



**Republic v Onyango & 5 others (Anti-Corruption Case  
28 of 2010) [2015] KEMC 1 (KLR) (30 April 2015) (Judgment)**

*Republic v Stephen Otieno Onyango & 5 others [2015] eKLR*

Neutral citation: [2015] KEMC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
ANTI-CORRUPTION CASE 28 OF 2010  
PM NDWIGA, PM  
APRIL 30, 2015**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**STEPHEN OTIENO ONYANGO ..... 1<sup>ST</sup> ACCUSED**

**ANTHONY JORDAN HUDSON ..... 2<sup>ND</sup> ACCUSED**

**LEONARD KARANJA ..... 3<sup>RD</sup> ACCUSED**

**SUSAN WANJIRU LEE ..... 4<sup>TH</sup> ACCUSED**

**CARGO ROLLERS ..... 5<sup>TH</sup> ACCUSED**

**HELLMAN WORLDWIDE LOGISTICS LIMITED ..... 6<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. Stephen Otieno Onyango, the 1<sup>st</sup> accused person herein, Anthony Jordan Hudson, the 2<sup>nd</sup> accused person herein, Leonard Karanja, the 3<sup>rd</sup> accused person herein, Susan Wanjiru Lee, the 4<sup>th</sup> accused person herein, Cargo Rollers Limited, the 5<sup>th</sup> accused person herein, and Hellman Worldwide Logistics Limited, the 6<sup>th</sup> accused person herein, are all jointly charged with eight [8] separate and distinct Economic Crime and Criminal Offences all arising out of the same transaction.
2. In the first court, the 1<sup>st</sup> and 5<sup>th</sup> accused persons are jointly charged with the offence of fraudulent failure to pay taxes payable to a Public body contrary to section 45 [1] [d] as read with section 48 of the *Anti-Corruption and Economic Crimes Act* No.3 of 2003.
3. The particulars of that offences are also set out in the charge sheet.



4. In the second count, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> accused persons are also jointly charged with a similar but separate and distinct, offence of Fraudulent failure to pay taxes payable to a Public Body contrary to section 45[1][d] as read with section 48 of the Anti-Corruption and Economic Crime Act, No. 3 of 2003. The particulars of that offence are also set out in the charge sheet.
5. In the third and fourth counts, the 1<sup>st</sup> and 5<sup>th</sup> accused persons are again charged with two [2] similar but separate and distinct offences of uttering of a false document contrary to section 353 of the Penal Code. The particulars of those offences are clearly set out in the charge sheet.
6. In the fifth and sixth counts, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> accused person are also separately charged with two [2] similar but separate and distinct offences of uttering of false document contrary to section 353 of the Penal Code. The particulars of those offences are also clearly set out in the charge sheet.
7. In the seventh count, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> accused persons are all jointly charged with the offence of conspiracy to commit an offence of corruption or Economic Crime contrary to section 47[a][3] as read with section 48 of the Anti-Corruption and Economic Crimes Act No.3 of 2003. The particulars of that offence are clearly set out in the charge sheet.
8. In the Eight count, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> accused persons are again all jointly charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code. The particulars of that offence are also clearly set out in the charge sheet.
9. The particulars of all the afore-stated offences are quite clear and give reasonable information as to the nature of all the eight [8] offences charged separately herein. It is alleged that, on diverse dates in the month of August, 2008 the accused persons jointly conspired to commit the Economic Crime of fraudulent failing to pay customs duty payable to Kenya Revenue Authority and to defraud the same authority Kshs.2,448,817 being the customs duty payable on 400 cartons of sealed solar batteries imported from China by Davis & Shirriff Ltd. It is further alleged that the 1<sup>st</sup> & 5<sup>th</sup> accused persons fraudulently uttered a false Import Declaration Form [Import Declaration Form] No. E0808093853 & a false commercial invoices No.P1080189 by Lodging them into the Kenya Revenue Authority Electronic Simba System. It is also alleged that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused persons fraudulently uttered a false Import Entry No.2008 MSA 1315800 and a false National Bank of Kenya deposit slip No.D229634 to Davis & Shirriff Ltd. It is finally alleged that the accused persons fraudulently failed to pay Kshs.2,448,817/= being Customs duty for 400 Cartons of sealed Solar Batteries to Kenya Revenue Authority.
10. The accused persons denied committing all the offences as charged. The Honourable court then entered a plea of not guilty for each accused person following which the case was set down for hearing. The prosecution then went ahead to call a total of seventeen [17] witnesses to establish its case against the accused persons as charged. The evidence of sixteen witnesses was heard and recorded by a magistrate who later on ceased to exercise jurisdiction herein, that is, after he was appointed a Judge of the High Court of Kenya. This court later took over the case and after complying with the Provisions of Section 200 of the Criminal Procedure Code, proceeded to hear and record the evidence of the Seventeenth prosecution witness. The prosecution case was subsequently closed. All the parties involved in the trial then agreed to file written submission. Those submission were filed by Mr. Daniel Karuri for the Director of Public Prosecution, Mr. Kute for the 1<sup>st</sup> accused and 5<sup>th</sup> accused persons and Mr. Njongoro for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> accused Persons. This Court then considered the evidence in support of the charges vis -a vis the written submission and all applicable laws and found that the accused persons had a case to answer. The accused persons however opted to remain silent and await Judgment on being placed on their defence.



11. The brief facts of the case are that, at all material times relevant to this case, Cargo Rollers Ltd [The 5<sup>th</sup> accused person] was a registered clearing and forwarding firm/company and Hellman Worldwide Logistics Ltd [The 6<sup>th</sup> accused person herein was a registered Freight Forwarding Firm Karen Rono [ PW15 herein] a State Counsel with the Registrar of Companies, office of the Attorney General confirmed the registration of the 5<sup>th</sup> and 6<sup>th</sup> accused person and went ahead to avail all the registration records. Those registration records established that the 1<sup>st</sup> accused person was one of the Directors of the 5<sup>th</sup> accused person. While the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were some of the Directors of the 6<sup>th</sup> accused person. The 4<sup>th</sup> accused person was identified by Dony Mutua [ PW5 herein] and Sammy Syengo Musunza [PW8 herein], her former colleagues as the 6<sup>th</sup> accused persons Operations Manager.
12. Sometimes in the month of March, 2008, Davis & Shirliff Ltd wanted to import 400 cartons of sealed solar batteries from Goston Enterprises Development Ltd of China. The Procurement and Importation process was handled by Anthony Maina Wang'ondu [Pw11 herein] and David Gatende [PW12 herein], the supply chain Director and managing Director at Davis & Shirliff Ltd respectively. The process was formally commenced on 29.3.2008 when PW11 raised a purchase order No. FP03121 [P- Exhibit No.16] to Goston Enterprises Development Ltd of China. That Purchase order was for 400 Cartons of sealed Solar Batteries. The 6<sup>th</sup> accused person was then appointed to clear that consignment.
13. In acknowledgement of the purchase order, Gaston enterprises Development Ltd issued a pro-forma invoice No. 1080089 [P-Exhibit No.17] to Davis & Shirliff Ltd. That pro forma invoice was for a total of USD 86,839 being the production and Freight charges. The pro- forma invoice was then used to prepare a costing sheet for the transaction. The amount in that costing sheet was Kshs.1,323,086. PW11 finally signed the costing sheet of 15.4.2008.
14. On 18.4.2008, Davis & Shirliff Ltd applied for an Import Declaration Form from the Kenya Revenue Authority for which they paid Kshs.5,000/= through National Bank of Kenya. The consignment in question was to be financed for Davis & Shirliff Ltd by their Bankers Standard Chartered bank. The necessary application was made to Standard Chartered Bank. Standard Chartered bank finally issued a letter of credit on 9.7.2008 guaranteeing payment of USD 86,839 to Gaston enterprises Development Ltd on behalf of Davis & Shirliff Ltd.
15. A commercial invoice was in the meantime issued by Guston Enterprises Development Ltd and sent to the Financiers, Standard Chartered Bank. A bill of landing No. S ZHAA 3205 was also issued by Maersk Shipping line on 26.6.2008 for the Freight of 400 sealed Solar Batteries in containers No. POM4904256.
16. Davis & Shirliff Ltd finally requested its appointed Clearance Agent, the 6<sup>th</sup> accused person, to clear the goods. The 6<sup>th</sup> accused persons were however not licensed Customs Clearance Agents at the Kenya Revenue Authority. That notwithstanding they went ahead to acknowledge the appointment and receive all the documents that were in the name of Davis & Shirliff and were necessary for such Clearance. The 6<sup>th</sup> accused person then went on head to sub-contract a licensed Customs Clearance Firm. The 4<sup>th</sup> accused person went on to appoint Warton Agencies to clear the goods. Catherine Karimi Ndege [PW16 herein] received the instructions as the Director Warton Agencies..
17. PW16 received all the original documents from the 6<sup>th</sup> accused person. She then commenced the clearance process by lodging the documents with K.R.A on 4.8.2008. The K.R. A. Electronic Simba System automatically calculated the total tax payable as Kshs.2,767,260. Julius Musyoki [PW 1 herein, Simon Muiruri Ndegwa [PW2 herein] and Zephaniah Orina Ochichi [PW7 herein] all Revenue Officers with K.R.A. confirmed that the Electronic Simba System calculated the tax due on the declared value of goods and was accurate. PW16 that lodged Import entry No.2003 MSA 1315800. PW 16



- however cancelled the entry later on when disagreements on payments arose between her and the 6<sup>th</sup> accused persons. Pw16 then returned all the documents she had in her possession over that transaction to the 6<sup>th</sup> accused person.
18. Nelson Mwanzia [PW3 herein], the 6<sup>th</sup> accused person's Chief Accountant, in the meantime prepared an invoice for Kshs.159, 449 and attached the import entry form generated by PW16. The invoice was sent to Davis & Shirliff Ltd. PW11 received the invoice and made an advance payment of the invoiced amount was then paid to the 6<sup>th</sup> accused person. A cheque No.65383 for kshs.2,767,260 dated 5.8.2008 was also drawn in favour of the 6<sup>th</sup> accused person's to cover the duty due.
  19. The 6<sup>th</sup> accused person then sub-contracted the 5<sup>th</sup> accused persons to clear the goods imported by Davis & Shirliff Ltd. The 5<sup>th</sup> accused person commenced the importation and clearing process a fresh. They first applied for an import Declaration form using a commercial invoice amount of USD 8,412 on 12.8.2008. Import Declaration form No.E0808093853 was then issued . The 5<sup>th</sup> accused person then proceeded on to lodge Import entry No.2008 MSA 133251 in which tax was calculated at Kshs.323,443/= on 15.8.2008. that entry was later on 18.8.2008 passed by Julian Ngina Muasya [PW10 herein]. PW10 then left the matter to the verifying officers. Anthony Wafula Wekesa [PW9 herein] and David Ndambuki Muli [PW13 herein] verifying officers with K.R.A. received all the documents from the 5<sup>th</sup> accused person. PW9 verified the documentation and noted they were all proper & tallying. He also confirmed that a duty of Kshs.323,443/= had been paid. PW13 then did a partially physical verification of the goods on 18.8.2008. The goods were finally released and delivered to Davis & Shirliff Ltd on 25.8.2008. The 6<sup>th</sup> accused person finally sent invoice No.1475 dated 24.8.2008 to PW11 in which the advance payment was calculated and onto which all the documents in support of payment of Kshs.2,767,260/= as duty were attached.
  20. Later allegations emerged that the 6<sup>th</sup> accused person was engaged in tax evasion practices. Abdul Hamid Farooque [PW17 herein] an investigator with the Ethics and Anti-Corruption Commission, was then directed to carry out further investigations on those allegations. Those investigations started on 9.12.2008. PW11 was was later contacted since the 6<sup>th</sup> accused persons were then their known appointed clearing agents. PW17 collected a bundle of documents and proceeded to National Bank of Kenya where Kelvin Waka [PW4 herein] confirm that 8 of the transactions had their duty paid for through the bank. PW's confirmation led to PW17 narrowing down his investigations. Those investigations touched on the present case. His investigations revealed that Kshs.2,447,217/= was not paid to KRA for 400 sealed Solar batteries import. He noted that the accused persons had used false documents to evade payment of tax. The accused persons were finally arrested and charged jointly with various Economic Crimes and Penal Crimes.
  21. I have carefully analyzed, considered and weighed all the evidence and submissions on record vis -a- vis the applicable laws. The prosecutions duty in the present case is quite strict. I am now enjoined to find out whether the prosecution has discharged that duty by establishing the offences against each accused person with credible evidence in order to prove its case as charged beyond reasonable doubt.
  22. The evidence on record is quite clear and straight forward. That evidence addresses all the issues that are for consideration by this court in the present case. A look at the said issues in relation to the court record including the cross-examination of the prosecution witnesses by the defence reveals that some of those issues appear settled. That is mainly because the defence either conceded to some of those issues or failed to dispute or discredit the evidence in support of the same. Those issues do not require further detailed evaluation of the evidence in support thereof. It is however necessary to set them out.
  23. First, it is now settled that the 5<sup>th</sup> and 6<sup>th</sup> accused persons are duly registered Companies. PW15 established the afore-stated. In her evidence by proving the records of the two companies from the



- Registrar of Companies. Those records are prima facie proof of registration of the companies in question. The defence did not even attempt to dispute the afore-said hence the capacity of the two companies to be charged herein as legal persons and in their own names was established. Secondly, it is settled that the 1<sup>st</sup> accused person was one of the Directors of the 5<sup>th</sup> accused person. PW15 established the afore-said by producing the records from the Registrar of Companies, the 1<sup>st</sup> accused person did not dispute that evidence. In fact, it is on record that the 1<sup>st</sup> accused person conceded to his Directorship and proceeded to take place on behalf of the 5<sup>th</sup> accused person.
24. Thirdly, it is settled that the 2<sup>nd</sup> & 3<sup>rd</sup> accused persons were some of the Directors of the 6<sup>th</sup> accused person. PW15 established the afore-stated by producing the records from the Registrar of Companies. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons did not dispute that evidence. In fact, it is also on record that the 2<sup>nd</sup> accused person conceded to his Directorship by taking plea on behalf of the 6<sup>th</sup> accused person at the beginning of trial.
25. Fourthly, it is settled that Davis & Shirtliff imported the 400 Cartons of sealed Solar batteries as alleged in the charges herein and that the customs duty payable to K.R.A was Kshs.2,767,260/=. The afore-stated was established by the evidence of PW3, PW5, PW11, PW12 & PW16. That evidence was not disputed by the defence even during the cross-examination of the witnesses mentioned.
26. The issues that are now outstanding taken on the Criminal Liability of each accused person for the offences that they face the issues that are therefore in dispute are whether the accused persons fraudulently failed to pay Kshs.2,448,817/= as customs duty to K.R.A and secondly, whether they uttered false documents in furtherance of the stated offence and finally whether all that was done after a conspiracy to commit an economic crime and/or defraud.
27. The first issue relates to the offences of fraudulent failure to pay taxes payable to a Public body as charged in the 1<sup>st</sup> and 2<sup>nd</sup> counts. PW11 and PW12 were quite clear in their testimonies. They stated that in the months of March to August, 2008, Davis & Shirtliff Ltd was importing 400 Cartons of sealed solar batteries from China and had appointed the 6<sup>th</sup> accused person as their clearing and forwarding agents. During that period, K.R.A was running an Electronic Clearance System known as Simba. It was therefore mandatory for all clearing agents to be registered and licensed in order to access the Simba System to clear goods. PW1, PW2, PW7 & PW10 all Revenue Officers confirmed that the system was automated and they would only verify the inputs relied upon.
28. It was however unknown to PW11 and PW12 that the firm they had appointed to clear their good was not licensed by K.R.A. . PW5 & PW8 confirmed to this court that the 6<sup>th</sup> accused persons was indeed not licensed by K.R.A.. they stated that as employees of the 6<sup>th</sup> accused person. Their testimony was not disputed. It therefore follows that the 6<sup>th</sup> accused persons was not in a position to clear any goods and pay taxes. It is clear that the 6<sup>th</sup> accused person through its Directors, the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons herein and through its Operations Manager, the 4<sup>th</sup> accused person, could not access the K.R.A Electronic Simba System in order to lodge the Import entry. It is this import entry that triggers the two payment process as it calculates the actual tax payable and is approved by K.R.A Officers such as PW2, PW7 & PW10. The 6<sup>th</sup> accused person and its officers could therefore not access the K.R.A Electronic Simba System in order to pay the required taxes. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> accused persons can thus not be directly accused of failing to pay tax in their capacity as a Freight Forwarding Company as is alleged in the 2<sup>nd</sup> count.
29. Further, it is clear from the evidence on record that the 6<sup>th</sup> accused person and its officers routinely engaged third party clearing firms to clear goods and pay all the required taxes. Such third party clearing



firms were identified as Warton Agencies through PW16 and Cargo rollers Ltd through the 1<sup>st</sup> accused person.

30. In the present case, PW16's firm Warton Agencies was the first firm to be engaged by the 6<sup>th</sup> accused person through the 4<sup>th</sup> accused person on 4.8.2008. It is clear that the PW16 received all the original documents obtained by Davis & Shirtliff Ltd during the importation of 400 Cartons of sealed Solar batteries from Goston Enterprises Development Ltd of China. The documents included the original commercial invoice of 1.7.2008 and the Import Declaration Form No.E0804040887 all for UDS 84,139. PW16 relied on those documents to lodge the Import Entry No..2008 MSA BI5800. Duty was calculated at Kshs.2,767,260. PW16 could however not pay tax and await a reimbursement from the 6<sup>th</sup> accused person. She thus cancelled the Import entry and returned all the documents to the 6<sup>th</sup> accused person. The 6<sup>th</sup> accused person then went ahead to make an advance payment request to Davis & Shirtliff on 4.8.2008 relying on the Import Entry lodged by PW.16. Davis & Shirtliff Ltd then issued cheque No.065383 for Kshs.2,767,260/= on 5.8.2008 which cheque was received at the bank on 6.8.2008 for clearance. It is now clear from the afore-going that is at that point, the 6<sup>th</sup> accused persons had not engaged in any impropriety. In fact, there was nothing to imply that they intended to evade paying tax as their request was for PW16 to pay the same and expect a reimbursement. PW17, the Investigator, was clear that on all the afore-said in his evidence.
31. It was after the 5<sup>th</sup> accused person was contracted to clear the goods in question through the 1<sup>st</sup> accused person that the second import entry No.1332514 was lodged. It is at that point that a second Import Declaration Form No.E0808093853 dated 12.8.2008 emerged alongside a second commercial invoice dated 13.7.2008 both declaring the value of the goods as USD 8,412. That Commercial invoice even quoted the wrong pro-forma voice number. As a result, tax was calculated at Kshs.323,443. Its that amount that was paid by the 5<sup>th</sup> accused person's agents on 18.3.2008. Tax of Kshs.2,443,817/= was subsequently not paid by the 5<sup>th</sup> accused person's officers as the K.R.A licenced clearing agents.
32. The issue now outstanding is whether failure to pay tax by the 1<sup>st</sup> and 5<sup>th</sup> accused persons was as a result of fraud. What is on record is that a false entry No.2008 MSA 1332514 was made by the 5<sup>th</sup> accused person through the 1<sup>st</sup> accused person by misrepresenting the value of the goods imported. That misrepresentation led to the fraud. The misrepresentation started at the point the 5<sup>th</sup> accused person started the clearing process afresh. The 1<sup>st</sup> & 6<sup>th</sup> accused persons in their written submissions acknowledged applying for an Import Declaration Form No. E0808093853 and paying for the Kshs.323,443/= Tax. Such a move was however not the preserve of a Clearing Agent but that of the Importer/owner. The Customs & Exercise Act enjoin the importers to declare the goods he intends to import. PW11 & PW12 stated that Davis & Shirtliff applied for an Import Declaration Form No.E804040887 on 18.4.2008 after receipt of the pro-forma invoice dated 1.4.2008. It is that Import Declaration Form that enabled Guston Enterprises Development Ltd issue its commercial invoice dated 1.7.2008 following which the same Declaration Number was quoted in the bill of lading that had been used to ship the goods on 26.6.2008. The goods arrived at Consul Base Ltd on 8.8.2008 and received normally by PW14 and his colleagues since the import had already been declared.
33. The 1<sup>st</sup> & 5<sup>th</sup> accused persons did not discredit PW11, PW12 & PW14's testimony on the Import Declaration Form [Import Declaration Form herein] No. EO804040887. It is also not clear on how they made a late declaration without involving the importer as is required. The mis-representation thus started with the Import Declaration Form No. E0808093853 on 12.8.2008. That Import Declaration Form was then used to lodge Import Entry No.1332514 where tax was assessed at Kshs.323,443/=.



34. The Black's law Dictionary 8<sup>th</sup> edition define fraud as follows:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”.

35. The 1<sup>st</sup> and 5<sup>th</sup> accused persons made an application for a fresh Import Declaration Form and then lodged an Import entry using uttered information. The truth was clearly concealed. The 1<sup>st</sup> & 5<sup>th</sup> accused persons cannot claim ignorance of the initial Import Declaration Form yet it was clearly quoted in the bill of lading dated 26.6.2008 No.SZHAA3205 they used to clear the goods alongside the other false documents. That bill of leading indicated the correct commercial invoice No. De No.KELCO80324 and the correct Import Declaration Form No. E 804040887. The 1<sup>st</sup> & 5<sup>th</sup> accused persons however went ahead to rely on other documents. It cannot be a coincident that they did not question the 6<sup>th</sup> accused person and its officer on the whereabouts of the documents quoted in the bill of lading. The 1<sup>st</sup> and 5<sup>th</sup> accused persons were clearly intending to misrepresent the facts & conceal some material facts.

36. The 1<sup>st</sup> & 5<sup>th</sup> accused persons opted to remain silent on being placed on their defence. They then went on to rely on written submissions which appeared to incriminate the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused person alleging that they received the commercial invoice dated 13.7.2008 from them and that no Import Declaration Form was availed. Though such submissions cannot be safely relied upon as a substitute to the defence, the evidence on record reveals that the allegations are false. First, there is an undocumented money transfer from the 6<sup>th</sup> accused person to the 5<sup>th</sup> accused person which was amended by PW17 in his evidence. Secondly, it is also on record that it is the 2<sup>nd</sup> accused person who suspected a case of fraud and reported to K.R.A. on 27.10.2008 while at the same time questioning the 5<sup>th</sup> accused person on their fraudulent tax evasion practices. Thirdly, it is also clear that PW16 had there before received all the original documents required to clear the goods from the 6<sup>th</sup> accused person. The written submission by the counsel for the 1<sup>st</sup> & 5<sup>th</sup> accused person are clearly in the form of an **alibi** and they also go on to incriminate the co-accuseds. The allegations raised therein can only be considered against the afore-stated evidence. What is on record is that the 1<sup>st</sup> & 5<sup>th</sup> accused persons received a bill of lading No. S2 HAA3205. That bill of lading had the details of the other two documents that were necessary to commence the tax payment process. It follows that the 1<sup>st</sup> & 5<sup>th</sup> accused persons received all three documents from the 6<sup>th</sup> accused person's Officer just like PW16 had received. They can now not claim ignorance. They clearly acknowledged applying for the Import Declaration Form No. E 0808093853 and such an act was unprocedural. The evidence that is now on record is that the 1<sup>st</sup> & 5<sup>th</sup> accused persons fraudulently failed to pay Kshs.2,448,817/= as tax to K.R.A. That evidence established the offence in the 1<sup>st</sup> count and not in the 2<sup>nd</sup> count. This court noted herein before that the evidence on record is to the effect that the 6<sup>th</sup> accused person lacked capacity or a licence to access the K.R.A Electronic Simba System in order to pay tax. There is therefore no evidence on record that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> accused persons fraudulently failed to pay tax as charged in the 2<sup>nd</sup> count. Further to the afore-going the 1<sup>st</sup> and 5<sup>th</sup> accused person clearly conceded to applying for Import Declaration Form No. E0808093853 for USD 8,412 dated 12.8.2008. they also conceded to relying on that Import Declaration Form to make or lodge the Import entry No. 1332514. They however denied any knowledge of the existence of another Import Declaration Form hence denied making that application fraudulently. It is clear from the evidence on record that the Import Declaration Form PW11 had applied for was quoted in the bill of lading issued on 26.6.2008. There was therefore evidence of knowledge of the truth and the existence of the Import Declaration Form plus a commercial invoice No. KELCO 803224. It is that truth that was misrepresented & concealed by the act of applying for Import Declaration Form No. E 0808093853. The accused persons in the



- 3<sup>rd</sup> count clearly knowingly and fraudulently uttered a false Import Declaration Form. The 1<sup>st</sup> & 5<sup>th</sup> accused persons are therefore guilty of the offence of uttering a false document as charged in the 3<sup>rd</sup> count.
37. As for offence in the 4<sup>th</sup> count, the commercial invoice used by the 1<sup>st</sup> & 5<sup>th</sup> accused persons in further support of the Import entry No.1332514 was No. KEL Co 80324 for USD B,8412 dated 13.7.2008. The commercial invoice noted in the particulars of the offence in the 4<sup>th</sup> count is No.P1080189. There is no evidence that specifically establishes the existence of a commercial invoice No. P1080189 whether false or genuine. The evidence that is on record is therefore not in support of the offence of uttering a false document against the 1<sup>st</sup> & 5<sup>th</sup> accused persons as charged in the 1<sup>st</sup> count.
38. In the 5<sup>th</sup> and 6<sup>th</sup> counts, it is specifically alleged that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused persons knowingly and fraudulently presented a false, processed & passed Import Entry No.2008 MSA 1315800 and a National Bank Ltd slip No.D 229634 for Kshs.2,767,260/= to Davis & Shirtliff. It is quite clear from the evidence on record that the two mentioned documents were false. The evidence of PW8 revealed that the National bank of Kenya Ltd deposit slip No. D 229634 dated 11.8.2008 was indeed a false document. That evidence was supported by the data provided by PW4 from the bank's system and the fact that the entry reference herein was for an Import entry that had not been processed, passed and approved. In fact the import entry had been cancelled. The evidence of PW7 & PW16 also revealed that the import entry No.1315800 purportedly passed on 12.8.2008 was a false document. With that settled, what is now outstanding is whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused persons knowingly and fraudulently uttered the said documents. A look at the evidence on record reveals that there is no proof that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> accused persons knew that the two documents were fraudulent.
39. It is clear from the evidence on record that it is the 2<sup>nd</sup> accused person who initiated the present case. On 27.10.2008 the 2<sup>nd</sup> accused person wrote to K.R.A & the 5<sup>th</sup> accused person on suspected tax evasion. The 8<sup>th</sup> accused responded to the allegations levelled against them on 29.10.2008 and passed the blame to its employees. The 5<sup>th</sup> accused person then promised to investigate & find out the employees involved. K.R.A. on the other hand took no action. On 16.12.2008 the 2<sup>nd</sup> accused person did a reminder to them on his report of suspected tax evasion against the 5<sup>th</sup> accused person. K.R.A. finally responded on 27.2.2009 confirming that the 5<sup>th</sup> accused person had been suspended as a Clearing Agent after investigations on the suspected forgery tax evasion. PW17 confirmed to this court that he was aware of the said correspondences but chose not to rely on the same in his case. PW17 was clear that he was not collecting evidence that was favourable to the 6<sup>th</sup> accused as he suspected a case of conspiracy.
40. It was during the cross-examination of PW17 that it emerged that he deliberately concealed some evidence in order to advance his suspicion of a conspiracy . PW17 however failed to gather enough evidence to convert his suspicions to admissible cogent evidence. Pw17 commenced his investigations on 9.12.2008.
41. Those investigations were commenced 1 ½ month after the 2<sup>nd</sup> accused person reported the matter. Such actions by the 2<sup>nd</sup> accused persons revealed that he had no knowledge of the forgery or fraud he complained about. He was clearly requesting K.R.A to investigate one of its licenced agent though his firm was not without knowledge, one cannot be held liable for uttering a false document or even conspiracy.
42. It is quite clear that PW17 concealed some evidence or conveniently failed to rely on the same because it was not favourable to his case. His case was that of a suspected conspiracy between the accused persons



herein. In the case of Kanyi -vs – Republic [1991] KLR 175 the High Court while considering a case pegged on suspicions held inter alia:-

“There was grave suspicion that the applicant might well have committed the offence for which he was charged but suspicion alone is not a substitute for the prerequisite evidence beyond reasonable doubt”

43. In the present case, PW17's suspicions can not suffice as evidence. What is clear from the evidence he compiled in one and a half [ 1½] years is that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused persons had no knowledge of the forgery, or fraud and that they did not conspire with the 1<sup>st</sup> & 6<sup>th</sup> accused persons not to pay tax and/or defraud K.R.A. The Black Law Dictionary 8<sup>th</sup> edition define conspiracy as follows:-

“An Agreement by two or more person to commit an unlawful act, coupled with an intent to achieve the agreements objective and [ in most states] action or conduct that furthers the agreement; a combination for an unlawful purpose”

44. In the present case the agreement objective, if there was any, would have been to defraud KRA and convert Kshs.2,448,817/= to their own use. The 2<sup>nd</sup> accused person's action of reporting some suspicious activity involving 5<sup>th</sup> accused person's engagement with K.R.A can not be said to have been to further the agreement. PW 17's concealment of some material evidence also goes on to discredit his trustworthiness hence casts some doubt on the prosecution case. The evidence on record is therefore not in support of the allegations that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused person's knowingly uttered false documents as charged. In the 5<sup>th</sup> & 6<sup>th</sup> counts, further, there is also no evidence at all of a conspiracy. There was clearly no agreement between the 1<sup>st</sup> & 5<sup>th</sup> accused persons on one hand & the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused person not to pay customs duty and hence defraud K.R.A. With evidence of such an agreement missing PW 17's suspicions will remain as such but at the end, the offences in the 7<sup>th</sup> & 8<sup>th</sup> counts have not be established against any accused person with creditable admissible evidence.

45. After evaluating all the evidence on record, I find that the same is only in support of the offences in the 1<sup>st</sup> and 3<sup>rd</sup> counts. That evidence is clearly not in support of the offences in the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> counts. The prosecution has clearly failed to prove its case in the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> counts beyond reasonable doubt. I accordingly find the 1<sup>st</sup> to 5<sup>th</sup> accused persons not guilty of the offences in the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> counts as charged. I hereby acquit the 1<sup>st</sup> & 5<sup>th</sup> accused person of the offences in the 4<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> counts under section 215 of the Criminal procedure Code. I also hereby acquit the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused persons of the offences in the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> counts under Section 215 of the Criminal Procedure Code.

46. It is clear that the evidence on record is duly in support of the offence in the 1<sup>st</sup> & 3<sup>rd</sup> counts. The prosecution has therefore proved its case against the 1<sup>st</sup> & 5<sup>th</sup> accused persons beyond reasonable doubt in those, two offence. I accordingly find the 1<sup>st</sup> and 5<sup>th</sup> accused person guilty of the offences of fraudulently failure to pay taxes payable to a Public body and uttering a false document as charged in the 1<sup>st</sup> & 3<sup>rd</sup> counts and hereby convict under section 215 of the Criminal procedure Code.

**COURT – READ AND SIGNED IN OPEN COURT THIS 30<sup>TH</sup> APRIL, 2015**

Coram: as before me – P.M. Ndwiga [Mr.] PM

Court Prosecutor- Mr. Karuri – SegA holding brief

Court Clerk – Kiarie

Accused – present



**P.M NDWIGA [MR]**

**PRINCIPAL MAGISTRATE**

**30. 4.2015**

Mutisya for the 1<sup>st</sup> & 5<sup>th</sup> accused

Njongoro for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 6<sup>th</sup> accused

**P.M NDWIGA [MR]**

**PRINCIPAL MAGISTRATE**

**30. 4.2015**

Sega – First offender

Court – So treated

Mutisya in Mitigation – 1<sup>st</sup> accused is remorseful. He is a father of 3. His mother is 95 years old and diabetic. He is the sole bread winner of his family. His children are in Secondary School. I pray for leniency and mercy of the court. We pray for an non- custodial sentence.

Court – I have considered the mitigation and the nature and circumstances of the offence herein. It is clear that the 1<sup>st</sup> accused used his company name to commit the present offences. He is therefore personally liable for his action. I also note the counsel's plea for leniency and non-custodial sentence and take them into account.

In the 1<sup>st</sup> count the 1<sup>st</sup> accused is fined Kshs.1,000,000/= in default 1 year imprisonment . Further K.R. A suffered a quantifiable loss as indicated in the particulars of the offence in the 1<sup>st</sup> count. So, in addition to the afore-going fine the 1<sup>st</sup> accused is fined a mandatory fine of Kshs.4,897,634 in default 1 year imprisonment. In the 3<sup>rd</sup> count the 1<sup>st</sup> accused is fined Kshs.50,000/= in default 3 months imprisonment.

The sentences to run consecutively.

**CONCLUSIONS**

**P.M NDWIGA [MR]**

**PRINCIPAL MAGISTRATE**

**30. 4.2015**

Njongoro – We pray for a refund of cash bail

Court – All cash bail to be refunded to the depositors

surety also discharged.

**P.M NDWIGA [MR]**

**PRINCIPAL MAGISTRATE**

**30. 4.2015**

Mutisya – We make an application under section 386 CPC we pray for bail pending appeal. Accused is not a flight risk. I will avail him in court wherever required.

Sega – I object the court is factus official. The Application should also be made formally in writing. The sentence is very lenient

Mutisya – An oral application can be made in the trial court.



Court – I have considered the accused's application for bail pending appeal. The grounds relied on by the counsel can only be considered when granting bail pending trial. The principles for granting bail pending appeal are different and have not be argued before me. The application by counsel for 1<sup>st</sup> accused lacks merits and its dismissed.

**P.M NDWIGA [MR]**

**PRINCIPAL MAGISTRATE**

**30. 4.2015**

Mutisya – I pray that 1<sup>st</sup> accused's cash bail be utilized as fine.

Court – Application granted. 1<sup>st</sup> accused's cash bail may be utilized to pay part of the fine imposed herein.

**P.M NDWIGA [MR]**

**PRINCIPAL MAGISTRATE**

**30. 4.2015**

