



**Republic v Oyugi & another (Anti-Corruption Case 28 of 2011)  
[2019] KEMC 13 (KLR) (Crim) (6 September 2019) (Ruling)**

*Republic v Francis Emmanuel Oyugi & another [2019] eKLR*

Neutral citation: [2019] KEMC 13 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT**

**CRIMINAL**

**ANTI-CORRUPTION CASE 28 OF 2011**

**F KOMBO, SPM**

**SEPTEMBER 6, 2019**

**BETWEEN**

**REPUBLIC ..... COMPLAINANT**

**AND**

**FRANCIS EMMANUEL OYUGI ..... 1<sup>ST</sup> ACCUSED**

**YOBESH AMORO ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. Francis Emmanuel Oyugi (Hereinafter –‘1<sup>st</sup> Accused’) and Yobesh Amoro (Hereinafter ‘2<sup>nd</sup> Accused’) are charged with a total of three Counts and one alternative Count, all preferred under the Anti-Corruption and Economic Crimes Act (Hereinafter ‘the ACECA’).
2. The 1<sup>st</sup> Accused is individually charged in Count 1, and its alternative, while Count 2 is a joint charge. In Count 3, the 2<sup>nd</sup> Accused is individually charged.
3. In this Court’s Ruling of 4/7/2018, I discharged the 1<sup>st</sup> Accused from these proceedings after a finding that he was incapable of further participation in the trial on account of legal insanity. The Court has since sadly learnt from defence Counsel that he is now deceased.
4. It follows therefore that Count 1, its alternative and the 1<sup>st</sup> Accused are not the subject of this Ruling, which now only concerns itself with Counts 2 and 3 and the 2<sup>nd</sup> Accused.
5. In Count 2, the 2<sup>nd</sup> Accused is jointly charged with the 1<sup>st</sup> Accused with the offence of conspiracy to commit an economic crime contrary to Section 47A (3) as read with section 48 of the ACECA.
6. The section provides as follows;



- 47A. Attempts, conspiracies, etc.
1. ...
  2. ...
  3. A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.
7. Particulars to the charge state as follows;
1. Francis Emmanuel Oyugi
  2. Yobesh Amoro
8. On or about the 29th day of March 2005, in the city of Nairobi within Nairobi Province, being the Managing Director and the Finance and Administration Manager of the Kenya Wine Agencies Limited respectively, conspired to commit an economic crime, to wit, misappropriation of public funds, by irregularly processing an application for a car loan made by the said Yobesh Amoro to the National Industrial Credit (NIC) Bank Limited for Ksh. 2,500,000/- purportedly made under the Kenya Wine Agencies Limited Staff Car Loan Scheme and further caused the Kenya Wine Agencies Limited to guarantee the same while knowing that the said Yobesh Amoro had not been formally employed by the said State Corporation and is consequently ineligible for a car loan under the aforesaid Staff Car Loan Scheme.
9. In Count 3 the 2<sup>nd</sup> Accused is charged with the offence of fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48 of the ACECA.
10. This section 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. ...
- Particulars in support of this Count are as follows;
- Yobesh Amoro:
11. On 8th April 2005, in the city of Nairobi within Nairobi Province, while holding on probationary terms, the office of the Finance and Administration Manager at the Kenya Wine Agencies Limited, a State Corporation, fraudulently acquired Ksh. 2,500,000/- from the National Industrial Credit (NIC) Bank Limited as a car loan purportedly under the Kenya Wine Agencies Limited Staff Car Loan Scheme when he was ineligible for a car loan under the aforesaid Staff Car Loan Scheme.
  12. The accused denied all the charges at plea and a trial ensued in which the State has called a total of 16 witnesses in support.
  13. Hearing commenced before Hon. D.A Okundi (Ag CM) who later moved on transfer and I took over the trial on 9/6/2015. Upon due election by the Accused, I directed that the trial would proceed to conclusion from the point previously reached by my predecessor who had heard nine witnesses.
  14. No submissions are made at this stage and the Court is therefore left to decide purely on the basis of the evidence adduced by the State.



15. In reaching a decision at this point, I am guided by section 210 CPC which provides as follows;
210. Acquittal of accused person when no case to answer
16. If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.
17. Courts have interpreted the Section to mean that the evidence adduced by the Prosecution in support of the charges must in the minimum, be sufficient to establish a ‘prima facie’ case and the evidentiary threshold required of such a case was settled in *Ramanlal Trambaklal Bhatt v Republic* [1957] EA 332 in the following passage at page 335 thereof;
- “...It may not be easy to define what is meant by a ‘prima facie case’, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the Defence...”
188. My reading of the charges has disclosed an anomaly in relation to Count 2 which I discuss hereunder;
19. The offence created by Section 47A (3) of the ACECA is, from its plain reading, one of conspiracy to ‘commit an offence’ of corruption or economic crime’.
20. The ACECA does not contain a definition of ‘offence’ but the *Interpretation and General Provisions Act*- Cap 2 defines the term as follows at Section 3; offence” means a crime, felony, misdemeanour or contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided;
21. From this definition an offence therefore, must be the breach of a specific written law and the description of an ‘offence’ must be the description of matters that constitute that breach.
22. From the text of Section 47A (3), the offence the subject of an alleged conspiracy thereof could be either of the genre ‘corruption’ or ‘economic crime’.
23. Thus a charge based on the section must describe and inform the Accused person(s), of a specific offence either of the nature of corruption or economic crime, which it is sought to be shown in the trial that they conspired to commit.
24. Of assistance to the instant charge and for purpose of ascertaining what offences would belong to the genre ‘economic crimes’, the ACECA carries a definition of the term in Section 2 thereof as follows; economic crime” means—
- 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;
25. It follows that an ‘offence of corruption’ would then be any that falls under the wider definition of ‘corruption’ in the ACECA but is not an ‘economic crime’ as defined above.
26. The particulars to the charge in Count 2 above describe the alleged offence of ‘economic crime’ which is the subject of the alleged conspiracy against the Accused amorphously as ‘misappropriation of public funds’.



27. In my view Count 2 as drawn is deficient and fails the test of a proper charge under section 47A (3) of the ACECA because it fails to describe an offence proper as the subject of the alleged conspiracy. To the extent that ‘misappropriation of public funds’ is not the description of a known offence, either of corruption or economic crime, then the charge is defective on its face.
28. The foregoing notwithstanding, I next consider the charges in light of the evidence adduced in support.
29. In my effort to understand it, Count 2 simply alleges in so many words that the 2<sup>nd</sup> Accused irregularly obtained a car loan from NIC Bank under the Kenya Wine Agencies Limited (Hereinafter ‘KWAL’) Staff Car Loan Scheme for which he was ineligible because he had not been ‘formally employed’ by the State Corporation.
30. Having evaluated the evidence on record, I find as a start, that it is utterly incapable of supporting the allegation in the charge that the 2<sup>nd</sup> Accused was not ‘formally’ employed by KWAL.
31. The evidence shows that the 2<sup>nd</sup> Accused made application to KWAL for the position of Manager Finance and Administration went through an interview by a panel and a recommendation was duly presented to the KWAL Board in its meeting held on 7/12/2004 which approved his appointment.
32. Pros Exh19 which are Minutes of that meeting record as follows in part at [MIN 200/2004-AOB](#);-
- “... After some discussion, the board approved the appointment of Mr Amoro to the position of finance and administration manager on a six-month probationary period. Meanwhile management must take references from his referees and Lonrho Motors...”
33. Further, the evidence shows that the 2<sup>nd</sup> Accused received an official ‘offer of appointment’ as Finance and Administration Manager’ by letter dated 9/12/2004-(Pros Exh 18) signed by the MD. Paragraph 3 of the letter states as follows;
- “... Your terms and conditions of service which I’m already negotiating with you will be drawn and forwarded to you in due course...”
- The letter further stated;
- “... Finally I wish to assure you of the full cooperation and support from the board and look forward to your important contributions towards the future growth and prosperity of the company...”
34. The evidence also shows that five days after receiving the offer of appointment, the KWAL Human Resources Manager Mr. P.K Bartay (PW 1) further wrote to him on 14/12/2004 (Pros Exh 48) requesting for a number of documents for his ‘employment records’.
35. The first paragraph in the letter addressed him as follows;
- “... Following your appointment to the above post, please submit the following information to this office for records and action...”
36. It also contained a paragraph which states as follows;
- “... We also enclose copies of all schemes and regulations for your perusal and retention...”



37. Mr Bartay himself confirmed the employment status of the 2<sup>nd</sup> Accused when he stated;

“..I recall the 2nd accused reported to work at KWAL. When I went on suspension in February, 2005 I left him working. According to me 2nd accused was in employment as there was a letter which had requested him to come to work...’

38. His successor in office, Voi Chiuli (PW 4) equally confirmed the fact when she stated as follows under cross-examination in relation to a document (DMFI3) shown to her by Mr Namada, then for the 1<sup>st</sup> Accused;

“...Mr. Amoro was to attend to the matter. Minutes confirm Mr. Amoro was to attend to the matter. Minutes confirm Mr. Amoro was already working and had been given duties by the Board...’

And further;

“...Mr. Amoro has come into KWAL lawfully though in my opinion with an incomplete contract. Mr. Amoro was an official employee of KWAL... he undertook official duties on behalf of KWAL. From the documents as at April 2005 the Board was still grappling over his final terms and details and even if this went on for a year it would not negate the fact that Mr. Amoro was a bona fide employee working for KWAL...’

39. In relation to the alleged incompleteness of the contract, this witness seemed to contradict herself by stating as follows;

“..The letter of offer was not acknowledged by Mr. Amoro. Process of employing Mr. Amoro was thus incomplete...,

40. She did concede however, under cross -examination by Mr Ario for the 2<sup>nd</sup> Accused that the 2<sup>nd</sup> Accused had indeed accepted the offer by stating;

“...Letter of offer was given on 9/12/04. He wrote an acceptance letter on 10/12/04 as I can see here – DMFI – 4. Usually the acceptance is on the letter of offer and is a portion to be signed by the one being offered the appointment...

41. Abdulhamud Farook Low (PW 16 –hereinafter ‘the Investigator’) who drew these charges appeared to testify against them when he stated;

“... I established that he was hired as finance and administration manager through a competitive process, which was ratified by the board in a meeting of 2004 (Shown Pros Exh 19). Under the minutes, the Board approved his appointment on a six-month probationary basis...’

And further during cross examination by Mr Namada;

“... I know that the 2nd accused was in office from 13/12/2004. My case is that he had not completed probation period of six months...’



42. Under further pressure during cross –examination, he struggled to explain the language of his charges as follows;

“... In the charge I meant that he had not completed his probation period. I’m saying that when one receives a letter under probation, that is not formal employment. According to me that starts from date of confirmation.

According to me, the salary is paid to a person who is not formally employed...’

43. The turn-around by the Investigator is not surprising because yet more evidence adduced by him shows that the Accused was ‘suspended’ and later ‘terminated’ after working for four months at KWAL from 13/12/2004.

44. He produced the suspension letter (Pros Exh 52) dated 22/4/2005 and a termination letter dated 2/6/2005.

45. I have examined the termination letter where the author also seemed to be struggling with the language, ending up with a strange and self-contradicting document that purports to terminate an ‘offer’ ‘retrospectively’ but on a date falling way after it was made while invoking a termination clause that seems to affirm the fact of the 2<sup>nd</sup> Accused’s employment.

46. The termination letter (Pros Exh 52) invokes Regulation 10(a) of Staff Regulations, which are produced herein as Pros Exh 17’ Examination of Regulation 10(a) refers to what the Regulation calls ‘established employees’ and states as follows;

“Employment of an established employee may be terminated on any day of the month by the employer or the employee, as the case may be, by each giving the required notice in writing, other than for gross misconduct where the employer will have a right to instantly dismiss an employee.

47. In the ‘definitions’ part of the Staff Regulations, an ‘established employee’ is defined as follows;

“established employee’ means an employee of the company who has successfully completed a probationary period..’

48. Evidence given by Sammy Muthoka Mbova (PW 14), who was Chairman of the Board at KWAL at the material time, serves a glimpse of what may have (mis)led the Investigator to conclude that the 2<sup>nd</sup> Accused was not ‘formally’ employed.

49. He identified Pros Exh 39- Minutes of a Special Board of Directors Meeting held on 28/4/2005, of which he had said virtually nothing during examination-in –chief but was forced to go into its details during cross-examination by Mr Namada for Accused.

50. It appears from the document that the witness presented a ‘Chairman’s Memorandum’ (which is not before the Court) for discussion at the said meeting which he also chaired, which contained various matters including the matter of employment of the 2<sup>nd</sup> Accused and the terms of his employment.

51. Part of the discussion centred on the status of his employment and it appears the Board took the position that the 2<sup>nd</sup> Accused had not been ‘formally appointed’ nor ‘qualified to be confirmed’ in employment.



52. Based on Pros Exh 39, the Board adopted the said ‘Chairman’s Memorandum’ and then reached a number of resolutions of which no. 7, 8, 9, and 10 related to the 2<sup>nd</sup> Accused. I reproduce the said resolutions as follows;
7. The suspension from duty on 22 April 2005 of Mr Y. Amoro , the finance manager and currently on six months probation, be revoked with effect from the same date.
  8. Pursuant to resolution number d(7) above, the employment of Mr Y.Amoro as Finance Manager and previously designated as Finance and Administration Manager be terminated with effect from 22 April 2005 and the Managing Director be directed to proceed accordingly.
  9. Pursuant resolution number d(8), above, the managing director be directed to urgently ascertain Mr Y. Amoro’s indebtedness to the company to date.
  10. The management be directed to note that failure to recover any funds currently advanced to Mr Y. Amoro to date, outside the company’s Staff rules and Regulations and/or, without prior Board approval, will be fully recovered from the Managing Director’s salary. At this juncture the Managing Director reported that he had held discussions with Mr Y. Amoro who had agreed to deposit title deeds of some of his landed properties as security for the Loans/Advances so far with Kenya wines Agencies Limited. The Managing Director had meanwhile recovered Mr Y. Amoro’s car and was in the process of ascertaining its ownership and ease of disposal
53. It is these resolutions that led to the letter of termination of the 2<sup>nd</sup> Accused’s employment with KWAL on 2/6/2005, just about six months from the date he received the offer and just over a month from the date of his suspension on 22/4/2005.
54. That the basis upon which these resolutions were made is dubious starkly came to light during cross examination of PW 14 by Mr Namada.
55. The witness was made to admit a number of significant inconsistencies between the contents of his statement to the investigators and the ‘findings’ by the Board and admitted that the information in his memorandum had been ‘given to him’ and had ‘not been verified on the ground’. He damagingly ended up conceding as follows;
- “ ... I would say that some of the information given to the Board was not factual...”
56. Moreover, he not only in contradiction to the purported Board findings in Pros Exh 39, confirmed the employment status of the 2<sup>nd</sup> Accused at KWAL, but also agreed that the 2<sup>nd</sup> accused was already executing duties assigned by the board, adding as follows;
- “ ... It is true that the board acknowledged that the 2nd accused had reported for duty and was receiving advance payment...”
57. The evidence of PW 14 hence casts serious doubts on the soundness of the KWAL Board’s findings and the resolutions made in Pros Exh 39 and particularly, it’s purported finding that the 2<sup>nd</sup> Accused was not ‘formally employed’.
58. Resolution 8 is itself clear that the termination was for an ‘employment’, of which the 2<sup>nd</sup> Accused was already serving what the board called ‘six months probation’. It is preposterous for the KWAL Board to have then allowed itself to turn around and claim that the 2<sup>nd</sup> Accused who was already ‘on probation’ was not ‘formally employed.’



59. From the totality of foregoing, I find that there was no basis whatsoever for the allegation in the charge sheet that the 2<sup>nd</sup> accused was not ‘formally’ employed.
60. Further this could not under any stretch of the imagination, be a basis for the ineligibility alleged in the charge sheet against him.
61. After his struggles with the issue of the status of the Accused’s employment, the Investigator chose to focus his guns on the sole contention that the 2<sup>nd</sup> Accused had not completed his probation period at KWAL and made that the main basis for his conclusion that a credit of ksh 2.5 million was ‘irregularly processed’ in his favour. It is also the basis for the charge in Count 3 that the same amount was ‘fraudulently’ acquired by the 2<sup>nd</sup> Accused.
62. Although it denotes a shift from the primary allegations in the charges against the 2<sup>nd</sup> Accused, I will proceed and consider the evidence on record relating to these specific matters.
63. Oral evidence called from KWAL through Philip Bartay (PW 1), Voi Chiuli (PW 4), and Grace Faith Obonyo (PW 8), and from Officials of National Industrial Credit Bank (NIC) through Moses Wamithi Maigua (PW 3), Susan Wairuri Orieko (PW 7), Virginia Wambui Waiganjo-(PW 13) and from Industrial and Commercial Development Corporation (ICDC) through Dismas J. Omwonga Oyieko (PW 6) and documentary evidence produced herein more specifically Pros Exh 2 and 9 make it clear that KWAL had in place two employment benefit schemes for its employees.
64. One of them, known as the Staff Car Loan Scheme (Pros Exh 2- ‘Hereinafter ‘the ICDC Scheme’) is a staff vehicle hire purchase arrangement between KWAL and Industrial & Commercial Development Corporation (ICDC) as Financier.
65. Paragraph 2.1 of the Staff Car Loan Scheme provides as follows;
- “...Any Assistant Manager and or/supervisory staff scale M3 and above who has accomplished his/her probationary period and has been confirmed in employment is eligible to apply for a car loan in writing to the Managing Director enclosing copies of National ID and current payslip...”
66. It further sets out other terms, mode of application and the documentation required of Applicants.
67. This is the specific scheme named in the Charge Sheet in Counts 2 and 3.
68. The other Scheme which some witnesses erroneously in my view, at times referred to as the ‘Staff Housing Scheme’ is contained in Pros Exh 9 (Hereinafter referred to as ‘the NIC Scheme’).
69. In regard to this scheme, PW 1 testified as follows;
- “...There is another document encompassing the scheme KWAL had with NIC Bank. That other document has not been produced in court. What you have shown me (DMFI-2) is a letter and not a scheme. Those eligible for the NIC scheme as per the letter you have shown me are the members of staff of KWAL and that is by and large. The letter as it is does not specify the employment status of members of staff eligible...”
70. Indeed the actual scheme is not produced in Court. It is not explained why, although PW1 stated under cross examination as follows;
- “...All documents and even the NIC Loan Scheme one were given to the investigators...”



71. Going by the terms in Pros Exh 9, though, the NIC Scheme's purpose was to provide personal or mortgage loans to KWAL staff.
72. Part of the security required under the scheme is a lien on deposit by KWAL matching each loan amount disbursed; It imposes conditions of a signed general letter of set-off by KWAL and an acceptance by the Applicant.
73. From the text in Pros Exh 9, there is no limitation in relation to staff qualification to apply.
74. PW 1 however stated as follows under cross examination;
- “...For the NIC Bank Scheme one was only eligible if confirmed as an employee of KWAL and at least having served for 5 years I do not have that NIC Scheme document with me...”
75. There is nothing in Pros Exh 9 and before the Court, to support the above allegation by PW1.
76. Documentary and oral evidence before the Court shows that the 2<sup>nd</sup> Accused made application under both schemes but his Application under the ICDC Scheme though earlier processed and approved, failed.
77. Dismas J. Omwonga Oyecko (PW 6) - , then Manager in charge of Loans and Investments testified as follows in this regard;
- “...In the matter in issue, the ICDC never lost any funds. I confirm the transaction fell through. No monies were paid to ICDC by KWAL on that transaction...”
78. He testified that the Application for Ksh. 3 million went all the way to approval which was given but the Cheque was cancelled.
- He stated as follows;
- “...I passed on the letter from KWAL to the Executive Director who in writing gave me approval on the internal memo to process the loan and he signed for that. For reasons unknown to me, the cheque for Kshs.3,000,000/= was cancelled by Engineer Munene on 9.6.2005...”
79. According to him, in the end, ICDC returned the vehicle Log Book that the 2<sup>nd</sup> Accused had submitted in his Application under the terms of the scheme.
80. He made reference to a letter by the 2<sup>nd</sup> Accused dated 28/4/2005 (Pros Exh 31) in relation to this. The letter reads as follows in its text;
- Dear Sir,
- RE: RELEASE OF LOG-BOOK KAP 029Z
- I would like to ask you to release the above logbook that had given new when I applied for a loan from you which unfortunately you did not give me
- Thank you.
- (SIGNED)
81. From the foregoing, the application by the 2<sup>nd</sup> accused under the ICDC scheme- better known as the Staff Car Loan Scheme, therefore failed and no monies were advanced to him under it.



82. As already seen it is this scheme which carried an express requirement for an applicant to have been confirmed in employment or in other words, to have completed probation, in order to qualify.
83. Through Pros Exhibit 11- a standard application form that is markedly different from Pros Exh 3- which the 2<sup>nd</sup> accused used in his application under the ICDC Scheme, the 2<sup>nd</sup> accused then applied for a facility of ksh 2.5 million under the NIC Scheme.
84. He indicated the purpose of this facility as ‘purchase of a car’ and the source of repayment as salary. His employer KWAL was to provide a deposit as a guarantee.
85. Once again, this application went through KWAL internal approvals and was remitted to the financier NIC Bank where it was further processed and approved. The application was accompanied by a duly signed top-up Cheque for ksh 800,000/- (Pros Exh 6) drawn by KWAL pursuant to deposit guarantee requirements under the scheme.
86. After the approval, NIC issued a banker’s cheque dated 4/3/2005 (Pros Exh 14) in the name of the 2<sup>nd</sup> Accused for the sum of ksh 2.5 million which evidence shows he collected.
87. NIC then wrote its letter dated 20/4/2005 (Pros Exh 15) to KWAL indicating the payable monthly instalment for a period of 60 months and the facility account.
88. It is therefore abundantly clear that it is from the NIC Scheme that the 2<sup>nd</sup> Accused obtained a loan of ksh. 2.5 million, and not the staff Car Loan Scheme administered by ICDC.
89. Once again the Investigator had no basis to allege in the charges against the 2<sup>nd</sup> Accused that the amount was ‘purportedly made under the KWAL Staff car Loan Scheme...’ There is no support of such a conclusion from the evidence he gathered.
90. He was confronted with the Issue of the two schemes by Counsel for the defence during cross – examination and stated incredibly as follows;
 

“... There was a Scheme between KWAL and NIC. Which allowed him to apply (referred to Pros Exhibit 9). It is true I have produced both documents. I charged the accused under the scheme in Pros Exh 9. According to me both schemes apply to my charge (Shown Pros Exh 2). Under this the accused could only become eligible after completing probation. He did not benefit under this scheme. (Referred to Pros Exh 9). This one has no employment timelines. It is not true that any employee would be eligible. This applied to a house purchase scheme. It is not here. Nothing would stop an employee from applying on the first day of employment. (Referred to the item on ‘nature and amount’ under term 2). Under this scheme, one could apply for mortgage or personal loan. Personal loans can be for different activities. The money can be used to buy a car...’
91. It is not clear why the Investigator stated that the charges were based on the two schemes when he was very specific in the charge sheet.
92. He also agrees that the 2<sup>nd</sup> accused applied under the NIC Scheme where he was eligible, which contradicts his allegation in the charge that the 2<sup>nd</sup> Accused was ‘ineligible’.
93. While he agreed that under the Scheme in Pros Exh 9, an Applicant could apply for a personal loan or a mortgage, he also unreasonably stated that the scheme in Pros Exh 9 applied to what he called ‘Staff Housing Scheme’, which however he has not brought before the Court.



94. This appears to be the same false basis that the KWAL Board proceeded on, during its meeting of 28/4/2005 recorded in Pros Exh 39 when it took the position in relation to the loan of ksh. 2.5 million obtained by the 2<sup>nd</sup> Accused under the NIC Scheme, that the fixed deposit maintained by KWAL at NIC Bank was in relation to a 'Staff Housing Loan Scheme' and not 'Staff Car Loan Scheme' and therefore the deposit of a top-up of ksh 800,000/- by KWAL in relation to the loan advanced to the 2<sup>nd</sup> Accused required board approval.
95. There has not been produced before the Court, any KWAL scheme known as the 'Staff Housing Scheme' and as conceded by the Investigator, which is also clear in Pros Exh 9, KWAL staff could apply for personal as well as mortgage loans under the scheme. The Investigator agreed that such a loan could be put by the applicant to any use, including the purchase of a car.
96. From the foregoing, it becomes clear that the Investigator's contention that the 2<sup>nd</sup> Accused had not been confirmed in employment or put differently, had not completed his probation period of six-months is immaterial in the circumstances. So is the question whether the length of his probation was three or six months.
97. Examining the substance of the individual counts in light of the foregoing discussion, I find that both are wholly unfounded against the 2<sup>nd</sup> Accused.
98. I need not say much more about Count 2 which failed on substance and must equally fail on the evidence.
99. As relates to Count 3, the evidence adduced does not support the allegation that a fraud was perpetrated by the 2<sup>nd</sup> Accused in the circumstances described. I find that there was no fraudulent or otherwise unlawful acquisition of the sum of ksh. 2.5 Million from NIC Bank, by the 2<sup>nd</sup> Accused.
100. The 2<sup>nd</sup> Accused was eligible to apply for a loan under the NIC Scheme which he did following the laid down procedures. The loan application was internally approved and forwarded to NIC Bank which also approved and paid it.
101. As such, the 2<sup>nd</sup> Accused lawfully obtained the said amount as his entitlement under the terms of his employment by KWAL which employment is emphatically established, but subject only to the terms of repayment contained in the NIC Scheme.
102. As such, the amount loaned on the 2<sup>nd</sup> Accused and secured, and later repaid by KWAL was a debt lawfully sanctioned and properly incurred by KWAL on account of the 2<sup>nd</sup> Accused who was its employee.
103. In these circumstances, there is absolutely no basis for alleging as the Investigator did, that KWAL lost money. Indeed as seen from the resolutions in its meeting of 28/4/2005, the Board of KWAL, while it apparently got a number of things wrong, seemed alive to the fact that KWAL's claim against the 2<sup>nd</sup> accused was a recoverable debt, and resolved to pursue that approach.
104. In part of his testimony, the Investigator stated as follows to support a claim of loss of money by KWAL;
 

“...My investigations revealed that the loan repayment was to be by check off from Mr. Amoro's salary. This was not done however, and the amounts kept accruing with interest until the bank utilized the lien. As per the statement, this was 16.11.2006, 1.2.2007, 9.3.2007, 19.4.2007 and 26.4.2007. This was done on instructions from KWAL. Interest up to 26.4.2007 was Kshs.880,752/51 later fees charged was Kshs.194,408/54. The total



amount paid by KWAL was hence Kshs.3,575,221/05. I prepared an excel worksheet on this computation.

105. The Excel sheet he refers to is Pros Exh 51.
106. From evidence that was in his possession, the Investigator ought to have noted from Pros Exh 15, that the first check-off repayment of ksh 62,131/.44 expected of the 2<sup>nd</sup> Accused under the Scheme was due on 30/4/2005 by which time under Pros Exh 52, the 2<sup>nd</sup> accused was already under suspension followed later by termination on 2/6/2005.
107. Through Pros Exh 33- and concerned of the accrual of interest and charges, KWAL of its own decision, wrote to its financier under the NIC Scheme-namely NIC Bank on 18/4/2007 authorizing a set-off of four pending loans against its corresponding fixed-deposits held by the Bank as a guarantee. One of the four loans is that taken by the 2<sup>nd</sup> Accused.
108. It is not clear, and the Investigator does not seem to have queried, why it took until 2007 for KWAL to take this step, or what became of the recovery steps contained in the resolutions in Pros Exh 39.
109. Clearly the Board knew or ought to have known that having terminated the 2<sup>nd</sup> Accused when he had just obtained his facility in 2005, there would have followed the natural consequence of interest accrual and piling charges on the facility which it had secured by fixed-deposit.
110. In these circumstances, then the loss relating to the component of interest and bank charges on the facility taken by the Accused cannot be justly attributed to him, as the Investigator purported to do in his computation.
111. Finally what emerges from Pros Exh 33 is that in spite of his unique circumstances evidenced herein, the 2<sup>nd</sup> Accused was not the only defaulter and beneficiary of the KWAL set-off at NIC Bank, and if KWAL lost any money by that fact, then it as much lost it from the 2<sup>nd</sup> Accused, as it did from his fellow defaulting loanees in the NIC Scheme whose loans were also similarly set-off.
112. In the end I find that the evidence adduced by the State herein is insufficient to found a prima facie case against the 2<sup>nd</sup> Accused in both Counts 2 and 3.
113. In accordance with the dictates of Section 210 CPC, I therefore ACQUIT him hereof, of both Counts 2 and 3.

**FELIX KOMBO**

**SENIOR PRINCIPAL MAGISTRATE**

**DELIVERED IN OPEN COURT THIS 6<sup>TH</sup> DAY OF SEPTEMBER 2019**

