



**Republic v Oyugi alias Francis Oyugi Okuku (Anti-Corruption Case
(Kibera Crim Case) 7550 of 2007) [2018] KEMC 96 (KLR) (Anti-
Corruption and Economic Crimes) (3 September 2018) (Judgment)**

Republic v Francis Emmanuel Oyugi [2018] eKLR

Neutral citation: [2018] KEMC 96 (KLR)

**REPUBLIC OF KENYA
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION CASE (KIBERA CRIM CASE) 7550 OF 2007
LN MUGAMBI, CM
SEPTEMBER 3, 2018**

BETWEEN

REPUBLIC PROSECUTOR

AND

FRANCIS EMMANUEL OYUGI ALIAS FRANCIS OYUGI OKUKU ... ACCUSED

JUDGMENT

1. The accused, Francis Emmanuel Oyugi alias Francis Oyugi Okuku faces a main charge and a corresponding alternative count all brought under section 45 (2) (b) as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#), No. 3 of 2003(hereinafter referred to ACECA).
2. The main count is wilful failure to comply with the law relating to procurement contrary to section 45 (2) as read with section 48 (1) of the Anti- Corruption and Economic Crimes [Act, No. 3 of 2003](#).
3. The particulars of the main offence are that on 22nd July, 2003 in the City of Nairobi within Nairobi Area of the Republic of Kenya, being the Managing Director of Kenya Wine Agencies Limited, a person whose functions concerned the management of public funds, wilfully failed to comply with regulation 17 (1) of the Exchequer and Audit (Public Procurement) regulation, 2001 by authorizing procurement of motor vehicle registration number KAR 505 B, Toyota Prado without open tendering.
4. The alternative charge is also brought under section 45 (2) as read with section 48 (1) of the Anti-Corruption and Economic Crimes [Act, No. 3 of 2003](#) the distinguishing factor being only in the particulars of the charge.



5. Whereas the particulars of the main count are based on alleged failure to comply with relevant procurement regulations; the alternative count on the other hand is founded on failure to comply with applicable guidelines and procedures of the Kenya Wine Agencies Limited Managers Car Loan Scheme dated 1st January, 1996.
6. The particulars are thus as follows:
7. On 22nd day of July, 2003 in the City of Nairobi within Nairobi Area of the Republic of Kenya, being the Managing Director of Kenya Wine Agencies Limited, a person whose functions concerned the management of public revenue, willfully failed to comply with clauses 1, 2 and 3 of the Managers Car Loan Scheme of Kenya Wine Agencies Limited dated 1st January, 1996 by authorizing the procurement of motor vehicle registration number KAR 505 B Toyota Land Cruiser Prado with 2986 cc engine capacity without approval of the Board of Directors of Kenya Wine Agencies Limited.
8. The prosecution called a total of eleven witnesses while the defence availed four.
9. The prosecution's case in summary is that the accused, Mr. Francis Emmanuel Oyugi alias Francis Oyugi Okuku who is a former Managing Director of Kenya Wine Agencies Limited (hereinafter abbreviated, KWAL); initiated the purchase of, and acquired motor vehicle KAR 505 B Toyota Prado using public funds belonging to KWAL, a State Corporation, in a manner that flagrantly violated the existing procurement regulations and/or the Corporation policies and procedures that had been put in place to enable Managers buy their own cars through KWAL's financing.
10. The prosecution led evidence in support of the fact that KWAL is a State Corporation. Mr. Vincent Atson Lawrence Opanga (PW 7), a former acting Managing Director who had replaced the accused after the later was suspended testified that the KWAL was registered on 17/5/1969. He produced its certificate of incorporation no. 8260 as (P. exhibit 25). He told this Court that two State owned Corporations, namely Industrial Commercial & Development Corporation (ICDC) and the Industrial Commercial & Development Investment Company Limited - (present day, CENTUM Investment Company Limited) jointly own 99.09% of shareholding in KWAL thus making the Government the controlling shareholder. He produced the shareholding schedule- P. exhibit 24.
11. Turning to the purchase of the motor vehicle, KAR 505 B Toyota Land Cruiser Prado, the prosecution called several witnesses who narrated how it was purchased.
12. Mr. Philip Bartay (PW 1) was the Human Resource Manager, KWAL. He told this court that during that time KWAL was running two car schemes, the Managers Car Scheme for the senior management and Staff Car Scheme which was for the middle cadre management.
13. He told this Court that he became aware of the Managers Car Loan Scheme for the first time on 8th May, 1997 when the then Deputy Managing Director, Mr. John Ndung'u circulated the same to all managers through an internal memo on with the said scheme attached. The memo together with the scheme were identified by the witness and later produced by the investigation officer, Mr. Ignatius Wekesa (PW11) as P. exhibits 1 a & 1 respectively.
14. He recalled that after the accused came in as the Managing Director KWAL, the accused issued a memo in connection with the Managers Car Loan Scheme on 14/11/2003. In the said memo (P. exhibit 2), the accused made reference to the existing Managers Car Scheme and directed that with immediate effect cars which were under the scheme would be co-owned between the concerned manager and KWAL. It further directed the Deputy Managing Director to provide details of the Scheme in his custody such as deposits, repayments and disposal charges for every manager's vehicle to the Human Resource Office.



15. Mr. Philip Bartay (PW 1) told court that once the accused took over office after appointment (the appointment was contained in the gazette notice no. 4740 of 11/7/2003- produced as P. Exhibit 3 and showed effective date of appointment was 18/6/2003); on 18/7/2003, the accused by way of comments on a pro-forma invoice dated 16/7/2003 (P. exhibit 4) instructed PW 1 to facilitate the processing of the said invoice for purposes of buying him the motor vehicle whose details were in the invoice. Mr. Bartay testified that he immediately went to seek clarification from the accused who instructed him to proceed and process the LPO. He thus prepared LPO number 19187 dated 22/7/2003 (P. exhibit 5) as directed.
16. Thereafter someone from Toyota (E.A) Limited, whom he came to know later as James Theuri (PW 2) came over with some forms where PW1 filled KWAL details. On 11/8/2003, he wrote to Toyota (E.A) Ltd indicating that the said motor vehicle be registered in joint names of the accused and KWAL (per his letter - P. exhibit 7).
17. On 15/8/2003, on instructions of the accused, PW 1 went to Toyota (E.A) Ltd accompanied by a driver and collected the said motor vehicle. He exhibited the delivery note- P. exhibit 8. The log book came out later in the name of the accused and KWAL- P. exhibit 10.
18. Later on in 2006; the accused ceased to be the Managing Director and PW 7; Vincent Opanga took over accused's position in acting capacity. The Acting Managing Director summoned him to his office and informed him Toyota (E.A) Ltd was seeking authority to repair a certain motor vehicle which he wanted him to go and confirm with Toyota (E.A.) Ltd.
19. He visited Toyota (E.A) LTD and found that the vehicle in question was KAR 505 B Toyota Prado. It appeared to have been vandalized.
20. On 21/2/2006; the Acting Managing Director convened a meeting of the Board to deliberate on the matter where Philip Bartay (PW 1) was also invited to make a presentation. He produced a report he gave to the Board that day as P. exhibit 11. The Board rejected the request to do the repairs and directed him to proceed and recover the said vehicle instead. He produced the vehicle recovery report as P. exhibit 12.
21. On Cross- Examination, PW 1 stated that the Managers Car Loan Scheme was under the office of Deputy Managing Director and not the Human Resource Office where he was in charge. His office only oversaw the Staff Car Loan Scheme.
22. Asked if he was aware that Mr. P.K. Chemngoren had also acquired a vehicle through the scheme, he replied:

“...I do not know how P.K. Chemngoren car was bought. I however know he left with the car. I do not know under what terms and conditions he left with the car...”
23. He confirmed that he used to be in-charge of administering the pay roll system hence he would have become aware of any car loans that would be paid off through the check off system.
24. Asked if he was aware that managers were entitled to mileage allowance which could be applied towards off-setting the car loans, he said:

“...I know managers were entitled to mileage allowances. I do not know how it was calculated though. I do not know if the mileage allowances were utilized to meet the commission on cars...”



25. James Theuri (PW 2) was a Sales Executive at Toyota (E.A) Limited. He testified that on 16/7/2003, he was at his place of work when a customer walked in and indicated that he was interested in buying a Toyota Prado that was in the show room. He showed him the vehicle and took his particulars. That gentleman was Mr. Francis Oyugi, the accused herein. The gentleman requested PW 2, to send a quotation to KWAL which PW 2 prepared and sent (in ref. to Pro forma invoice- P. Exhibit 4).
26. PW 2 subsequently received a faxed copy of LPO (P. exhibit 3) from KWAL by Philip Bartay (PW 1). He subsequently proceeded to KWAL and picked the original LPO (P. exhibit 5). He used the original LPO to prepare the order dated 28/7/2003- P. exhibit 12. He also obtained the relevant registration forms and filled the details of the car before taking it to Bartay (PW 1) who informed him the vehicle was to be registered in joint names of the accused and KWAL. He requested him to do a formal letter to that effect which PW 1 did vide a letter- P. exhibit 7. Registration of the vehicle was subsequently processed which culminated into issuance of log book -P. exhibit -10.
27. The total price of the car was Kshs. 4, 616, 275/-which was paid in full through cheque number 018675 dated 23/9/2003 (P. exhibit 19) as also further evidenced by receipt number 20F215587- P. exhibit 18.
28. On Cross- Examination, he stated when the accused visited the show room and he attended to him, the accused was alone.
29. Asked how he then came to deal with Mr. Philip Bartay (PW 1), he explained:
- “...Oyugi told me to address the quotation to the Managing Director KWAL, attention Mr. Oyugi. He later referred me to Philip...”
30. The successor to the accused, Vincent Atson Lawrence Opanga (PW 7) who was appointed Acting Managing Director in place of the accused testified and confirmed the existence of the Car Loan Scheme for Managers. He affirmed:
- “... The Company had a car loan scheme for guiding procurement of vehicles for managers...”
31. Describing how the scheme operated, he stated the Scheme had a clause requiring that before the vehicle is purchased the Company had to approve it first and further that for any vehicle beyond engine capacity of 1600cc, approval of the Board was required.
32. He said the vehicle the accused had purchased was 2986cc hence Board approval before purchase should have been obtained.
33. He explained that the discovery of the irregularity that had been occasioned by the accused in acquiring the said vehicle was triggered by the following chain of events:
- “...A memo was written by Officer in Charge of Administration of the Company to the Acting Financial Manager (dated 15/9/ 2005-P. exhibit-26) at the time. Her name was Ann Ogunda. The memo was about damage to the same vehicle that was damaged during robbery that occurred on 31/8/2005. The vehicle was under custody of Oyugi when he proceeded on leave with it. The memo (P. exhibit 26) was asking for approval for repairs to be undertaken because it was damaged during robbery. After administration wrote to Finance Manager, the Finance Manager referred to me for directions. I sought to establish if it was Company vehicle. I was advised it was personal vehicle and I declined to authorize repairs of the same... I raised a number of issues for clarification. When the matters were



clarified, I gave directions that the vehicle be towed to the Company as I sought authority from the Board...”

34. On Cross-Examination, the Acting Managing Director was challenged by Mr. Namada, Advocate for the accused to provide proof that the Board had approved the Managers Car Loan Scheme. He answered:

“...Such approval would not be in the body of the document. It could be in another document may be minutes. It has no indication when it was approved...”

35. Pressed further on the same issue he said:

“...The Board Minutes are in the custody of the Company. To write that I must have seen them. I have not quoted the dates of such minutes...”

36. Sammy Muthoka Mbora (PW 6) was the Chairman of the Board of Directors KWAL from June, 2003 to April, 2005. He testified that he was aware that KWAL had two car schemes one for the senior managers and another for its junior managers. He testified:

“...At the time, there were two loan schemes, one for senior managers and junior managers...”

37. He produced the letter he wrote to the accused setting out his terms and conditions of service- P. exhibit 23.

38. On Cross- Examination by Mr. Namada on the existence of the Car Loan Scheme, he explained:

“...When I was appointed, we were informed there were two schemes existing that time. Actual details I cannot really speak on them with authority. The information must have come through Board of Directors. It was raised... I did not see the previous minutes which had approved and adopted the scheme. I was there from June 2003 to April 2005. During my tenure, I don't recall approving any car loan scheme. I did not see any...”

39. Eric Kemoi Koech (PW 5) an employee of Barclays Bank Head Office where KWAL maintained account number 5628084 produced the bank statement for the period between 29/9/2003 to 30/9/2003 (P. exhibit 21). It showed that cheque number O18675 dated 23/9/2003 drawn by KWAL to Toyota (E.A) LTD – P. exhibit 19 for Kshs. 4,616,275/- was cleared through the account to City Bank on 30/9/2003.

40. Jacob Njeru Munyi (PW 8), the accountant in charge of payables at KWAL confirmed he processed the invoice from Toyota E.A Ltd (P. exhibit 27) for Kshs. 4, 616, 275/- of which cheque number 18675 was issued by KWAL in full payment.

41. The prosecution also called Elijah Omero Nyamamba (PW 3), an employee of National Treasury working as a Supply Chain Management Officer to give evidence on procurement. He did not speak on procurement law. Instead he dedicated his time in the witness box on Managers Car Loan Scheme (P. exhibit 1). However, having looked at the gist of his evidence, it is clear it was not informed by experience in actual implementation of that Scheme nor any similar experiences elsewhere but was purely based on what he read and deduced from the document. I do not think he was an expert on the subject. The Court, if need be should read the document which is already an exhibit and make its own deductions.



42. Superintendent of Police, John Muinde (PW 9) produced the document examination report (P. exhibit 31) which was prepared by his colleague Antipas Nyanjwa. The report showed the signature on the cheque dated 23/9/2003 (P. Exhibit 19) and on the Local Purchase Order dated 22/7/2003 (P. exhibit 5) were compared with the specimen signatures of the accused (P. exhibit 28, a, b and C) as well as accused known signature (P. exhibit 29) and the finding of the document examiner was that they were similar and indistinguishable thus made by the same author. He produced the said document examiner's report as P. Exhibit 31 and the exhibit memo that forwarded the exhibits for examination as P. exhibit 30.
43. Mr. Ignatius Wekesa (PW 11) was the investigation officer in this case. He gave detailed testimony detailing the manner in which he went about this investigation during which he came across various documents which he collected besides interviewing witnesses whose statements he recorded. Some of the documents were produced by the witnesses that testified in this case and others were produced by him such as the handwritten letter by the accused dated 31/8/2005 to Acting Managing Director KWAL informing him about the damage to motor vehicle KAR 505 B and seeking for repairs undertaken by KWAL. This request was not granted; as per the letter of 3/10/2005 to Acting Finance Manager (P. exhibit 36) communicating the decision of the Board on the issue. Further, Toyota E.A. was also directed not to release the vehicle via the letter of 3/10/2005 (P. exhibit 37). Recovery was subsequently done on 5/10/2005 as evidenced by- P. exhibit 12.
44. At the time of the investigation, the vehicle was still in the custody of KWAL.
45. He testified that he preferred count 1 for the following reason:
- “...I looked at regulation 17 ...open tendering was to be used as a preferred procedure of procurement...plus this vehicle was procured by a visit to Toyota Kenya by M.D. and coming back to write LPO to apply. It was not fitting the bill...”
46. As for the alternative count, he said:
- “...I also subjected the process to Managers Car Scheme regulations which he could have used instead of public procurement regulations. After going through (MFI-1) the Manager Car Scheme in force from 1/11/1996, my interest in this purchase was clause 3; it reads:
- ‘the engine capacity of a car purchased under the scheme shall not exceed 1600cc without Board approval’
47. The vehicle was 3.0cc which was way above 1600cc and as per regulation; it was supposed to be placed before the Board for approval even if the scheme was to be used...”
48. On Cross- Examination by Mr. Namada Advocate for the accused, the Investigation Officer was asked if the vehicle the accused had purchased was bought as a Company vehicle or whether the accused was facilitated by KWAL to purchase one as an individual, he replied:
- “...The vehicle was purchased as a parastatal vehicle to be used by M.D...”



49. On being confronted with a letter dated 16/5/2006 (D. exhibit 6 a & b) by Human Resource Officer KWAL, one Voi Chiuri showing a demand of Kshs. 9,812,517.02 out of which Kshs. 4, 616, 275/- was described as car loan; the investigation officer responded:

“...It was not brought to my attention. I cannot confirm its authenticity. I was neither shown any loan application forms...”

50. He was also required to clarify if his investigations found any evidence that showed the Managers Car Loan Scheme was ever approved by the Board, he stated:

“...We collected many minutes from 1988 and I believe I saw it only that it has not been tabled in court...”

51. The accused gave sworn evidence in his defence and called two witnesses.

52. Francis Emmanuel Oyugi, the accused herein was the first defence witness (DW1). He told this Court that he became the Managing Director KWAL effective 18/6/2003 but he took over office on 24/6/2003.

53. The accused explained that upon his appointment, he visited KWAL on 18/6/2003 to see the outgoing Managing Director, Mr. Chemngoren. Mr. Chemngoren informed the accused he was not yet aware of the changes and hence suggested that should meet after a week for discussion.

54. When accused returned after a week, the outgoing Managing Director was no longer there. He called the Deputy Managing Director, Mr. Ndungu to find out from him if the former M.D had handed over anything to him but Mr. Ndungu informed him there was nothing that had been handed over.

55. He enquired from his Secretary the number of departments in KWAL then summoned all the departmental heads for a meeting. According to the accused the briefing went on but no policy documents were given to him.

56. He subsequently called the Head of Human Resource who was in charge of vehicles. The Head of Human Resource, PW 1 Mr. Philip Bartay informed him that the former M.D. had left with the vehicle he had been using but assured him the Company will buy him another vehicle. The accused recounted the briefing by the Human Resource Officer as follows:

“...The arrangement would be to buy the vehicle and it would be paid through the allowances because it would be registered in the name of the officer. It was a loan because every month, one would get allowances that would be withheld towards off-setting the loan. These allowances were those that you were to be paid for using the vehicle for official work. That was the practice in the Company...”

57. The accused continued;

“...The former M.D. I took over from, he went with the vehicle and when I asked HR, he said he had paid off using that arrangement. Mr. Ndungu was still there and was paying through the same system...”

58. The accused referred to motor vehicle KAR 123 R which he testified was registered in the joint names of Mr. Chemngoren and KWAL. Equally, he said it was the same with motor vehicle number KAN 143 R registered in joint names of J.N. Ndungu and KWAL.



59. The accused denied having taken part in the process leading to the purchase of the said vehicle which he claimed was entirely done by the Human Resource Manager; he explained:

“...My vehicle KAR 505 B; the process of acquiring it was initiated by Human Resource Manager. He asked me which type I needed. I wanted a strong vehicle. He said he would organize for me. He generated the LPO which Deputy M.D. signed and it was also brought to me and I signed it. It was taken to where I was buying from, Toyota (E.A) LTD. After LPO, the payment cheque was prepared by Mr. Philip Bartay- Human Resource Manager. He gave Finance Department instructions to prepare a cheque which was taken for signature to Deputy M.D and me. The value of the vehicle was Kshs. 4, 616, 275/= . Mr. Philip Bartay is the one who took the cheque to the dealers. He is the one who brought the vehicle to me. It was registered in my name and Kenya Wine Agencies. It is Philip Bartay who undertook the exercise of registration...”

60. Reacting to the evidence of PW 1, Philip Bartay in Court, the accused said:

“... I heard Mr. Bartay testify in Court. He said he was working strictly under my instructions. That was not right. I did not take over anything that I would give instructions. He was telling me everything...”

61. Concerning the Managers Car Loan Scheme, the accused asserted:

“...It was never brought to my attention. I saw it when this case started. I was M.D for about three years. I don't remember seeing the operationalization of the Scheme of the Organization...”

62. The accused also referred to Board Staff and Administration Committee meeting of 24/3/2005 particularly referenced as “MIN 8/BSACM/2005- Car Scheme For Managers” citing it as evidence of the fact that the said scheme had never been approved because even on that particular day, it was deferred to be discussed at a later date.

63. The accused explained further that the vehicle he was purchasing was personal hence it was not subject to the process of tendering. He affirmed:

“... This issue of motor vehicle was personal. I was not supposed to buy through tendering. It was not being bought as a parastatal vehicle. The company role was to give me a loan which would be paid back...”

64. The accused referred to D. exhibit 6 a & b, which was a letter written to him by the Human Resource Officer KWAL claiming from him Kshs. 9,812,517.02 of which Kshs. 4,616,275 was listed as car loan which he said supported his proposition that this was a loan advanced to buy his own car and was never a company vehicle to be subjected to normal procurement regulations.

65. On Cross-Examination by Mr. Gikonyo for the State; the accused was challenged to show if this was in fact a loan as alleged in his defence the much he had repaid. He explained that the Finance Department



was supposed to be computing his mileage entitlement for the use of the car and withholding it and apply it towards clearing the loan. Asked for specific proof of payments made, he said:

“... I would say I paid because I was not taking the money they calculated on mileage. I used my car... Jacob was here and he said that in my account of the car he had saved Kshs. 163,000 which was in my account instead of giving me...”

66. On re-examination accused was more emphatic, he explained:

“...The practice was to buy a vehicle using KWAL’s money. The reimbursement entitled for use of one’s car would be accumulated to pay the loan which was taken. That’s what happened to former M.D. and his deputy...”

67. Mwaniki Joram Musyoka (DW 2) an employee of National Transport and Safety Authority gave the evidence in connection with the registration status of the two motor vehicles the accused had mentioned in his evidence. These were KAR 123R previously registered jointly between KWAL and P.K. Chemngoren but on 3/9/2003; KWAL transferred the vehicle to P.K. Chemngoren. He produced the copy of record in respect of the said vehicle as D. exhibit 1. For motor vehicle KAN 143 R, the said vehicle was still in the name KWAL and J.N. Ndungu. The copy of record was produced as D. exhibit 2.

68. Doris Macharia Thangei (DW 3), the Company Secretary KWAL was called to produce the Minutes of the Board and Staff Administration Committee Minutes of 24/3/2005 which she produced as D. exhibit 4.

69. Benard Kariuki Godo (DW 4) a Finance Director at KWAL since the year 2007 produced the pay-slips of the accused from July 2003 to Sept. 2005 with the entire bundle being produced as D. exhibit 5.

70. In his closing submissions, the Advocate for accused Mr. Namada Simoni submitted that no evidence had been tendered in respect of count 1. He thus submitted that Count 1 must collapse for lack of evidence.

71. As for the alternative count which was premised upon the Managers Car Loan Scheme, he raised two main issues:

1. If the Scheme existed and,
2. If it existed, whether approval of the Board was mandatory before acquisition of the motor vehicle subject matter of the case.

72. On whether the Scheme existed, he submitted that none of the witnesses was able to show how it came into being, he posited:

“... A Corporation’s scheme only exists if it has been approved by the Board of the Corporation. These are private schemes not governed by statutory law and therefore do acquire validity only upon resolution of the Board...”

73. Mr. Namada argued that if the Board had approved the Scheme, nothing would have been easier for the prosecution than to produce the minutes and the resolution of the Board to that effect. He pointed out that criminal culpability should never attach to a policy document whose authenticity cannot be confirmed. He opined:

“... What therefore existed at Kenya Wine Agency Limited was a management decision on how to facilitate managers’ acquisition of motor vehicles for use in the Company Service.



One may have reservation, even serious reservations about application of decisions and decisions themselves but such reservations do not filter into the realm of criminality. The charge before the court is not even the omnibus abuse of office charge...”

74. Mr. Namada further observed that in the appointment letter of the accused, it was indicated that he was entitled to benefits of reimbursement of own car on Company business and wondered where these benefits disappeared to.
75. He noted that even letters sent to the accused by the Company showed it was treating the subject motor vehicle as a loan or debt. He reasoned that if it was meant that accused should be crucified, the same should not have been extended to the criminal realm; at least the crucifixion should have stopped at the civil law domain.
76. Mr. Namada relied on several High Court decisions and among them Criminal Appeal No. 76 of 2012-Philip Muiruri Ndaruga vs. Republic where the Court held that accused should only be convicted on the strength of the prosecution case and not the weaknesses of his defence as was held in the case of Sekitoleko Versus Uganda.
77. The Prosecution Counsel, Mr. Joseph Gikonyo reiterated the prosecution witnesses’ testimony which he argued had clearly demonstrated that the accused acquired the said motor vehicle irregularly. He submitted:

“... Evidence adduced before the Court shows a unilateral decision to purchase the motor vehicle without following stipulated procedures. Barely two months into his appointment, the accused person short circuited the whole procedure laid down by KWAL and Government procurement procedures and acquired the vehicle and went ahead and had it jointly registered in his name and KWAL...”
78. He castigated accused defence that the he was unaware of the Managers Car Loan Scheme or the assertion that the scheme had not been approved by the Board, he submitted:

“... The accused person cannot feign ignorance of the Car Scheme of Managers as he is the one who in compliance with the said scheme issued exhibit 2 clearly proving he was privy to the contents thereof and which he failed to comply with. Similarly, he cannot cite the issue of the minutes not indicating whether the issue of car scheme was discussed or not yet he had himself referred to the car scheme in exhibit 2. He cannot be allowed to blow hot and cold at the same time...”
79. I will first deal with the question of whether KWAL is a state corporation.
80. Though the issue was not contested by the defence, it is an important issue as it is a matter which alone can lead to collapse of the main count since only public institutions or agencies are subject to public procurement regulations.
81. The status of KWAL as a State Corporation was concretely established by the prosecution through the evidence of PW 7, Vincent Atson Lawrence Opanga; the former Acting Managing Director KWAL who stepped in after accused was suspended. In his testimony, he produced a document showing the shareholding levels (P. exhibit 24) whereby the Government through its two corporations, ICDC and ICDL owns 99.09% of the shareholding.
82. The fact that the Government is the controlling shareholder is also evidenced by the fact that the appointment of the Managing Director as was the case with the accused was done through a gazette



notice- P. exhibit 3 by the Minister concerned. It is this Court's finding therefore that KWAL is indisputably a State Corporation.

83. The next issue is to determine if this particular procurement of motor vehicle was a public procurement that ought to have been subjected to Exchequer and Audit (Public Procurement) regulations, 2001 or not. The answer to this will determine viability of the main charge in this case.
84. Under the Exchequer and Audit (Public Procurement) regulations, 2001; the term 'public procurement' means procurement by public entities using public funds.
85. Under rule 3(1), it is declared that "these regulations shall apply to all public procurement by public entities."
86. Going by the evidence on record, it is a fact that the motor vehicle in question, KAR 505 B Toyota Prado was paid for fully using public funds, through cheque number 018675 dated 23/9/2003 for Kshs. 4,616,275 -(P. exhibit 19). Evidence that the cheque was issued by KWAL for payment to Toyota E.A Ltd was adduced and the bank statement produced (P. exhibit 21) by Eric Kemoi Koech (PW 5), an employee of Barclays Bank Head Office indeed confirmed that the money came from KWAL account.
87. Can this fact of payment alone paying using public funds be the only factor to determine if this was a procurement governed by Public Procurement regulations?
88. Considering the evidence on record, I would not think so.
89. To begin with, there was unanimity by all the witnesses from KWAL that KWAL had a Car Loan Scheme for its employees where the Company could facilitate financing of the employees to purchase and own vehicles under either the two Company Car Schemes i.e.- The Managers Car Loan Scheme (P. exhibit 1) and The Staff Car Loan Scheme (P. exhibit 22).
90. From the evidence of PW1, Philip Bartay, who was the Head of Human Resource and who said was involved in that process purchasing the car on instructions of the accused, he said his understanding was that the accused was purchasing the motor vehicle KAR 505 B under the Managers Car Loan Scheme (P. exhibit 1).
91. Indeed the letter produced in this Court by the accused- D. Exhibit 6 a & b written to the accused on 16/5/2006 by Voi Chiuli, a Human Resource Manager at KWAL seems to confirm that the fact that the Company resulted to treating it facilitation for car loan hence the demand to the accused.
92. In this regard, I would agree with the accused when he stated:

“... This issue of motor vehicle was personal; I was not supposed to buy through tendering. It was not being bought as a parastatal vehicle. The company role was to give me a loan which would be paid back...”
93. The circumstances under which the said vehicle, KAR 505 B was bought despite the use of public funds was not a matter of public procurement perse to which Exchequer & Audit (Public Procurement) Regulations, 2001 applied. With utmost respect to the Investigator and the learned Prosecutor; I dare say they got it completely wrong in framing a charge based on Exchequer & Audit (Public Procurement) Regulations 2001, considering the nature of evidence at their disposal. The main count must thus inevitably fail and give way to evaluation of the evidence in respect to the alternative count.



94. The defence mounted a strong argument that the Managers Car Loan Scheme which the prosecution had based its alternative count on did not exist as there were no Board minutes produced showing when the Board approved the Scheme. On this matter, Mr. Namada submitted vigorously as follows:
- “... A Corporation’s scheme only exists if it has been approved by the Board of the Corporation. These are private schemes not governed by statutory law and therefore do acquire validity only upon resolution of the Board...”
95. He remarked further:
- “... What therefore existed at Kenya Wine Agency Limited was a management decision on how to facilitate managers’ acquisition of motor vehicles for use in the Company Service. One may have reservation, even serious reservations about application of decisions and decisions themselves but such reservations do not filter into the realm of criminality. The charge before the court is not even the omnibus abuse of office charge...”
96. On his part, accused denied having come across the Managers Car Loan Scheme (P. exhibit 1) insisting that he saw it for the first time when this case started; he stated:
- “...It was never brought to my attention. I saw it when this case started. I was M.D for about three years. I don’t remember seeing the operationalization of the Scheme of the Organization...”
97. The Prosecution countered this argument by pointing out that even in absence of Board Minutes; it had produced the Managers Car Loan Scheme itself (P. exhibit 1) before this Court together with the accompanying memo (P. exhibit 1a) which was circulated to the managers to signal its application, a fact P.W. 1, Philip Bartay himself a Human Resource Manager at the time said came to his attention. The Prosecution further submitted that it was also fact that even accused was a beneficiary of the said Managers Car Loan Scheme which he was denying existed prompting the Prosecution Counsel, Mr. Gikonyo to urge the Court not to allow him to blow hot and cold at the same time.
98. Additionally, the Prosecutor also pointed out that the accused had even personally authored a memo on 14/11/2003 (P. exhibit 2) where he made reference to the existing Managers Car Scheme and issued directives on joint registration of motor vehicles under the scheme yet he was feigning ignorance of the same in Court.
99. The issue as correctly framed by Mr. Namada is; did the Managers Car Loan Scheme exist or not?
100. Although the Board minutes signaling when the said Scheme was approved by Board were never produced, witnesses who testified from KWAL told this Court that they knew for a fact that the Scheme existed and that in reality employees of KWAL were actually getting facilitated to acquire vehicles by KWAL under the scheme and that even the motor vehicle KAR 505 B which accused was facilitated to buy was a case in point. On cross- examination they also confirmed that besides the accused, the former M.D. Mr. P.K Chemngoren and his then Deputy J.N. Ndungu had also acquired their vehicles through the same method. The prosecution further produced a document detailing the procedures governing the application of the scheme (P. exhibit 1) together with the memo that was circulated to the Managers on 8/5/1997 notifying them about the said Scheme.



101. The allegation by the accused that he became aware of this scheme when this case started is utterly misleading in the light of the memo he wrote on 14/11/2003 (P. exhibit 2). From the tone and the contents of the memo, it is quite evident he was well versed with the Scheme details. He wrote:

MEMO

To: All Managers

From: Managing Director

Date: November 14, 2003

RE: MANAGERS VEHICLES

This has reference to existing manager's car scheme and the managers' vehicle currently existing in the fleet.

With immediate effect, please note that all managers' vehicles will be co-owned between the manager concerned and the company.

By copy of this letter, the Deputy Managing Director is to provide the details of the above scheme to HRO who will manage the said scheme and regularize the changes. DMD will also provide this office with current status of initial deposits, repayments and disposal charges for every manager's vehicle for perusal and compliance.

Please be guided accordingly.

F E OYUGI

cc Human Resource Officer

102. The above in my view is not the language of a person who was in the dark about the scheme until this case started in as much as he wants the Court to believe. He was well informed about the Scheme right from the year 2003 when he was writing this memo. The instructions are firm and to the point.
103. I also find it strange and bordering on hypocrisy for the accused to deny the existence of the scheme or its legal basis when as Managing Director and top most official in the management KWAL he had not only acknowledged its existence by issuance of the above memo directing its implementation and had also benefited from the scheme. In view of the foregoing facts, I am prepared to invoke section 120 of the Evidence Act against the accused and find that he is precluded from denying the existence of the said state of facts or affairs which he previously confirmed their existence.
104. Section 120 of the Evidence Act provides:
- “When a person has , by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed , in any suit or proceeding between himself and such person or his representative, deny the truth of that thing.”
105. It is inexcusable for the accused who was the senior most employee of KWAL in terms of interpreting and executing policies of the organization to deny that the scheme he wrote a memo about and directed its implementation on behalf of KWAL and one through which he claimed he acquired a car never existed or was not in force.
106. Moreover, after carefully considering the Board Staff and Administration Committee Minute of meeting on 24/3/2005- (D. exhibit 4) in particular MIN 8/BSACM/2005 - titled “Car Scheme For



Managers” which the accused cited as evidence to show that the said scheme had not been approved as it was put off for discussion to another date in future, I am not persuaded that is the implication of that minute. The accused who was also sitting in that meeting as member number 4 was already enjoying a benefit from the Car Scheme for Managers. He had written a memo that recognized its existence way back on 14/11/2003 (P. exhibit 2). In any case, the specific discussion that was contemplated by the Board about the scheme in the future is not disclosed.

107. It is also quite obvious that this particular minute was in respect of an individual case by Finance and Administration Manager- Mr. Yobesh Amolo who had applied for Company Financing to purchase a personal car which clearly demonstrates that such approvals actually used to be channeled through the Board. That day, his application was deferred.

108. In view of the foregoing, I find that notwithstanding the non-production of actual minutes of the Board which approved the Car Loan Scheme for Managers; the fact that this policy was regularly and openly implemented without any of the successive Boards of KWAL voicing any known objection raises a presumption as to its validity. Under the law of evidence this is what is referred to as presumption of regularity, which is expressed in latin *maxim omnia preasumuntur rite esse acta* which the author in the book- Murphy on Evidence 14th Edition at pg. 745 explains as follows:

“...Regularity of official acts- On proof of primary act that some official act has been performed in an official or public capacity, it is presumed that the act done complied with any necessary formalities, or that the person so acting was properly appointed for the purpose as the case may be...”

109. The burden is on the person who alleges irregularity to bring evidence to disprove or establish irregularity. With all witnesses from KWAL attesting to the fact of regularity in so far as the scheme is concerned, the evidential burden and not the legal burden was on accused to displace that presumption. Merely saying the minutes of the Board where approval was granted were not produced without more is in my view not sufficient to discharge the evidential burden in view of strong evidence of regularity presented; nothing sort of availing credible evidence to the contrary would suffice to displace the presumption.

110. As to whether Board could can lawfully develop such procedures and guidelines to govern such credit or loan arrangements concerning public funds at its disposal, I perused the *State Corporations Act* of 1986 which I believe is the parent law that regulated State Corporations around that time and found that under section 17 thereof, subject to certain approvals, the Board could create procedures that would allow utilization of funds at its disposal to facilitate credit or loan advances to its Board members or staff of the Corporation. The said section provides:

“Notwithstanding any written law establishing a State Corporation or its memorandum of association, no State Corporation shall grant to a member of the Board or Staff any loan or advance any credit facility for him except in accordance with regulations made by the State Corporation under this section and approved by Treasury but in absence of the regulations such loan or credit facility may be granted in accordance with the terms and conditions approved by the Committee.” (“Committee” is in reference to State Corporations Advisory Committee established by section 27 of the Act)

111. KWAL therefore was within the mandate to develop internal policies in form of procedures and guidelines to facilitate credit/loan to its staff as long as it obtained all the necessary approvals as is specified in the above quoted section. Since these procedures and guidelines were demonstrated through witnesses called from KWAL to have been put place by way of the Car Loan Scheme and as



a fact, many employees had benefited under either of the two schemes namely Managers Car Loan Scheme (P. exhibit 1) or Staff Car Loan Scheme (P. exhibit 22); again under the principle of regularity of official acts; I would presume that all the necessary approvals were sought and obtained by KWAL prior to commencement of the two schemes unless there is evidence to the contrary and I find no contrary evidence on record. The principle is of fundamental importance and is representative of a broader legal concern: legal certainty. In exercise of powers by public authorities or bodies, it is clearly in public interest that decisions cannot be open to challenge long after they have been taken and acted upon. In an English case *R (Newhaven Port and Properties Ltd vs East Sussex County Council)* (2013) EWCA, it was held by the Appeal's Court that by laws relating to Newhaven harbour that had been made under the then harbour authority, Southern Railway Co; that there was no reason to suppose they had not been subject to the requisite statutory publicity before the minister confirmed them.

112. Kyalo Mbobu speaking on this presumption of regularity in his book "The Law and Practice of Evidence in Kenya" explains:

"... This is the presumption that official and judicial acts are performed regularly. It is based on sound public policy which imputes good faith on official and judicial conduct. The burden is on he/she who alleges irregularity to bring evidence to disprove or establish irregularity..."

113. In absence of evidence to the contrary, I find that the Managers Car Loan Scheme (P. exhibit 1) which as implemented at KWAL for the benefit of its employees was not only lawfully in existence but also complied with the formalities specified under section 17 of the *State Corporations Act*.

114. And while at it, I find no difficulties in discerning the mischief section 17 of *State Corporations Act* intended to avoid by providing that 'no State Corporation shall grant to a member of the Board or Staff any loan or advance any credit facility for him except in accordance with regulations made by the State Corporation under the section...'. The essence here was to protect public funds under the Corporation from arbitrary actions of individuals in these State Corporations by ensuring that when such loans or credit is advanced to the staff of the corporation or the Board members, it was done transparently through properly laid out procedures to enhance accountability and avoid possible loss.

115. It was thus imperative that every employee or member of staff seeking such a facility that involved application of public funds or financing through the Corporation for a personal benefit to fully comply with such procedures and guidelines to guard against possible loss of public revenue or property.

116. An example is the condition for Board approval prior to buying one's preferred car. This requirement might look insignificant but is very vital especially because it provides opportunity to assess the employee's capacity to repay the facility by evaluating his financial ability.

117. For instance, the accused said he took the loan in question on the understanding that his mileage allowances would be computed and applied towards his repayment. Had he sought approval of the Board as required, the Board could have interrogated and determined if it was viable for him to take a loan of Kshs. 4,616,275 /- and seek to repay it using that method.

118. The issue of seeking approval before purchase was also important because it would give the Company the chance to assess if the type of the vehicle proposed to be bought by the employee was appropriately suited in enabling the employee to undertake Company assignments or if it was just for employee other considerations that had nothing to do with Company business. This could inform the Company decision especially where it is prioritizing different employees amidst scarce resources to decide who to give.



119. To put it straight; this was not just any other loan but a regulated loan. Absolute compliance with the policies under the scheme was not a choice but an obligation.
120. This Court finds that these procedures and guidelines under the scheme were meant to protect and also ensure prudent application of public resources hence any act of breach of such procedures and guidelines definitely violates section 45 (2) of Anti- Corruption and Economic Crimes *Act, No. 3 of 2003* which prescribes criminal consequences for breach of procedures and guidelines meant to protect public revenue or property. It is not just a matter where remedy only lies in civil law as was submitted by Mr. Namada.

Did the accused comply with the Managers Car Loan Scheme Guidelines of KWAL?

121. Obviously, the answer is in the negative. In clause 2 of P. exhibit 1; it provided:

Clause 2: A Manager who is allowed use of a Company car under this Scheme shall after identifying a car of his choice seek approval to purchase such a car under this Scheme whether new or second hand. In both cases, the Company must approve the choice of the car before purchase...

Clause 3; The engine capacity of a car purchased under this Scheme shall not exceed 1600cc without Board approval.

122. The accused bought a vehicle whose engine capacity was 2986cc which was way above 1600cc without obtaining Board approval before purchase.

Clause 4: The Financing of purchase price of the car shall be made by the Company through a Finance House such as Trans- National Bank or Prudential Bank Ltd. A new Car would be financed over 48 months and a second hand car over 36 months.

123. Evidence shows that the accused purchased the vehicle using funds which were drawn directly from KWAL account number 5628084 at Barclays Bank Head office by way of a cheque (P. exhibit 19) to Toyota E.A. Ltd. This was not the arrangement anticipated under the scheme for it was expected that it was to be financed by KWAL through a Finance House which is not what the accused did.

Clause 5: The monthly lease hire installments to the Finance House will be restricted and shall be worked out on the following formula:

Mileage up to a maximum of 2500 kms per month times A.A. recommended claim rate will equal the maximum lease hire installment to be paid by the Company.

124. In essence, it meant that the Company could make the monthly payment out of manager's mileage claim but only up to a maximum of 2500 km multiplied by applicable A.A rate; if the amount was not sufficient;

Clause 6; provides the way forward: it states: in the event the lease hire installments to finance the car over the maximum lease hire period are not sufficient to fully fund the purchase price of the car, the lease hire period may be extended at the discretion of the Company to such period as it will be sufficient to liquidate the lease hire amount. Alternatively, the manager concerned may be required to pay such a deposit as would be sufficient to enable the balance of the purchase price to be liquidated over the lease hire period as defined in 4 above.

Clause 8; At the end of lease period, a manager will be given first priority to purchase the car from the Company under the Scheme. The purchase price shall be the lesser of 10% for



a car purchased new or 20% for a car purchased second hand and the value of the car as determined by the Company.

126. Alternatively, a manager may at the time of buying a car opt to pay a down payment of 5% for a new car or 10% for a second hand car. If the alternative is followed, the manager will pay a final purchase price of 5% for a new car and 10% for a second hand car.
127. Clause 8 means that at the end of payment period, the manager will be accorded the first chance to buy the vehicle from the Company and upon value of the vehicle being determined, he would be required to pay 10% of purchase price if the car was bought as second hand or 5% of purchase price if it was bought new plus the value determined by the Company at the end of lease period. It should also be remembered that this will also certainly take into account the payments in terms of withheld mileage claims applied towards the purchase price, if any.
128. By failing to comply with these procedures, the accused complicated the application of the rules of the scheme. For instance, the vehicle he bought was not financed through a Finance House; it was fully paid for hence it was not attracting monthly payments as contemplated. How could his mileage allowance thus be applied towards repayment of a car that had already been fully paid for by the Company? What duration was the lease period?
129. What the accused did was not governed by any rules at all. Not even a letter or do any form of application in respect of the money spent to buy the car was done by him. Apart from tracking the transaction through the actual records connected with the purchase such as receipts, invoices, LPOs and the cheque, there was nothing to show that the accused took the money in form of loan or credit from the Company and under any terms. There was absolutely no accountability on his part. It was an arbitrary act of culpable recklessness and outright impunity.
130. Despite accused claiming he was repaying for the vehicle through reimbursable allowances withheld the bottom line is had he not purchased the vehicle in accordance with the laid down procedure under the scheme. In any event, no evidence of any payment was shown to have been made by him, even the bundle of pays-slips he produced (D. exhibit 5) did not show any deductions towards repayment of this amount. However, as already observed, even repayment was really not the issue in this trial, the bone of contention here is the manner or method used, was it procedural, the Court has found it was not.
131. The accused attempted to bring in the name of his predecessor Mr. P.K Chemngoren to demonstrate that he was being persecuted because the former M.D. also purchased a car through a similar arrangement yet he has not been prosecuted. It must be understood that the culpability of the accused is not based on the fact that he bought a car for himself. It is clear that there was nothing wrong with anybody acquiring a car under that scheme as that was a company policy to facilitate its managers to buy vehicles. The problem with the accused is that he chose to ignore the procedures which the Company had put in place before using public money at Corporation's disposal to buy himself the car.
132. There was no evidence that Mr. Chemngoren also acquired his vehicle without seeking necessary approvals as accused did in this case hence that comparison is misplaced. Had accused followed the procedure stipulated under the Managers Car Loan Scheme, he would not have committed any offence by acquiring the vehicle for himself through the credit facilitated by KWAL.
133. The accused also defended himself that he did not take part in purchasing the said vehicle; that in fact, the entire process was done by PW 1, Philip Bartay. This line of defence too has no merit and must also fail. P.W. 2, James Theuri, an employee of Toyota E.A. Ltd said it was the accused that visited the



show room on 16/7/2003 and selected the vehicle of his choice. He later in the course of transacting, instructed PW 2 to deal with PW 1. PW 2 explained:

“...Oyugi told me to address the quotation to the Managing Director KWAL attention Mr. Oyugi. He later referred me to Philip...”

134. The accused also signed the L.P.O as well as the Cheque a fact corroborated even by the document examiner (Per P. exhibit 31). I find that accused's participation in the entire process as hugely substantial.
135. Having regard to this Court's findings in this case, I do find that the prosecution has established the alternative count beyond reasonable doubt. I accordingly find the accused guilty and convict him under section 215 of the Criminal procedure Code.

Judgment read, signed and delivered in open court this 13th day of July, 2018.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

13. 7.2018

Judgment read in open court in presence of Mr. Mulako for Mr. Namande for accused.

Mr. Gikonyo for the state

Accused - Present

Court Clerk – Eric

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

13. 7.2018

Mr. Gikonyo for the State – The accused person has two previous convictions in ACC No. 20/2007 and ACC 32/2008. I don't have records with me right now but I can avail them in a week's time. The same are relevant to in the present case.

Mr. Mulako – We have no objection for time to provide the record.

Court – Mention on 17.7.2018 for the prosecution to provide records for purposes of sentences. Accused bond is cancelled in the meantime.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

13. 7.2018

17.7.2018

Coram: Hon. L. N. Mugambi [Mr.] CM

Prosecutor – Mr. Gikonyo for the State

Court Clerk – Eric

Accused – Present

Mr. Namanda – I appear for accused together with Mr. Mulakho.



Mr. Gikonyo is present for the state.

Court – This matter is coming for sentence. The prosecution was to provide previous records of the accused.

Mr. Gikonyo for the State -

We have record of previous proceedings where accused was convicted before the court in form of actual court files.

It is in ACC No. 32/2008 & ACC 20/2008.

[Court peruses the court records.]

In ACC 32/2008 – Accused was convicted for abuse of office and sentenced to a fine of Kshs.1,000,000/= [One Million] in default serve three [3] years imprisonment on 29.12.2010.

[Court also peruses ACC 20/2007] – Accused was convicted for unlawful acquisition of Public Property Contrary to section 45 [11[a] as read with section 48 of ACECA and was fined Kshs.1,000,000/= in default serve 3 [three] years imprisonment on 15.11.2010.

He appealed against ACC No.20/2007 which appeal was dismissed by Justice Kimaru and fine 1,000,000/= enhanced to 3.4.. Million.

That is all.

Mr. Namanda in Mitigation on behalf of the accused -

In respect of previous records, the record in respect of ACC No.20/2007 the one that was appealed under Criminal Appeal No.172/2012 by Judge Kimaru, that is a true record.

In ACC No. 32/2008 accused appealed to High Court in Criminal Appeal No. 2 of 2011 and convictions was set aside by Justice Ochieng. If the prosecution was to bring the case, it would also have brought the appeal. I have not carried the decision but I am sure it is reported.

To Mitigation now -

In Mitigation, we have the following to bring to the court's attention. That indeed accused faced one main charge being willful failure to comply with procurement procedures and alternative Charge of failing to abide to Company Procedures and Guidelines.

The main charge was dismissed and accused acquitted. The conviction is on alternative charge which relates to Company's procedures & Guidelines.

I wish to bring to court's attention in mitigation that this offence was committed on 22.7.2003.

Accused had just been appointed into position on 18.6.2003. This was barely within the month of his appointment.

Without giving any excuse, you heard him on his evidence he relied on advises of his officers who had been in Corporation long before he was appointed Managing Director. Is that a Legal excuse? No!

But it is humanly possible from human experience. We rely on officers we find in position of responsibility everyday.

He regrets this human error of Judgment and is extremely remorseful for this error of Judgment. If he would have taken time to interrogate the advise he was receiving as at that time, he would not be before this court.

He appeals that the court understands that position from human point of view, not a legal point of view.

The second issue is that accused pleads with your honour that he has been punished long enough. This case commenced in the year 2007, we are now in the year 2018.



He was arrested and detained before being released on bail and for 11 years he has been through these procedures, literally every month, if not a hearing, a mention or hearing or special mention. For 11 years, he has been through this process. If its learning lessons in life, he reckons he has learned well enough.

Fortunately at 70 years and ailing, he may not have a chance to lead another organization to apply stable lessons he has picked from these proceedings.

In the course of these proceedings, severally, accused could not be able to attend court. He was severally admitted in hospital.

He was diagnosed with prostate cancer and he remains in that critical condition and he is on treatment to date. The same has not dissipated. Critically, towards the end of this case, we brought to court attention and even made an application for termination of these proceedings, on the basis of a critical medical findings that accused has been diagnosed with dementia and depression and deteriorated to a mental state which predisposed him not to understand and be part of these proceedings.

The prosecution sought to verify those findings by getting accused to be checked at Mathare Mental Hospital and the Doctors at Mathare Mental Hospital brought confirmatory Mental Report that accused mental level had deteriorated to literally being of unsound mind.

In ACC No.28/2011 which is persuasive, not binding your brother Mr. Kombo faced with accused state of mind after making a fairly measured analogy made a return that accused is of no mental state to proceed with hearing and those proceedings were terminated.

The last issue I wish to address the court on is that in this alternative charges, the Corporation has not suffered loss. Why do I say so? The motor vehicle which was acquired pursuant to accused failing to seek approval of Board, the motor vehicle which was acquired by himself in his position as Managing Director KWAL.

During evidence, it came out clearly, at the time he was appointed Managing Director, there was no vehicle designated for Managing Director. When he ceased being the Managing Director of this Corporation, the motor vehicle was taken by Corporation, to date, it is property of and in custody of the Corporation.

At no point, did he get personal benefit from failure to adhere to procedures and Corporation did not lose any value arising from failure to follow procedures.

What has been prosecuted here, is a governance issue. How CEO should follow the procedure in making decision. In a nut-shell, there is no loss of Public funds in that charge.

That being the case therefore, accused is asking to understand all these circumstances, his state of health, age – now 70 years plus and appreciate that whose time at KWAL ended when he was 58 years and for 12 years, he has aged and is now an old man in this court.

He is extremely remorseful and seeks to have peace in his remaining part of life. We will be asking that you kindly consider a non- custodial sentence -

Principally, his state of health cannot withstand a custodial sentence his age and mental state as medically confirmed, court understands a custodial sentence it will literally be a short cut to his demise.

You have the power to give a non - custodial sentence. Under ACECA No.3 of 2003 section 48 – penalty provision, allows you to pronounce a fine not exceeding 1 Million Shillings or to imprisonment not exceeding 10 years or more section 48 [1] [a].

Alternative charge is under section 48 [1] [a]

Looking at the charge being a charge related to failure to follow literal procedure, of not going to the Board, looking at duration of time and appreciating the fact that over 12 years, accused has not been able to engage in any income earning alternatives appreciating that no loss befell the organization and that the vehicle is still in



custody of organization, we urge you if you consider a fine, you consider a most modest fine possible. Accused has been on a cash bail of Kshs.50,000/= and has religiously availed himself before the court. I would consider that in his circumstances to form an appropriate fine in these proceedings.

There is an alternative non-custodial sentence under probation of offender's Act. Under section 4 of the said Act, power of court to permit conditional release of offenders.

Having regard to normal character, antecedents, home surroundings health or mental condition or offender or the nature of offence and to any alternate circumstances in which offence was committed, it is expectancy to release the offender on probation.

In the totality of this submissions, I submit accused fits the bill of someone who can be admitted to probation. In the ruling of Hon. Kombo, he actually released accused to the custody of his wife finding that accused required more medical and family care and not continued prosecution.

In the circumstances, we said accused survives under care and guidance of his wife who is before court which include finding his way into this court.

For all these reasons, I rest my mitigation and prayers in so far as sentence is concerned.

SENTENCE

The prosecution has provided records showing that accused has two previous convictions – in ACC 32/2008 and ACC 20/2007. These are aggravating circumstances besides the fact that accused committed this offence by virtue of the position he occupied.

The repeat offending pattern is a factor to be considered in sentence.

Nevertheless, it must be weighed against the mitigation circumstances that have been strongly brought out by Mr. Namanda for the accused at length.

In Particular, Mr. Namanda has pin-pointed the fact that although the accused breached the procedures in acquiring this vehicle, he basically used it during the time he served as the Managing Director and on leaving, the organization followed and recovered it, hence the Organization did not suffer loss as such. The said motor vehicle he submitted it still held by KWAL.

He also urged the court to consider that accused was very new in his position and though this may not be legally excusable, humanly it is possible to make such mistakes, particularly if you are relying on counsel of other persons.

He has also pointed the fact that since 2007 accused has faithfully presented himself in this court and thus submitted himself cooperatively to ensure the case proceeded.

He submits that accused is regretful and has learnt vital lesson in life.

That at 70 years of age, the court should be lenient considering that for last 12 years, he has no where else work. Finally and most importantly, that accused has since developed a mental condition that has even seen him discharged in ACC 28/2011 on account that he cannot properly follow the proceedings.

The court has also been provided with medical documents to ascertain this current medical status.

With regard to the decision by my brother Felix Kombo [SPM] it is clear the accused was discharged on account of failing memory.

However, a similar application was made before me but abandoned by the defence on 4.4.2018. Besides, unlike Hon. Kombo who relied only on medical evidence, this court had a opportunity of witnessing accused first hand as he gave his testimony which was sworn. He even withstood vigorous cross-examination by the state by answering all the questions intelligently. Having seen the accused and watched him therefore, I would not



place too much reliance on the decision of Hon. Kombo in ACC 28/2011 for purposes of this sentence but considering the medical test were done after he had testified before me, I would not rule out completely the fact that his condition could have in fact deteriorated.

I would also taken into account that the accused did not completely benefit from the procedural breach he occasioned considering that the car was in fact recovered by KWAL.

I will also consider the advanced age of the accused, at 70 years; I would not consider it expedient to give a strictly custodial sentence. I believe inspite of his wrong, as a senior citizen of this country, he could still have contributed something positive to this nation.

All in all, I am of the view that accused should benefit from a non-custodial sentence but certainly, not a probation order. A probation order would be inappropriate considering that accused has past criminal records which goes to his character or antecedents, the nature of the offence is corruption related which I believe would not be appropriate for probation placement. I consequently order that in view of the foregoing reasons, weighing the aggravating circumstances, vis – vis mitigating circumstances, accused be and is hereby sentenced to a fine of Kshs.800,000/= [Eight Hundred Thousand] in default serve one [1] year imprisonment.

Further, the court orders that the registration of motor vehicle in question KAR 505 B Toyota Prado in custody of KWAL be regularized to remove the name of accused from the Log book so that it remains in sole ownership of KWAL.

Right of Appeal 14 days

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

17. 7.2018

Order – I have read the letter by Mary Maloba Mangwana dated 31.8.2018 seeking refund of cash bail.

The copy of receipt attached is in her name. The receipt is for kshs.50,000/=. I hereby authorize refund of the said cash bail subject to fulfilling all the applicable requirements as required by the accounts office.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

13. 7.2018

16. 10.2018

In Chambers

Before L. N. Mugambi [Mr.] CM

Court Clerk – Pretty

Order - I have read EACC letter dated 26.9.2018 ref. EACC 6/27/1.VOL.IX [35] by John Loikoloi Deputy Director Forensic Investigations seeking release of Exhibit in this case. I hereby order the same be released to an officer appointed in writing by the Commission for that purpose.

L.N. MUGAMBI (MR)

CHIEF MAGISTRATE

16. 10 .2018

