

**IN THE COURT OF APPEAL
AT NAIROBI**

[CORAM: KIAGE, ACHODE & JOEL NGUGI, JJ.A.]

CRIMINAL APPEAL NOS. E115 OF 2023
CONSOLIDATED WITH
CRIMINAL APPEAL NO. E116 OF 2023

BETWEEN

MUKURIA NGAMAU.....1ST

APPELLANT QUORANDUM

LIMITED.....2ND APPELLANT VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal against the judgment of the Anti-Corruption and
Ethics Court at Nairobi (E.N Maina J.) dated 16th February, 2023,*

in

ACEC Appeal No. E018 of 2021)

JUDGMENT OF THE COURT

Introduction

1. This is a second appeal arising from the decision of the High Court in Anti-Corruption and Economic Crimes Appeal No. E018 of 2021 (Esther Maina J), which upheld the conviction and sentence of the 1st and 2nd appellants, rendered by Hon. D.N. Ogoti, Chief Magistrate, in Milimani Anti-Corruption Case No. 12 of 2016.

Background

2. At the start of the trial, there were six accused persons jointly facing a host of charges of corruption and economic crimes, under the **Anti-Corruption and Economic Crimes Act** (ACECA), and making false documents under the **Penal Code**, in Nairobi CM Anti-Corruption Case No. 13 of 2016, **Republic vs Catherine Namuye & 4 others**. Along the way, two of the accused persons, being accused no. 1 and 2, died. The proceedings against them abated, resulting in the withdrawal of the charges against them.
3. The remaining four accused persons, including the two appellants, faced the remaining five charges as follows:
 - 1) Count 1: Conspiracy to commit an economic crime contrary to Section 47A (3) as read with section 48 (1) of the *Anti-corruption and Economic Crimes Act* No. 3 of 2003.

PARTICULARS: Between 17/11/2014 and 4/5/2015 within Nairobi county in the Republic of Kenya, jointly conspired to commit an economic crime namely unlawful disposal of public property through unlawful payment of Kshs. 180,364, 789.00/= from Youth Enterprise Development Fund, and Quorum Ltd for services not rendered.
 - 2) COUNT 2: Unlawful acquisition of public property contrary to Section 4-5(1) (a) as read with Section 48(1) of Anti- Corruption and Economic Crimes Act No. 3 of 2003

PARTICULARS 3. MUKURIA NGAMAU 4. DOREEN WAITHERA NGANGA 5. QUORANDUM LIMITED On 23/12/2015 within Nairobi County in the Republic of Kenya, being the Directors of Quorandum Limited and Quorandum Limited, a corporate body respectively jointly unlawfully received Ksh.115,710,000/= from Youth Enterprise Development Fund account number 005xxxxxxxxxxx held at Chase Bank for services not rendered.

- 3) COUNT 3: Unlawful acquisition of public property contrary to Section 45(1) (a) as read with Section 48(1) of Anti- Corruption and Economic Crimes Act No. 3 of 2003.

PARTICULARS: 3. MUKURIA NGAMAU 4. DOREEN WAITHERA NGANGA 5. QUORANDUM LIMITED On 4/5/2015 within Nairobi County in the Republic of Kenya, being the Directors of Quorandum Limited and Quorandum Limited, a corporate body, respectively, jointly unlawfully received Ksh.64,654,789/= from the Youth Enterprise Development Fund account number 005xxxxxxxxxxx held at Chase Bank for services not rendered.

- 4) COUNT 10: making of false document contrary to Section 347 (a) as read together with Section 349 of The Penal Code.

PARTICULARS: CATHERINE AKELLO NAMUYE 3. MUKURIA NGAMAU: on 17/11/2014 within Nairobi County in the Republic of Kenya, being the Acting Chief Executive Officer of Youth Enterprise Development Fund and Director of Quorandum Ltd respectively, jointly made a false document namely a contract between Quorandum Ltd and Youth

Enterprise

Development for contract sum of Kshs. 114,909,946.00/= for alleged provision of consultancy services on Design of Specifications for an Enterprise Resource Planning by Quorandum Ltd to the Youth Enterprise Development Fund, purporting it to be a genuine document.

- 5) COUNT 11: Making a false document contrary to Section 347(a) as read together with Section 349 of The Penal Code.

PARTICULARS: 1. CATHERINE AKELLO NAMUYE 3.

MUKURIA NGAMAU: on 17/11/2014 within Nairobi County in the Republic of Kenya, being the Acting Chief Executive Officer of Youth Enterprise Development Fund and the Director of Quorandum Ltd respectively, jointly made a false document namely a contract between Quorandum Ltd and Youth Enterprise Development Fund for contract sum of Kshs. 65,985,000/= for alleged provision of consultancy services on ICT Strategy Design by Quorandum Ltd to the Youth Enterprise Development Fund purporting it to be a genuine document.

4. The appellants pleaded not guilty to the charges and the prosecution fielded 32 witnesses to build their case. A summary of the culpatory facts distilled from the evidence of the 32 witnesses will put the appeal into perspective.
5. **Joseph Alumasa**, PW1, the officer then in charge of the ICT department at the Youth Enterprise Development Fund, (the Fund), compared the contract entered into earlier between the Fund and Microflex Business Solutions (Microflex), with the

impugned contracts between the Fund and the appellants,
and

found that the documents relating to the appellants were falsified. In the 11th Special Meeting held at the Fund on 21st October, 2015 to discuss the loss of Kshs.180 Million from the Fund, the said contract documents were disowned by the then Acting Company Secretary of the Fund, Miriam Boit, PW7, who was in charge of drafting contracts for the Fund. This was confirmed by Emmanuel Japheth Odero, PW2, the Manager Internal Audit and Valuation at the Fund.

6. **Dr. John Kipyego Ngeno**, PW8, the head of Procurement at the Fund asserted that there was no other work plan for ICT Strategy and Policy presented for procurement in the 2014/2015 financial year.
7. **Jacob Oduor**, PW23, a Document Examiner, examined the specimen handwriting and signatures of the accused persons obtained by the Investigating Officer and supplied to him at the laboratory and compiled the report produced as PExh 55. In the report, he confirmed that the 1st appellant's signature appeared on PExh 33 (a) and (b), the contracts that were found to have been falsified and were disowned by employees of the Fund. These were the same documents the bank relied on to make payment to the 2nd Appellant.
8. Upon evaluating the evidence before him, the trial magistrate, Hon. D.N. Ogoti, rendered a judgment dated 30th September 2021. He convicted the appellants on all five counts and sentenced them as follows:

- i. In Count 1, the 1st Appellant was sentenced to serve 7 years imprisonment without an option of a fine.*
 - ii. In Count 2, the 1st Appellant was sentenced to pay a mandatory fine of Kshs. 462,840,000 in default to serve 7 years imprisonment.*
 - iii. In Count 3, the 1st Appellant was sentenced to a mandatory fine of Kshs.462,840,000 in default to serve 7 years imprisonment and for the benefit received, an additional mandatory fine of Kshs.258,619,156/- in default to serve 7 years imprisonment.*
 - iv. In count 10, 1st Appellant was sentenced to serve 3 years imprisonment.*
 - v. In count 11, the 1st Appellant was sentenced to serve 3 years imprisonment.*
 - vi. Additionally, the court ordered that pursuant to Section 54(a) of the ACECA, the 1st Appellant pays or compensates the Youth Enterprise Development Fund Kshs. 189,364,789.00 being the amount that would fully compensate the Fund for the loss suffered.*
9. Aggrieved by the conviction and sentences of the trial court, the appellants filed a petition of appeal dated 12th October 2021 and amended on 6th June, 2022 in the High Court at Nairobi, Anti-Corruption and Economic Crimes Division in Cr Appeal No. E018 of 2021. Upon evaluating the record and the arguments before her, Maina, J. delivered a judgment on 16th February, 2023 and acquitted the 1st appellant in count

1, on

the charge of conspiracy and set aside the sentence thereon. She upheld the conviction and sentences in counts 2, 3, 10 and 11.

10. Still riled by the decision of the superior court and perhaps believing in the adage, “third time is a charm”, the appellants filed the two appeals before us. The firm of Wandugi and Company Advocates filed **Criminal Appeal No. E115 of 2023** on behalf of the 1st and 2nd appellants. The Memorandum of Appeal is dated 11th April 2023. Subsequently, the 1st appellant filed another appeal in person being **Criminal Appeal No. E116 of 2024** and the Memorandum of Appeal is dated “March 2024”.
11. The grounds raised in the two memoranda are the same. In addition, however, the 1st appellant sought an order for the redaction and removal from the record of all evidence relating to the deceased accused persons and any reliance thereon in the memorandum dated “March 2024”. We summarized the grounds as follows:
 - i. Alleged violation of constitutional rights under Articles 25, 27, and 50;*
 - ii. Conviction based on insufficient or unlawful evidence;*
 - iii. Misapplication of the Public Procurement and Disposal Act;*
 - iv. Improper reliance on evidence concerning deceased persons.*

1ST appellant's submissions

12. The 1st appellant filed submissions said to be filed in appeal No. E018 of 2012 in the High Court Anti-Corruption and Economic Crimes Division. However, they are dated “March 2024” which is long after the judgment in the High Court delivered on 16th February 2024. We took this heading to be a mere misnomer on the 1st appellant’s part, more so since he filed the submissions in person. The submissions are in respect of the appeal in the Court of Appeal and apply to both appeals.
13. The 1st appellant identified three issues in his submissions for determination as follows:
 - i. *That he was denied his constitutional right to fair hearing;*
 - ii. *That the errors of law were sufficient to render the verdict of guilty unjust; and*
 - iii. *That gross errors of fact which lead to untenable findings were sufficient to negate all conclusions formed.*
14. The 1st appellant submitted that the charges in count 2 and 3 were defective. That whilst he faced two counts of unlawful acquisition of public property contrary to **Section 45 (1)** of the **ACECA**, he was not informed which law was breached by the offence stated therein as “services not rendered”. Further, that **Section 45 (1)** of the **ACECA** does not define the

“unlawfulness” in acquisition of public property. He thus had

no opportunity to put up an informed defence to the charge under an unspecified law as it was.

15. Secondly, the 1st appellant contended that although he was charged for the offence of “services not rendered”, he was prosecuted based on breach of the procurement process upon which the trial court based its judgment. His contention was that no one in this case was charged, prosecuted and found guilty of breaking any law under the PPD Act.
16. The 1st appellant also argued that in the judgment, there was repeated adverse mention of accused no.1 who was deceased, to the prejudice of the 1st appellant. That once accused no.1 died, the charges against her abated and were withdrawn. Therefore, the charges in count no. 10 and 11 should have been withdrawn and new charges preferred against him. He relied on the decision of the Supreme Court of Nigeria in **Bakare vs State (1985) 2 NWLR** to assert that proof beyond reasonable doubt stems from the compelling presumption of innocence in our adversarial system of criminal justice.
17. Lastly, he urged that there were gross errors of fact and law leading to untenable findings. He enumerated these as: failure to prove the case beyond reasonable doubt in count 2 and 3; failure to specify the part he played in count 10 and 11 since his co-accused passed away and charges against her abated; failure to prove that he had access to

information to warrant the court's holding that he had special knowledge and further,

it was not his duty to prove his innocence; and lastly, failure to establish that the falsehood of the documents was not attributable to him and in any case, it was not clear whether the documents were forged or not.

18. The 1st appellant referred to the decisions in **Republic vs Makali & 3 Others (1994)**, **Fredrick Okaran Chesebe vs R [2009]** and **Rex vs Difford [1937]** South Africa Court of Appeal.

Respondent's submissions

19. **Mr. O. J. Omondi**, the learned counsel, and Senior Assistant Director of Public Prosecution (SADPP), filed submissions dated 2nd May 2024 on behalf of the respondent. He urged that count 2 and 3 are both in respect of the charge of unlawful acquisition of public property, contrary to **Section 45(1)** as read with **Section 48 (1)** of the **ACECA**, and the funds in question were Ksh. 115,710,000 and Kshs. 64,654,789, respectively.
20. Counsel contended that the evidence in P.Exh. 8 and 9 had nothing to do with the 1st appellant, and no prosecution witness led any evidence to the effect that the 1st appellant was the one who presented the two documents to Chase Bank. He urged that the documents which formed the basis of the charges against the appellants were the contracts produced as PExh 33(a) and 33(b) and the learned Judge's advertence to

P.Exh. 8 and 9 as having been executed by the 1st appellant

and the Accounting Officer (CEO), of the Fund was an error on the face of the record. That this did not in any way, affect the culpability of the appellants in counts 2 or 3.

21. Counsel submitted that even though the Learned Judge did not consider the effect of the withdrawal of counts 1, 4, 5, 6, 7, 8, 9, 12, 13 and 14, which were against the CEO and the chairperson of the board, this did not impact on counts 2 and 3 which were against the appellants. He submitted that the offences preferred against all the accused persons were stand- alone offences which could be proved separately with evidence tendered by the prosecution in respect of each accused. Therefore, the withdrawal of any one of the charges did not affect the trial and proof of others.
22. Counsel asserted that accused 1 (deceased), and the 1st appellant executed contracts, solely for purposes of illegal payment for services not rendered and the 1st appellant failed to prove that he executed any services. He posited that PW2 who was the Head of the Audit department presented irrefutable and detailed evidence on how payments were made into the 2nd appellant's account. Further, PW4 who was the Head of Finance department tabled evidence on how the Investment Account was raided and through the actions of the 1st appellant, sh.180,000,000 was transferred into the 2nd Appellant's account, and the 1st appellant was "seen literally

chasing money in the bank” for several days before the payment was made.

23. Counsel urged the Court to find that the offences in count 2 and 3 were proved beyond reasonable doubt.
24. On counts 10 and 11, counsel submitted that the learned Judge put a lot of weight on the evidence of Joseph Alumasa (PW1) and Miriam Boit (PW7), to arrive at the conclusion that the documents referred to were falsified, thereby upholding the conviction and sentences in those counts. That the learned Judge stated that the two alleged contracts were not forgeries within the strict meaning of the term. That according to **Section 134** of the **PPDA**, the responsibility of preparing a contract was on the Accounting Officer, who in the instant case was, accused 1 (deceased) and without a witness who testified that he or she saw the 1st appellant, actually put pen and ink to paper, the presumption that the 1st appellant was the maker of the document did not arise.
25. Counsel opined that if the elements of the offence of forgery were not proved in the strict sense as defined under **Section 345** of the **Penal Code** as the Judge stated, then the offence as charged under **Section 349** of the **Penal Code** was not proved beyond reasonable doubt against the appellants and they should have been given the benefit of doubt. Therefore, counsel conceded the appeal on count 10 and 11.

26. The appeal came before us for hearing on the virtual platform on 4th March 2025. The 1st appellant was present in person on his own behalf and on behalf of the 2nd appellant. He rehashed his written submissions briefly. Mr. Jami learned State counsel, held brief for the SADPP and relied on the written submissions entirely. By consent of the parties, the two appeals, **Criminal Appeal No. E115 of 2023** and **Criminal Appeal No. E116 of 2023** were consolidated.

Analysis and determination

27. We have considered the record of appeal, the contending submissions and the law. This being a second appeal, our mandate under **Section 361(1)(a)** of the **Criminal Procedure Code** is confined to questions of law. In the case of **Dzombo Mataza vs. R [2014] eKLR**, we are cautioned against interfering with concurrent findings of fact by the two courts below, unless such findings are based on no evidence, are perverse, or are otherwise legally unsound.

28. With the above circumscribed jurisdiction in mind, the issues of law that the 1st appellant has invited us to determine are:

- i. Whether the 1st appellant was denied his constitutional right to fair hearing;*
- ii. Whether errors of law in the judgment were sufficient to render the verdict of guilty unjust; and*

iii. Whether there were gross errors of fact which led to untenable findings and were sufficient to negate all conclusions formed.

29. The first issue for our consideration is whether the 1st appellant was denied his constitutional right to fair trial. He alleged that he was charged with two counts of unlawful acquisition of public property contrary to **Section 45 (1)** of the **ACECA**, in count 2 and 3 respectively, and the offence was stated as “services not rendered.” However, he was not informed which law was breached and **Section 45 (1)** of the **ACECA** does not define the “unlawfulness” in acquisition of public property. That he thus, had no opportunity to put up an informed defence to the charge under an unspecified law as it was.
30. The 1st appellant alleged that the gaps stated above resulted in the violation of his right to fair trial under **Article 50(2)**, because of lack of clarity in the charges and insufficient information to mount a proper defence. Further, failure to re-draw charges following the death of the 1st accused, affected the legality of counts 10 and 11.
31. In rebuttal, the respondent urged that count 2 and 3 are both in respect of the charge of unlawful acquisition of public property, contrary to **Section 45(1)** as read with **Section 48 (1)** of the **ACECA**. Further, the funds in question were Kshs. 115,710,000 and Kshs.64,654,789, respectively. He

urged the Court to find that the offences in count 2 and 3 were proved beyond reasonable doubt.

32. The pertinent provisions under **Article 50 (2)** in view of the appellants' complaint are **Sub Article (b)** and **(c)** which provide as follows:

“Every accused person has the right to a fair trial which includes the right-

(a)

(b) To be informed of the charge with sufficient detail to answer it.

(c) To have adequate time and facilities to prepare a defence.”

33. The right to be informed of the charge with sufficient detail to answer it ensures that accused persons understand the specifics of the charges against them, enabling them to prepare an effective defence. The concept of fair trial, particularly in the context of due process is often evaluated based on whether the accused was accorded the essential legal protection and procedures.

34. This Court had occasion to discuss violation of a right under **Article 50 (2) (c)** where an appellant complained that he was not informed of the evidence against him in **Cornel Ogutu Mikwa v Republic [2016] KECA 267 KLR** as follows:

“Finally, there is the complaint that the appellant's right under Article 50 (2) (c) to

be informed of the evidence against him was

violated. In the case of Thomas Patrick Gilbert Cholmondeley vs Republic [2008] eKLR to which the appellant referred, this Court stated that the prosecution is required to provide an accused person in advance of the trial;

‘all relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.’

The prosecution was therefore under a duty to provide the appellant with all material including witness statements. There is however no indication from the record that the prosecution failed to do so. There is also no record of any complaint by the appellant that the prosecution had failed to provide any statement. The appellant cross examined prosecution witnesses without any indication that he was hampered from doing so. He did not complain before the two courts below that he was denied witness statements. He raised the matter for the first time in this appeal before this Court. We do not think there is merit in this complaint.”

35. In count 2 and 3 complained of herein, the appellants were charged with unlawful acquisition of public property contrary to **Section 45(1) (a)** as read with **Section 48(1) of ACECA**. **Section 45(1)(a) ACECA** provides that:

“A person is guilty of an offence if the person

fraudulently or otherwise unlawfully-

(d) Acquires public property or a public service or benefit;”

36. The particulars were that accused 3, Mukuria Ngamau, accused 4, Doreen Waithera Ng'ang'a and accused 5, Quorandum Limited on 23rd December, 2015 within Nairobi County in the Republic of Kenya, being the Directors of Quorandum Limited and Quorandum Limited, a corporate body respectively, they jointly and unlawfully received Ksh. 115,710,000 in count 2 and ksh. 65,184,946 in count 3 from the Fund account number 005xxxxxxxxxxx, held at Chase Bank for services not rendered.
37. The undisputed facts in the evidence were that: the 2nd appellant received Kshs.115,710,000 and Kshs.65,184,946 in its bank account no. 0052075584001 at Chase bank from the Fund; the 1st appellant is the director of the 2nd appellant; he signed PExh 33 and (a) and (b) which were the alleged contracts for consultancy services with the Fund; the Fund is a public body; the Fund had already awarded the said tender to Microflex Limited and signed a contract; and, finally there is no evidence on record that the appellants' participated in any procurement process with the Fund, or rendered any services to the Fund to justify the payments they received.
38. We keep in mind that the assessment of whether an accused was accorded fair trial rights is based on whether the accused was accorded due process of the trial, and not whether they

agree with the outcome. We reiterate the holding in **Francis**

Kahindi Mwaiha v Republic [2015] eKLR where this Court stated as follows:

“We have perused carefully the proceedings before the trial court and we are unable to appreciate the nature and basis of this complaint. The appellant was taken through every motion during the trial. . . The record does not show that the prosecution was allowed to address the court but the appellant was denied that right. Nor does the record show that the appellant requested to be allowed to address the court and he was denied the right.”

39. In the present case, we note that the appellants had legal representation, and the law that was breached and the particulars of the acts that constituted the offence were clearly stated. The appellants were accorded the opportunity to cross-examine and a chance to present their evidence. In the end, they were given a reasoned judgment.
40. Further, under **Section 87(a)** of the **Criminal Procedure Code**, the prosecution is entitled to withdraw charges at any stage before judgment. Once the co-accused died, only the charges against her abate under **Section 202** of the **Criminal Procedure Code**. Therefore, the remaining accused persons could still be tried on individual culpability, provided the charges were otherwise valid and supported by evidence. The 1st appellant’s claim that new charges should have been drawn against him alone is, therefore, without

legal basis. We also

found no count in the charge sheet for an offence known as “services not rendered” against the 1st appellant. Therefore, we are satisfied that he was accorded full procedural safeguards during the trial and we have no basis to uphold his belated complaint that his right to fair trial was violated.

41. The next issue the 1st appellant raised was whether the errors of law in the judgment were sufficient to render the verdict of guilty unjust. Specifically, that the learned Judge misapplied the provisions of the **PPDA** to sustain the conviction against him. That although he was charged for the offence of “*services not rendered*,” he was prosecuted, based on breach of the procurement process upon which the trial court based its conviction. He argued that he is not to be faulted for the irregularities in the procurement process at the Fund, upon which the courts below relied heavily to convict, although he was not charged under the **PPDA**.
42. In response, the respondent asserted that accused 1 (deceased) and the 1st appellant executed contracts, solely for purposes of illegal payment for services not rendered and the 1st appellant failed to prove that he executed any services. He posited that PW2 who was the Head of the Audit department presented irrefutable detailed evidence on how payments were made into the account of the 2nd appellant. In addition, PW4 who was the Head of Finance department testified on how Kshs.180,000,000 was transferred from the Investment

Account, following the actions of the 1st appellant, into the 2nd appellant's account. Further, that the 1st appellant was "seen literally chasing money in the bank" for several days before the payment was made.

43. The charges against the appellants were for unlawful acquisition of public property, contrary to **Section 45(1)**. The evidence on record revealed that this was a case of nefarious acts contrived to acquire monies from the Fund unlawfully, under the guise of contracts having been secured and, indeed, monies were transferred to the appellants pursuant to the "contracts." It was therefore, imperative for the courts below to examine the genuineness of those contracts.
44. The learned Judge considered the process that led to the payment of funds into the 2nd appellant's account and stated as follows:

"This court has evaluated the evidence from both sides and it finds that the documents were indeed false. To begin with there was evidence from PW1, PW2 and PW8 that the Fund already had an ICT Strategy and Policy in place so it did not require any other. PW1 (the ICT manager) and PW8 (the then head of procurement), at the Fund were all emphatic that there was no work plan for provision of ICT strategy and policy in the 2014/2015 financial year. Secondly, there was evidence from Miriam Boit (PW7), the then Ag. Company Secretary for the Fund disowning the contracts prepared in

favour of the appellants. PW7 testified that as the Company Secretary she was in

charge of drafting contracts. She was however emphatic that she did not draft the contracts with the 2nd Respondent. She pointed out discrepancies between those contracts and those that emanated from the Fund and reiterated that the Fund did not in fact, require an ICT strategy and policy as there was one already in place. It was also her evidence that unlike the contracts emanating from the Fund, the contracts with the 2nd Appellant did not have the requisite original annexures. It was her evidence that she had never seen the alleged contracts between the Fund and the Appellants whereas it was she who had drafted the contract between the Fund and Microflex. It is instructive that a contract is the last step in a tender process and hence it cannot exist in the absence of a tender. (See. **Section 68(1) of the Public Procurement and Disposal of Assets Act (2005)**).

45. **Section 45(1) (a) of ACECA and Section 27 of the PPDA 2005** (repealed), that was applicable at the time, imposed clear responsibilities for complying with the Act on all actors. **Section 27 of the PPDA 2005** covered all the actors as follows:

“1) A public entity shall

2) The accounting officer of a public entity shall

....

3) Each employee of a public entity

4) Contractors, suppliers and consultants shall comply with all provisions of this Act and

regulations.”

46. We are fortified by the holding in **Joseph Juma Musoga v Republic [2022] eKLR**, where the Court stated that:

“a person who knowingly benefits from an unlawful procurement process is equally culpable under the law.”

47. We also agree with the holding of the Constitutional Court of South Africa in **Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency [2014] ZACC 12**; that compliance with procurement laws is a constitutional imperative and violations invalidate the entire process.

48. We observe that there was no paper trail of the procurement process that birthed the “contracts” on which the payment was based, and it is not enough for the 1st appellant to say the blame lies solely with the Fund. As the saying goes, it takes two to tango. In this regard **Regulation 6 of the Code of Ethics for Suppliers in Public Procurement and Disposal** adjures that:

“..... the supplier shall not engage in fraudulent, collusive or corrupt practices or inappropriate influences.”

49. It is evident from the record that the 1st appellant knowingly participated in an unlawful act and thereby acquired a public property and benefited therefrom. We, therefore, find no basis to fault the learned Judge for her conclusion, and this ground fails.

50. The last issue raised by the 1st appellant for our determination is whether there were gross errors of fact leading to untenable findings. He raised two main arguments stating that the courts below placed improper reliance on evidence concerning deceased persons to convict him in count 1 and 2. That although 1st and 2nd accused died and the case against them was dismissed, the judgment continuously made adverse mention of accused no.1 to the prejudice of the 1st appellant.
51. Secondly, he argued that the courts below made errors of fact in finding: that he played a part in the making of the documents in count 10 and 11; that he had access to information to warrant the court's holding that he had special knowledge and yet it was not his duty to prove his innocence; and lastly, that the falsehood of the documents was attributable to him, while it was not clear whether the documents were forged.
52. In rebuttal, it was urged for the respondent that even though counts No.1,4,5,6,7,8,9,12,13 and 14 which were against accused 1 and 2 (deceased) were withdrawn, this had no impact on counts 2 and 3 which were against the appellants. In addition that the charges against all the accused persons carried stand-alone offences, which could be proved separately with evidence tendered by the prosecution in respect of each accused. Therefore, the withdrawal of any one of them did not affect the trial and proof of others.

53. Counsel, however, conceded the appeal on count 10 and 11 in which the 1st appellant was charged with making of false document contrary to **Section 347 (a)** as read with **Section 349** of the **Penal Code**. He was of the view that without a witness who testified, that he or she saw the 1st appellant actually put pen and ink to paper, the presumption that he was the maker of the document did not arise.
54. The record shows that the 1st appellant and the deceased 1st accused and the 1st appellant executed the contracts of service and ERP. **Section 347** of the **Penal Code** is broad in its outline of what constitutes the offence of making a false document. Subsection **(a)** under which the 1st appellant was charged states that;

***“Any person makes a false document who-
(a) Makes a document purporting to be
what in fact it is not;”***

32. The evidence on this issue was circumstantial, since no witness testified to having witnessed the actual making of the contract documents. We, therefore, subjected it to the test applicable to circumstantial evidence. The Court restated the parameters to be considered in the celebrated case of **Abanga alias Onyango vs. R, Criminal Appeal No. 32 of 1990** as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such

evidence must satisfy three tests;

- i. The circumstances from which inference of guilt is sought to be drawn, must be cogently and firmly established;**
- ii. Those circumstances should be of a definite tendency and erringly pointing towards the guilt of the accused;**
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else within all human probability.”**

55. The Document Examiner's report produced as P.Exh 55, confirmed that the 1st appellant's signature appeared on P.Exh 33 (a) and (b) and the 1st appellant himself admitted that he signed these documents. The documents turned out to be the falsified service contracts for ICT Strategy and Policy and for ERP services. These documents were disowned by employees of the Fund including PW1 and PW3. PW7 the legal officer at the Fund whose duty it was to draw up contracts on behalf of the Fund testified that she saw these documents for the first time when they were shown to her at the EACC office. Further that they were obviously falsified as they lacked the standard clauses on dispute resolution, termination and obligations of the procuring entity.

56. In reliance of these documents, the 1st appellant pursued the funds from Chase bank. PW2, the Head of the Audit department presented detailed evidence on how payments were made into the 2nd appellant's account, while PW4

the

Head of the Finance department testified that the Kshs.180,000,000 transferred into the 2nd appellant's account came from the Investment Account of the Fund. Further, that the 1st appellant was "seen literally chasing the money in the bank" for several days before the payment came through.

57. PW15, the then Branch Manager Chase bank lent credence to the evidence of PW4. She testified that the 1st appellant visited her at the bank on 24th February 2015 having been referred by the teller. He was seeking to know whether money had been credited into the 2nd appellant's account, and whether he could access it. PW15 checked the account and confirmed that Kshs.115,710,000 had come in from the Fund. The 1st appellant could not access it because the account was flagged for 'No debit' since the sum credited was huge and the 1st appellant had no supporting documentation.
58. PW17, the Customer Service Assistant at the Fund testified to having come in contact with several letters on the 2nd appellant's letterhead, signed by the 1st appellant and addressed to the Fund. The letters included those that forwarded the inception report for the ERP services, the draft Strategic Plan for ICT, the Review of Enterprise Resource Planning and many invoices. None of the services had been advertised since the procurement for the Strategic Plan for ICT had already been awarded and a contract signed with

Microflex, while ICT Center won the tender to provide ERP

services. There was no evidence that the 1st appellant executed any services for the Fund on the basis of these communications.

59. We have considered the record and we find that the courts below evaluated the evidence in totality as they should, and no culpability of the deceased accused persons was transposed to the 1st appellant. The courts below properly found that the documents submitted were falsified to facilitate the payment and they relied on evidence from bank officials, the Fund, and forensic expert. Indeed we are cognizant that the courts would have been perfectly in order to place reliance on statements of deceased persons if that were the case (but it is not), and it only becomes unlawful where no corroboration exists. See: **Republic v Daniel Kavive & Another [2019] eKLR.**

60. Consequently, despite the State counsel's concession of appeal in count 10 and 11, which is not finding on us, we are satisfied that the circumstances from which the inference of guilt was drawn were cogently and firmly established. They were of a definite tendency unerringly pointing towards the guilt of the 1st appellant. The circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that the 1st appellant committed a crime within all human probability. His conviction was grounded on direct and corroborated evidence independent of the evidence against the deceased

accused

persons. It was in regard of his own actions and not the actions of others.

61. In the premise, the argument that improper reliance was placed on evidence concerning deceased persons to convict him in count 1 and 2, or that unnecessary weight was placed on the evidence concerning the deceased accused to hold that he played part in the offences in count 10 and 11 lacks merit and must fail.
62. The appeal is found to lack merit and is hereby dismissed in its entirety.

It is so ordered.

Dated and delivered at Nairobi this 24th day of October, 2025

P. O. KIAGE

.....
JUDGE OF APPEAL

L. ACHODE

.....
**JUDGE OF
APPEAL JOEL
NGUGI**

.....
JUDGE OF APPEAL

*I certify that this
is a true copy of the
original.*

Signed

DEPUTY

REGISTRAR.