property transaction were sourced from Mayfair Insurance Company Ltd, where Advocate Muriu stated he was a shareholder and Director, alongside the 2nd Accused. It is not clear why the letter is personally addressed to Advocate Muriu and not the Insurance Company itself. Mr Muriu made it clear that he was only a shareholder and director.
229. The foregoing notwithstanding, when Defence Exhibit 1 is examined against the evidence before the Court relating to the Loresho property, it is abundantly clear that funds for the transaction were not sourced from Mayfair Insurance Company Limited.
230. From the foregoing, I draw the conclusion that Advocate Muriu was a credible and believable witness. From this, I find that the 2nd Accused was himself not truthful in his denial of the meeting of 27/1/2006 with Advocate Muriu, his claim that Pros Exh 3 and 4 were forgeries, his claim that the transaction involved property agents who were paid 3% Commission and his claim that Kenya Re was not the Statutory Manager of United Insurance Company Limited.
231. I find that none of the documents produced by Advocate Muriu in this trial has been shown to be a forgery. Finally I find that the evidence establishes that the 2nd Accused received into his personal client account at Muriu Mungai & Co. Advocates, the sum of ksh 7,260,000/- which under his express instruction, was applied by the law firm into payments to complete the purchase of his Loresho property.
232. Thus far I have established that Kenya Re was at as at the time of the United Insurance Towers transaction, the Statutory Manager in relation to the sale of that property. I have also established that the 2nd Accused was paid by Muriu Mungai & Co. Advocates, a sum of ksh 7,260,000/- in purported agency fees in relation to that transaction.
233. Different charges are preferred herein against the Accused in relation to this amount and I now consider the specific charges against the foregoing findings. I have already found that Count 4 has no legal basis.
234. In Count 1 the 2nd Accused is charged, as was earlier seen, alongside the 1st Accused, who is no longer in the case, with the joint fraudulent acquisition of the amount of ksh 7,260,000/- which is described as public property.



235. Although the charge was preferred jointly against the 2nd Accused and Advocate Muriu, its 'joint' nature was altered by the termination of Advocate Muriu's case and his subsequent discharge. The trial has therefore proceeded against the 2nd Accused on that basis.
236. The circumstances under which the 2nd Accused secured payment of the amount in the charge to himself leave no doubt that it was fraudulent. He wrote the instruction in pros Exh 2 in full knowledge that there were no agents involved in the transaction, and when pushed disclosed to Advocate Muriu that he was in fact, the agent. The 2nd Accused only mentioned that he had informed Advocate Muriu of the existence of agents in a separate letter during cross examination. He did not produce that letter. It is notable that he claimed to be the Agent when he was also the Managing Director of the Statutory Manager.
237. The next question relating to the charge is whether the amount of ksh 7,260,000/- was public property.
238. The term 'public property' is widely defined in Section 45(3) of the ACECA as follows;
- (3) In this section, "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.
239. This definition applies wider criteria to the meaning of 'public property' that clearly goes beyond ownership. It seems enough that such property is in fact under 'the control of' the public body in question. I do not therefore find that it avails the 2nd Accused to say that United Insurance Towers and the proceeds from sale thereof had not passed to Kenya Re, suggesting it was private property.
240. Kenya Re as a State Corporation is a public body and was the one undertaking, through its agents such as the 2nd Accused and Mr Samuel Mweni, the management of United Insurance Company Limited. Proceeds from the sale of United Insurance Towers were by virtue of its appointment money 'due to' Kenya Re on account of United Insurance Company Limited and the 10% deposit and every part thereof paid by ZEP-RE was money 'under the control' of Kenya Re, as Statutory Manager.
241. I therefore find that the sum of ksh 7,260,000/- hived out of the 10% deposit of ksh. 24,200,000/- paid to Kenya Re by ZEP-RE for the purchase of the United Insurance Towers was 'public property' by virtue of Section 45(3) of the ACECA. The amount is proved to have been paid and applied to the benefit of the 2nd Accused and his spouse, in the purchase of the Loresho property.
242. I therefore find, in relation to Count 1, that the State has proved the charge of fraudulent acquisition of public property against the 2nd Accused beyond all reasonable doubt.
243. In relation to Count 2, there is in my view no legal or evidential basis for concluding that the amount of ksh 7,260,000/- was paid from 'public revenue' and for 'services not rendered'. The evidence is clear that the money was part of the proceeds from the sale of United Insurance Towers.
244. There is no basis for this Count and I find that it is not proved at all.
245. I already expressed the difficulties I had with Count 3, which lacks clarity in the manner it is drawn. Even from evidential point of view, the charge is wholly misconceived and I find that it is not proved at all.
246. In the end I Acquit the 2nd Accused in Counts 2, 3 and 4 and Convict him in Count 1 under section 215 CPC.

R/A- 14 Days.

FELIX KOMBO



SENIOR PRINCIPAL MAGISTRATE

DELIVERED IN OPEN COURT THIS 8TH DAY OF APRIL 2019

