



**Lenolkulal & 2 others v Republic (Criminal Appeal E009 & E008 of 2024
(Consolidated)) [2025] KEHC 16027 (KLR) (Anti-Corruption
and Economic Crimes) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CRIMINAL APPEAL E009 & E008 OF 2024 (CONSOLIDATED)**

BM MUSYOKI, J

NOVEMBER 7, 2025

BETWEEN

MOSES KASAINI LENOLKULAL 1ST APPELLANT

HESBON JACK WACHIRA NDATHI 2ND APPELLANT

BERNARD LITARASI LESURMAT 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being appeals from judgment, conviction and sentence of Chief
Magistrate's Court at Milimani Anti-Corruption case No. 3 of 2019
(Hon. Thomas T. Nzyoki) dated 28th August 2024 and 29th August 2024)*

JUDGMENT

1. These appeals were consolidated on 23-05-2025 with appeal number E009 of 2024 being the lead file. In the lower court, the appellants and 8 others were charged with different counts. After the trial the appellants herein were convicted of the following offences;

Count 3 against the 1st appellant- conflict of interest contrary to Section 42(3) as read with Section 48(1) of *Anti-Corruption and Economic Crimes Act* (hereinafter referred to as 'ACECA') particulars being that between 27th March 2013 and 25th March 2019 at Samburu County Government offices within Samburu County in the Republic of Kenya, being an agent of the Samburu County Government as the Governor and being the sole proprietor of Oryx Service Station he knowingly acquired a direct private interest in contract between Oryx Service Station and Samburu County



Government for the supply of fuel. Upon conviction, he was sentenced to a fine of Kshs 1,000,000.00 and in default to serve four years imprisonment.

Count 4 against the 1st and the 2nd appellants- unlawful acquisition of public property contrary to Section 45(1)(a) as read with Section 48(1) of the ACECA particulars being that between 27th March 2013 and 25th March 2019 within Samburu County in the Republic of Kenya being the Governor of Samburu County and a private person, they unlawfully acquired public property to wit Kshs 84,695,996.55 for the supply of fuel to Samburu County Government through Oryx Service Station. The two were sentenced to a fine of Kshs 1,000,000.00 each and in default to serve prison term of four years. In addition, they were sentenced to a mandatory fine of Kshs 83,460,995.00 under Section 48(1) (b) of ACECA.

Count 11 against the 3rd appellant- abuse of office contrary to Section 46 as read with Section 48(1) of the ACECA. The particulars were that between 27th March 2013 and 25th March 2019, at Samburu County within the Republic of Kenya, being the Chief Officer-Lands, Housing and Urban Development of Samburu County Government, he used his office to improperly confer a benefit of Kshs 9,030,640.00 to Moses Kasaine Lenolkulal trading as Oryx Service Station for supply of fuel to Samburu County Government. He was sentenced to a fine of Kshs 700,000.00 and in default to serve four years imprisonment.

2. Aggrieved by the above convictions and sentences the 1st and 2nd appellants filed their joint appeal number E009 of 2024 raising the following grounds;
 1. That the learned Magistrate erred in fact and law by failing to fully analyze and evaluate the evidence adduced and thereby arrived at the wrong conclusions of fact.
 2. That the learned Magistrate erred in law by failing to appreciate the meaning and effect in law of the appellant's declaration of conflict of interest dated 23/4/2013.
 3. That the learned Magistrate erred in law by failing to properly appreciate the means rea for the offence of conflict of interest in Section 43 (2) of the Anti- Corruption and Economic Crimes Act.
 4. That the learned Magistrate erred in law by finding that the Anti- Corruption and Economic Crimes Act barred public officers from trading with public entities where they are employed.
 5. Having found that evidence adduced in respect of the amounts paid to the appellant by the County Government of Samburu were at variance with the amounts set out in counts 3 and 4 of the amended charge Sheet, the learned Magistrate erred in law by substituting the amounts set out in the said counts with amounts derived from his own tabulation.
 6. Having found that evidence adduced in respect of the amounts paid to the appellant were at variance with the amounts set out in counts 3 and 4 of the amended charge sheet, the learned Magistrate erred in law by failing to find that the offences set out in counts 3 and 4 of the amended charge sheet were not proved.
 7. By substituting the figures set out in counts 3 and 4 of the amended charge sheet, the learned Magistrate erred in law by allowing himself to descent into the fray of the trial and by so doing conducted the trial of the appellant in a manner contrary to Article 50 of *the Constitution*.
 8. That the learned Magistrate erred in law by convicting the appellant of an offence not set out in the amended charge sheet contrary to Section 134 of the Criminal Procedure Code.



9. That the learned Magistrate erred in fact and in law by failing to properly appreciate the impact of the affidavit of the learned prosecutor sworn on 13th October 2024.
10. That the learned Magistrate erred in law by failing to appreciate that Section 48 (1) (b) of the Anti- Corruption and Economic Crimes Act was only applicable where it had been proved that a loss had been occasioned as a result of an offence committed under Part V of the [Anti-Corruption and Economic Crimes Act](#).
11. Having found that appellant did indeed deliver the fuel and lubricants for which he was paid by the County Government of Samburu and as result no loss was occasioned to the County Government of Samburu, the learned Magistrate erred in law by sentencing the appellant under Section 48 (1) (b) of the Anti- Corruption and Economic Crimes Act.
12. The sentence imposed by the learned Magistrate is unlawful as it does not take on board the fact that the High Court in Civil Suit no. 21 of 2019: Ethics and Anti-Corruption Commission V Moses Kasaine Lenolkulal where the High Court directed forfeiture of property held to have derived from the same transaction that was the subject matter of prosecution before the Learned Magistrate.

In appeal number E008 of 2024, the 3rd appellant raised the following grounds;

13. That the learned trial Magistrate erred in both law and facts in convicting the appellant when the crucial ingredients of the offence of abuse of office as created by Section 46 of [Anti-Corruption and Economic Crimes Act](#), 2003 were never established by the prosecution.
 14. That the learned trial magistrate erred in both law and facts convicting the appellant on the face of material contradiction and inconsistency of the evidence by the prosecution.
 15. That the learned trial Magistrate erred in both law and facts in failing to consider and in disregarding the sworn affidavit of the learned prosecutor (in conduct) dated 12th October, 2022.
 16. That the learned trial Magistrate erred in law and facts in convicting the appellant without considering extenuating circumstances of the case.
 17. That the learned trial Magistrate erred in law and facts in disregarding the defence given on oath and defence submissions without giving reasons and failing to resolve the gaps and doubts in prosecution case in favour of the appellant.
 18. That the learned trial Magistrate erred in both law and facts in convicting the appellant whilst relying on his own conjectures, speculations and assumptions to effect that the appellant knew that Oryx Services Station was owned by the former Governor, Moses Kasaine Lenolkulal and thus arrived at the wrong decision.
3. This being a first appeal, this court has mandate and is required to conduct the appeal as if it was conducting a re-hearing and proceed to re-evaluate, re-examine and re-analyse the evidence produced in the lower court afresh and come to its own independent conclusion. The court must however take into account the fact that it did not take the evidence of the witnesses first hand or observe their demeanours



and give due allowance for that. In *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* (2018) KEHC 5465 (KLR), the court restated this position thus;

“As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. v Associated Motor Boat Co. Ltd* (1968) EA 123).”

The Court of Appeal held the same position in *Mbuthia Macharia v Annah Mutua Ndwiga & another* (2017) KECA 290 (KLR) when it stated that;

“This is a first appeal, that being so, we are conscious of our duty to re-evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify.”

Honourable Justice Joel Ngugi (as he then was) stated in *Ndungu Dennis v Ann Wangari Ndirangu & Eddah Mwihaki* (2018) KEHC 8799 (KLR) that

“As a first appellate court, this Court’s duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.”

Similarly, in *Syuki v Kenya School of Law & another* (2025) KEHC 12067 (KLR) it was held that;

“This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.”

4. In line with the above established and sound legal principle, this court will go through the testimony of the witnesses and the exhibits produced in the trial court and come to its own independent conclusion but obviously with reference to what the trial court found. The summarised version of the testimony of the witnesses is reproduced below.
5. The first prosecution witness was one Joseph Mayali Lekulkuli who told the court that he worked for the Samburu County Government as the head of treasury accounting unit with his duties including planning and budgeting process, requisition and securing of funds from the national government, approval of manual and electronic transactions, generating of financial statements, spearheading audit process, following up on audit queries, supervision of awarding staff and any other duty as may be assigned by the Chief Officer Finance.
6. He told the court that he was aware that the case arose and involved procurement of fuel and lubricants for the County Government of Samburu (hereinafter referred to as ‘the government’) from an entity known as Oryx Fuel Station in Mararal (hereinafter referred to as ‘Oryx’). He was required by the Ethics and Anti-Corruption Commission (hereinafter referred to as ‘the EACC’) to peruse a couple of payment vouchers addressed to Oryx, the payee and give information on what the government was paying for. He added that for a payment voucher to be drawn, there must have been procurement process with request originating from the user department. The witness went on to narrate the procurement process which I don’t consider important reproducing in this judgment.
7. The witness was led to identify the aforesaid payment vouchers and their attachments being documents related to the procurement in question which were invoices, tender documents, minutes, counter receipt vouchers, award decisions and local purchase orders. He stated that all the payments in question were paid via electronic funds transfer. He produced a total of 232 exhibits.



8. In cross-examination, PW1 stated that he played a crucial role in the process of payments. He confirmed that by approving payments vouchers, it meant that the procurement process involving payment in reliance on documents produced as exhibits 1 to 231 was satisfactory. He also insisted that the government's dealings in respect of the payment vouchers he had produced were in compliance with procurement laws and that Oryx was not the only fuel supplier to the government as there were two others who had been pre-qualified.
9. The witness added that after pre-qualification of suppliers, it was left to the Chief Officers of the ten departments in the government to make decisions which service stations they would want to deal with. He was referred to several exhibits and confirmed that they were in order and issued procedurally and the procurement of supplies for fuel was done competitively. He added that the 1st appellant never made any follow ups of payment. He also confirmed that the government got value for the money it paid and the payment vouchers he had produced had met all the requirements necessary for payment.
10. PW1 also stated that there was a letter written by the 1st appellant declaring interest that he had relinquished Oryx to the 2nd appellant. He added that the procurement of the fuel and lubricants in question was already on at the time the 3rd appellant was appointed. He also confirmed he signed the payment vouchers after having confirmed that the fuel had been delivered as contracted and he could not pinpoint any blame on the 3rd appellant among other co-accused who were charged with abuse of office.
11. In re-examination, he clarified that he was not a procurement professional and that by stating that the procurement process was okay, he meant that the supporting documents led him to make assumption that procurement process was proper. He stated further that before payments were made, he checked the payment vouchers approved by the A.I.E holder and the unit sizes and that he could not have signed a payment voucher which had not been signed by the A.I.E holder.
12. The prosecution called Joram Ramiti Lentoijoni as its second witness. Joram was at the time of his testimony working at the government as the acting Head of Supply Chain Management. He told the court that he was the custodian of all procurement documents. He had also served at the principal procurement office in agriculture department and also as an assistant procurement officer and a clerical officer in the ministry of livestock.
13. He testified that he was aware how the procurement in question was done. He went on to explain the process of the procurement including the process of payment. He stated that he did not participate in pre-qualification for suppliers from 2013-2017 since his main duty was the custody of procurement documents. He identified and produced list and register of pre-qualified suppliers, procurement plans for the years in question, quotations registers for the years in question and budgets for different departments as exhibits 233 to 237(r).
14. The witness was subjected to cross-examination where in addition to repeating the procurement process told the court that Oryx appeared in the list of pre-qualified suppliers and that the fuel supplied had been budgeted for. He confirmed that Oryx was prequalified by the government for the supply of fuel & lubricants in the financial year 2014/2015.
15. PW2 emphasized that there was no irregularity in the procurement documents he produced before the court. Among the documents he produced was a letter by the 1st appellant dated 5th April 2013 as exhibit 238 which was addressed to the County Secretary Samburu County Government. The letter was in respect of a declaration of conflict of interest. The letter was copied to all accounting officers and all procurement officers and according to the witness, the 1st appellant declared a conflict of interest



in respect of Oryx with effect from 5th April, 2013. He added that the money paid to Oryx was paid lawfully.

16. The testimony of PW3 was quite short. Evans Juma Osetero told the court that he had been an employee of Postal Corporation of Kenya as an assistant manager investigation based at delta house Nairobi headquarters. He testified that he had been required to supply particulars of rental box number 113 Maralal. He added that he wrote to the EACC giving details of the rental box which showed that the box was rented to David Lenolkulal. He produced the letter as exhibit 240. In a short cross examination, he said that he did not know any of the accused persons.
17. Peterson Wachira working at the Registrar of Companies Department and based at Sheria House was the fourth witness. He had been requested by the EACC to give information of 83 companies including Oryx upon which he prepared a report. Among the 83 were Orxy Petrol Station, Orxy Service Station and Orxy Petrol Station. After conducting a search for three companies he arrived at the following findings: -
 - i. Orxy Petro Station was a business name registered on 9th March, 2015 under registration no. BN/2015/344811 located on plot no. 64 Nyahururu road. Its proprietor was Hesbon J.W Ndathi the 2nd appellant. The business had been ceased pending conversion to a limited liability company. He did not provide the documents to show when the business ceased but the information was available online.
 - ii. Oryx Service Station was a business name registered on 1st February, 2010 under registration no. BN/2010/60371. It was located at plot no. 35 Maralal road. Its proprietor was the 1st appellant. The business had also been ceased pending conversion to a limited company.
 - iii. Orxy Petrol Station was also a business name which did not appear in the data base of the registered businesses.
18. He produced the report and its annexures as exhibit number 243. He also produced a CR13 in respect of a company known as Oryx Investment Company Limited which showed that the 1st appellant was a director holding 75 shares and one Lily Sepita Lenolkulal as a director shareholder with 25 shares. It is said to be a limited liability company formed on 7th October 2008.
19. He was cross examined by the defence counsel and stated that Orxy existed before County Governments came into existence and that he had not produced the registration certificate for Orxy. He added that their record did not have the date when Oryx Service Station ceased to exist.
20. PW5, Mr. Stephen Yego was a forensic document examiner working with EACC on full time basis. He recalled that on 13-03-2019, he was on duty at EACC Forensic Laboratory when he received a request from Joel Khisa Nyongesa in form of an exhibit memo with the following documents;
 - i. A lease agreement of Oryx Service Station plot no. 5 between Moses Kasaine Lenolkulal proprietor and Hesbon J.W. Ndathi dated 1st May 2013 marked A1. It was marked by the court as MFI 245.
 - ii. A lease agreement of Oryx Service Station plot no. 5 between Moses Kasaine Lenolkulal proprietor and Hesbon J.W. Ndathi dated 1st May 2013 marked A2 which was identified in court as MFI 246.
 - iii. An agreement made between Moses Kasaine Lenolkulal (proprietor) and Hesbon J.W. Ndathi (lessee) regarding management of Oryx Service Station dated 20th November, 2013 marked A3. It was marked in court as MFI 247.



- iv. A certain copy of Equity Bank application for funds transfer of Ksh 7 million from Orxy Service Station account no. 1100297993314 between Moses Kasaine Lenolkulal account no. 110029474606 dated 9th September, 2013 marked A4. The same was marked in court as MFI 248.
- v. Equity Bank application for funds transfer of Ksh. 11 million from Moses Kasaine Lenolkulal account no. 110029474606 to Balala Abeid Advocates in Imperial Bank account no. 0340875028 dated 9th September, 2013 marked A5 which was marked for the court as MFI 249.
- vi. KCB application for funds transfer of Kshs. 8,100,000/= from Moses Kasaine Lenolkulal account no. 1108168841 to Balala Abeid Advocates in Imperial Bank account no. 0340875028 dated 9th December, 2013 marked A6. It was marked in court as MFI 250.
- vii. KCB cash withdrawal advise slip dated 26th May, 2014 from Oryx Service Station account no. 1124724591 of Kshs. 900,000/= marked A7 which was now marked in court as MFI 251.
- viii. KCB application for funds transfer of Ksh. 2 million from Moses Kasaine Lenolkulal account no. 066199000060 to Kemonde Ilara account no. 057019664914 in Equity Bank dated 6th March, 2013 marked A8. It was marked in court as MFI 252.
- ix. KCB application for funds transfer of Ksh. 2,300,000/= from Oryx Service Station account no. 1124724591 to Modern Precast Kenya Limited account no. 0404901101 in Equatorial Commercial Bank dated 28th July, 2015 marked A9. It was marked in court as MFI 253.
- x. KCB application for funds transfer of Ksh. 715,000/= from Oryx Service Station account no. 066130051325 to Hass Consult Limited account no. 2035726554 in Barclays Bank dated 7th October, 2017 marked A10. It was marked in court as MFI 254.
- xi. KRA minutes of negotiations over ground floor for Maralal office at Samburu County Government Chambers dated 28th January, 2018 marked A11 which was now marked in court as MFI 255.
- xii. Orxy Service Station copy of cheque no. 1124724591 dated 29th August, 2012 of Kshs. 666,000/= marked A12. It was marked in court as MFI 256.
- xiii. A copy of KCB customer transaction voucher dated 19th September, 2013 for account no. 199000060 in the name Moses Lenolkulal of Kshs. 180,000/= marked A 13. It was now marked in court as MFI 257.
- xiv. A copy of KCB transaction voucher dated 20th September, 2013 of account no. 1124724591 in the name of Orxy Service Station of Ksh. 180,000/= marked A 14. It was marked in court as MFI 258.
- xv. A copy of KCB customer transaction voucher dated 2nd December, 2013 of account no. 1124724591 in the name of Orxy Service Station of Kshs 2,316,000/= marked A 15 which was now marked MFI 259.
- xvi. A copy of KCB transactions voucher dated 14th August, 2014 of account no. 066130051325 in the name of Moses K. Lenolkulal of Kshs 224,220/= marked A 16. It was then marked MFI 260.



- xvii. A copy of KCB transfers of funds transactions voucher dated 16th May, 2013 of account number 1103629506 in the name of Hesbon J. W Ndathi of Kshs 1,600,000/= marked A 17. It was marked in court as MFI 261.
 - xviii. KCB transactions of funds voucher dated 9th December, 2013 of account no. 1124724591 in the name of Orxy Service Station of Kshs 200,000/= marked A 18. It was then marked in court as MFI 262.
 - xix. A copy of Oryx Service Station cheque no. 00423 KCB on account no. 1124724591 dated 29/01/2014 for Ksh. 1,004,500/= marked A19 which was then marked MFI 263.
 - xx. Samburu Furniture copy of cheque no. 000015 KCB account no. 1148627103 dated 26/5/2014 for Ksh. 700,000/= marked A20. It was then marked 264.
 - xxi. Orxy Service Station copy of cheque no. 00526 K.C.B account no. 1124724591 dated 11/8/2014 of Ksh. 1,014,000/= marked A21. It was marked in court as MFI 265.
 - xxii. A copy of Oryx Service Station cheque no. 00652 K.C.B account no. 1124724591 dated 17/4/2015 for Ksh. 600,000/= marked A22. It was then marked in court as MFI 266.
 - xxiii. A copy of Oryx Service Station cheque no. 00651 K.C.B on account no 1124724591 dated 17/4/2015 for Kshs 2,000,000/= marked no. A23. It was then marked in court as MFI 267.
 - xxiv. A copy of Oryx Service Station cheque no. 00819 K.C.B on account no. 1124724591 dated 29/1/2016 for Ksh. 1,000,000/= marked A24. It was then marked in court as MFI 268.
21. These were the questioned documents in addition to which he received specimen signatures of the 1st appellant. He stated that he also received the following documents;
- 1. A cheque leaf no. 002576 in the name of the 1st appellant bearing his known signature.
 - 2. A certificate of inauguration of the Governor of Samburu County dated 27/3/2013 bearing the known signature of the 1st appellant.
 - 3. Oryx Guest House Maralal management agreement bearing the known signature of the 1st appellant.
 - 4. Samburu County Government transfer of land to Lilipilise Lekupe by the 1st appellant dated 10/11/2015.
 - 5. Other marked documents bearing the known signature of the 1st and 2nd appellants.
22. Upon his examination, he established that the documents attributed to the 1st appellant were made by the same author as well as those attributed to the 2nd appellant. He prepared a report which he produced as exhibit 244(b) in court.
23. On crosse-examination, he stated that his report was independent and free from bias although he was an employee of EACC. He denied that EACC had an interest in the case.
24. Jacob Oduor was another forensic examiner working for EACC who recalled that on the 11th April 2019, several exhibits were submitted to the EACC laboratory by Joel Issa. The documents were numerous 120 LPOs, 167 payment vouchers and specimen signatures of various people including the 3rd appellant. He matched signatures and authorship of the various documents and prepared a report which he produced as exhibit 282.



25. He continued and told the court that again on 18th April 2019, he received other bundles of documents comprising 68 LPOs, 51 payment vouchers and specimen signatures of various people none of whom is an appellant herein. He prepared a report dated 25th April 2019 which indicated that the documents were authored by the same person which report he produced as exhibit 297.
26. The witness added that on 29th April 2019, he received another exhibits memo accompanied by 199 LPOs and a memo addressed to the County Secretary dated 18-05-2017 together with specimen signatures of one Geoffrey Kiteesen. Upon examination as requested by the investigating officer, he concluded that the documents and the specimen signatures were made by the same person. He prepared a report dated 30th April 2019 which he produced as exhibit 298(b).
27. In cross-examination, this witness explained the methodology he used in carrying out his examination. He added that it took ten minutes to examine one signature and added that he examined the documents on 12th April 2019 for 13-14 hours. Despite working for the EACC, he maintained that his work was independent and impartial. He also confirmed that some of the documents he examined were not signed. He also stated that he did not notice anything unusual about the payment vouchers and out of the thirteen names mentioned in exhibit memo dated 18th April 2019, only one Stephen Siringe was in the charge sheet.
28. PW7 was Johnstone Kirui who was working at Kenya Commercial Bank, Maralal branch as the branch manager. He was served with a miscellaneous application No. 1029 of 2019 and an order dated 5/3/2019 in respect of 29 accounts out of which he was to act on accounts numbers 1124724591 and 1177182416 also for Oryx Service Station but he only acted on account No. 1124724591.
29. He also told the court that the EACC requested statements in both soft and hard copies, books, cheques, account opening documents including details of account signatories, mandate card, EFT instructions, EFT instruction letters, disbursements authorization, deposit slips and withdrawal slips for the said account. He complied with the order and supplied the account opening documents which was opened by the 1st appellant as a sole proprietor account on 7-02-2011. The application for account opening was made on 7th February 2011. He also supplied instructions for the change of signatories dated 1st May 2013 which was received on 22/10/2015. The name and the signatures of the 1st appellant were being removed and the name of Hesbon J.W. Ndathi ID No. 8823757 was introduced. He produced the instructions as exhibit 302 and the bank statement for the period between 9-12-2012 to 28-02-2019 as exhibit 303.
30. The witness proceeded to single out payments in the bank statement which were made to Oryx by the government and made an excel sheet for the same. He told the court further that the EACC investigators requested for all payments paid to Oryx by the government. He gave the breakdown of the payment which were 15 running from 9-05-2013 to 24-12-2013. He also supplied four cheques viz number 427 dated 21-08-2013, number 569 dated 4-10-2013, another one dated 17-09-2013 and number 529 also dated 17-09-2013.
31. When he was placed under cross-examination, the witness reiterated that Oryx became a KCB customer from the 7th February 2011 while the government became operational in the year 2013. He also confirmed that only two payments above one million were made after 2016 and for the entire period the bank did not see any suspicious payments neither did the bank flag or report to Central Bank any suspicious payment. He confirmed that the bank received the letter for change of signatories on 22/10/2015 and it effected the changes on the same day. He stated that, the 1st appellant ceased to be a signatory to the account on 22/10/2015 and was replaced by the 2nd appellant. He also confirmed



- that once one ceased from being a signatory, they cannot access funds from the account. He reiterated that from October 2015, the 1st appellant could not access the account.
32. In re-examination, he told the court that the first payment made into the account was on 18/7/2013. He restated that a person whose signature is not in the bank system cannot withdraw the money.
 33. The prosecution's 8th witness told the court that he had previously worked at Maralal branch of Kenya Commercial Bank with effect from April 2016 until April 2019 as service quality and compliance manager. He added that on the 27th February 2019, he was served by EACC with a warrant issued in miscellaneous criminal application No. 871 of 2019 which required him to provide documents and transactions relating to account numbers 1103831208 which was the same as 066130051325 (belonging to the 1st appellant), 1108168841 which was the same as 066199000060 (belonging to the 1st appellant), 1234708647, 124724591 (belonging to Oryx Service Station) and 1177182416 (belonging to Oryx Service Station). He added that account number 1108168841 was also opened by the 1st appellant on 7th March 2006 with him being the only signatory. Account number 1234708647 was opened on 25-10-2011 while account number 1124724591 was opened on 24/2/2011. The 1st appellant was a signatory to account number 1103831208 the same having been opened on 7th July 1994.
 34. He went to provide the required information including identity and account opening cards. The witness produced transfer instructions and cheques done by the 1st and 2nd appellants to various persons on various dates. He confirmed that the bank received a letter dated 1st May 2013 instructing it to withdraw the 1st appellant as a signatory and have the 2nd appellant remain as the sole signatory. Although he could not tell when the instructions were effected, he was sure that they were. He was also sure that when he reported to Maralal in April 2016, the 2nd appellant was the signatory.
 35. In cross-examination, PW8 told the court that he did not know when the 2nd appellant became a signatory to account for Oryx although his statement to the EACC indicated that the said appellant became a signatory on 9th August 2016. He added that the transaction slip produced as exhibit 312 (a) and some others had nothing to do with Oryx. He also confirmed that warrant to investigate the account covered the period between 1-01-2013 and 31-01-2018 and some documents supplied were outside this period. He was also not aware that the change of signatories changed the account holding.
 36. Priscila Lanyasanya who worked in the government as the Director Human Resource was the 9th witness. She testified that she received a letter dated 5-04-2019 from the EACC requesting for documents related to the government's staff which information she provided. The files she forwarded were those of the appellants and their co-accused except one Paul Lolmingeni who was the 7th accused and not a party to this appeal. She said nothing much in cross-examination that is relevant to this appeal.
 37. Alex Kinyanjui the 10th prosecution witness identified himself as working for the EACC as a digital forensic analyst based at the forensic lab since 2015 having been a forensic investigator with the Commission since 2010. On 25-02-2019 an investigator, one Joel Nyongesa submitted a Safaricom modem recovered from the office of the Governor of Samburu County with requirement to extract all data pertaining to financials and assets. He also received a "fujistu" CPU Serial No. YL TH 400117 from which he was required to extract all data pertaining to financials and assets. The CPU was said to have been obtained from the Governor's residence in Samburu County.
 38. On 20-02-2019, he also received Apple 1 Mark PC Serial No. C02WJ1CNJ1G6, Apple iPhone Serial No. G00VIIX17JC L6 (G0GVVX17JCL6), Samsung Mobile IMEI No.352402093787861 (352402093787861), HP 650 Laptop Serial No. 5CB237153F, Mark Book Pro Laptop Serial No.



- CO2X534BJHC9, Nokia Y280 IMEI No. 355881914249753 (355881914249753), Samsung mobile IMEI No. 355089088755107, Infinix X551 IMEI No. 353486078186123, Window Tablet Serial No. 022706430653 and Apple Ipad Tablet Serial No. DMPTW2B4J2D3. The instructions for these were to extract all data pertaining to financials and assets. The items were obtained from the Governor's residence in Karen Nairobi.
39. He also on 1-03-2019 received from Joel Nyongesa an exhibit memo with mobile phone IMEI No. 359656250004658 (359656250004658), A Samsung phone IMEI No. 352623048693876, Nican Camera Serial No. 73008110, Samsung IMEI No. 354769044087882, A-Touch Tablet, Huawei Phone IMEI No. 868624012875264 and Tecno Phantom IMEI No. 353587080034209 which were obtained from the 2nd appellant's residence in Maralal with instructions to extract all data pertaining to financials and assets.
 40. On 22-02-2019, he also received from Joel Nyongesa a red flash-disk which did not have a serial number. This was obtained from the 1st appellant's residence in Maralal and the instructions were to extract all data pertaining to financials and assets.
 41. Upon receiving the items mentioned above, the witness undertook examination of the items and summarized the finding in a report dated 7th March 2019. He added that the report showed that there were Mpesa messages ranging from 10-02-2017 to 8-02-2019 between the 1st and the 2nd appellants. They were 14 transactions being moneys sent from the 2nd appellant to the 1st appellant.
 42. The witness also did examination of IFMIS transactions involving the government and Oryx for the period between 22-08-2014 to 16-01-2019 which showed the total payments as Kshs 73,109,615.35. He produced the two reports as exhibit 356.
 43. He was cross-examined by the counsel for the 1st appellant only. He stated in the cross examination that the total amount paid was Kshs 73,109,615.35 but he would not be able to tell whether the payment through IFMIS were genuine or not neither could he tell whether there was loss of funds. He confirmed that there were no electronic certificates for the Mpesa messages and other data provided to the court other than the IFMIS report. He also did not get confirmation from Safaricom on ownership of the telephone lines.
 44. The prosecution's last witness was the investigating officer one Mr. Joel Khisa Nyongesa. He had been working for EACC as an investigating officer since 1st August 2016. He told the court that around February 2019, the EACC received information that the 1st appellant, then the Governor of Samburu County Government was trading with his own government using an entity by the name Oryx Service Station after which a team of investigators was constituted with him leading.
 45. According to this witness, the 1st objective was to establish the ownership of Oryx Service Station, the 2nd objective was to know the identity of the 1st appellant, the 3rd objective was to establish whether Oryx Service Station traded with the County Government of Samburu, the 4th objective was to establish how much if at all Oryx Service Station traded, the 5th objective was to establish whether by Oryx Service Station trading with Samburu County Government led to a conflict of interest on the part of the Government and the 6th objective was to establish if there was conflict of interest, who facilitated it.
 46. He added that the team wrote to the relevant authorities and bodies including the County Government of Samburu, the registrar of companies, the postal corporation, the registrar of persons and the government printer. They also obtained orders to investigate bank accounts and subjected the relevant documents to forensic examination. They also subjected digital gadgets to forensic digital examination and recorded statements from witnesses and the accused persons who were before the court.



47. The team searched the 1st and 2nd appellant's houses and offices in Nairobi and Maralal upon obtaining court warrants. He gave a list of documents and items recovered from the searches and he singled out several documents which he regarded as significant to the case starting with a Kenya Commercial Bank application for funds transfer dated 2nd October 2017. The applicant in this document was the 1st appellant through his account No. 066130051325 and the funds of Kshs 715,000.00 were to be transferred to Hass Consult Limited, account No. 2035726554 at Barclays Bank Kenya Limited being for purpose of purchase of a house. The transfer was produced as exhibit 253. There were other documents which were showing transfer of funds to various people by the 1st appellant.
48. As to the relationship between the 1st and 2nd appellants, the witness produced minutes for a meeting for negotiations on tenancy agreement between Kenya Revenue Authority and the 1st appellant dated 28-01-2016 which was produced as exhibit 255 and pointed out that the parties present in the meeting were 1st appellant as landlord and the 2nd appellant as landlord's representative. He also pointed out that the 2nd appellant held a meeting in Nairobi and also signed the minutes on behalf of the landlord.
49. A search conducted in the house of the 2nd appellant recovered a lease agreement dated 1st May 2013 between the 1st appellant and the 2nd appellant which was produced as exhibit 245. The 2nd appellant signed the agreement as the tenant. He also produced another agreement between the two dated 26th November 2013 as exhibit 247. He went on to confirm what PW10 had found out after examination of the gadgets.
50. At Oryx Service Station, the team recovered a letter dated 17th November 2014 from head of supply chain management Samburu County Government which was a prequalification notification send to Oryx to supply oil and lubricants relating to tender No. SCG/009/2014-2015. The letter was acknowledged on behalf of by Oryx Service Station by the 2nd appellant. They also recovered LPOs from Oryx.
51. By a letter dated 27th February 2019, the registrar of companies indicated that Oryx was registered to the 1st appellant on 1st February 2010 as a business name and the nature of business was supply of stationery. An inquiry from Post Master General about rental box number 113-20600 Maralal which appeared in registration details of Oryx revealed that it belonged to David Lenolkulal and the same had not been renewed since the year 2017. They also established from the registrar of persons that David Lenolkulal was the father to the 1st appellant.
52. The witness continued to state that from the government, they requested for the budget and procurement documents and established that Oryx was pre-qualified as a supplier of petroleum products. They also established that procurement of petroleum products was budgeted for. The witness added that they concluded that Moses Kasaine Lenolkulal trading as Oryx Service Station was prequalified in supply of oil, fuel and lubricants to the government and some instances, they won and in other instances they were not successful.
53. Other significant findings were that, between the period from May 2013 to early 2016 before the new Procurement Act came into force, the government used to raise local purchase orders directly to petrol stations among them Oryx without subjecting them to any competition. However, when the new Procurement Act came into force, the government used to issue quotations to prequalified suppliers under the category of petroleum products. The same quotation would be opened, evaluated and professional opinion issued by the head of procurement and awards made by the Chief Officer of the respective departments who is also the accounting officer for the departments. He concluded that the 1st appellant then the Governor of Samburu County trading as Oryx Service Station actually traded with his own government.



54. He added that after calling for documents and going through them, the team established from the bank and payment vouchers reconciliation that the 1st appellant was paid a total sum of Kshs 86,837,894.55 in 242 transactions. They however realised that there could have been some transactions without payment vouchers. They realized that there were 9 cheques amounting to Kshs 2,142,900.00 which was received from the government totaling but they did not get supporting documents for them and this did not constitute what was in the charge sheet.
55. The witness added that Kshs 84,695,996.55 was transacted vide the IFMIS although it was not conclusive as the system did not cover the whole period. This made them go through the bank statements provided from the Central Bank account and having considered what was transacted through cheques and what was transacted through the IFMIS, they established that the 1st appellant received Kshs. 86,837,894.55. He however said that after they verified the supporting payments through payment vouchers whose purpose was the supply of automotive fuel, they established that the benefit to the 1st appellant was Kshs. 84,695,996.55.
56. The witness added that under Section 33 of the repealed Public Procurement and Disposal Act under which the 1st appellant purported to declare a conflict of interest vide his letter dated 5th April 2013 marked MFI 238, a procurement entity was prohibited from entering into contract with its employees, public servants and state officers. He added that Section 43 of the repealed Act addressed issue of conflict of interest by providing for a declaration of public of interest in respect of procurement. He held the opinion that the 1st appellant's omnibus declaration of conflict of interest was not envisaged in the law.
57. It was the witness's further evidence that when they requested for the conflict of interest register, the government gave them a black counter book with the names of the 1st appellant and Oryx. He rubbished the declaration of interest done by the 1st appellant through an entry dated 5-04-2015 since the same was general and not for specific procurement process or items.
58. He confirmed that there was a lease agreement between 1st and 2nd appellants which indicated that 1st appellant was leasing out the business to the 2nd appellant for a consideration of Kshs. 70,000/- per month payable quarterly in advance. He added that their search also recovered an agreement dated 26th November 2013 which was between the 1st and 2nd appellants where the matter of interest was management of Oryx. The 2nd agreement was recovered at the residence of the 2nd respondent based on which the investigators established that the relationship between the two was based on the management of Oryx Service Station.
59. The witness also testified on the process of account opening as narrated by the witnesses from the bank which I do not consider important to reproduce in this judgment safe to add that there was no change of ownership of the account and the 2nd appellant was just an agent of the 1st appellant.
60. He added that between August 2013 to October 2014, the 1st appellant was actively transacting in the Oryx account while the 2nd appellant became active in transacting in the account from December 2013 but the document introducing him was received by the bank on the 22nd October 2015.
61. He added that declaration of interest is not a license for a state officer to trade with their institutions. He stated that if a situation like this arose, the responsibility remained with the awarding officers and the accounting officers. He concluded that the contracts were not lawful because they were against the provisions of the repealed Public Procurement Disposal Act 2003 and the Public Procurement and Assets Disposal Act of 2015. This is where the 3rd appellant who was the Chief Officer Lands,



Housing and Urban Development, executed contracts and who approved payment amounting to Kshs. 9,030,640/- came in as a culprit.

62. From the digital forensic report, the witness said that he was able to see the business relationship between the 1st and 2nd appellants. According to him the 2nd appellant was used to conceal the real identity of the 1st appellant and assisted him to trade with the County.
63. In cross-examination, PW11 stated that he was the one who recorded statements from the witnesses and added that the Public Procurement and Assets Disposal Act obligated the accounting officer to comply with the law and that he had charged those who bore the highest responsibility. He maintained that the contract for the supply of the fuel was tainted but the fuel was supplied.
64. He stated further that the 3rd appellant was not a signatory to the Samburu County Government Accounts but was an approver in the IFMIS payment system. He also stated that by the time the 3rd appellant was appointed, part of the fuel had been supplied. He stated further that they did not quantify the volume of fuel supplied to the government and insisted that the county did not receive value for money.
65. He also confirmed that the 1st appellant had no role in procurement in the government. He added that he established that Oryx received Kshs 86,837,894.55 but the documents given to them showed Kshs 84,695,996.55. He also stated that the investigators did not ascertain the aspect of whether Oryx supplied fuel because to establish that one had to do an audit which was not done. He alleged that the 1st appellant influenced the Chief Officers who were his co-accused to award the contracts for the supply in question pointing out that the evidence of the influence is contained in the letter dated 5-04-2013.
66. On conflict to interest, he alleged that the entire sum of Kshs. 84,695,996.55 went to the 1st appellant. The account at KCB No. 1124724591 was operated at some time by the 1st appellant who was the sole account holder for the period March 2013 to December 2013. He claimed that from mid-December 2013 up to 2019 the 2nd appellant was introduced as an agent to operate the account and signatories changed in 2015. He claimed that the lease between the 1st and 2nd appellants related to the premises but not the business of Oryx. He took position that the case was about conflict of interest and it did not matter whether the supplies were done or not.
67. When the appellants were, together with their co-accused persons placed on their defence, they opted to give sworn statement as follows.

1st appellant

68. He confirmed that he was the elected Governor of the County of Samburu during the period in question and that he was aware of the charges he was facing. He explained that Oryx was a petrol station which was in existence before his election as the Governor for Samburu County having been registered sometimes back in the year 2010. He stated further that the entity was an ongoing concern when he was elected. He admitted that he owned the station alone.
69. He added that in recognition that he had been elected and was now a state officer, he took the first initiative to declare his interest regarding Oryx as per the requirement of statutes and *the Constitution*. He wrote to the County Secretary declaring his interest in Oryx and gave his commitment that any engagement with Oryx station and the government should be done in the light of his declaration of conflict of interest. This was in terms of the letter dated 5th April 2013 which was produced as prosecution's exhibit number 238.



70. In the letter, he indicated that he intended to transfer ownership of Oryx and proceeded to lease it to the 2nd appellant through the agreement dated 1-05-2013 which had been produced by the prosecution as exhibit number 245. After the lease where monthly rent was Kshs 70,000.00, the 2nd appellant took possession and continued to operate the station. He stated that he used to receive rent from the 2nd appellant. He added that Oryx operated one bank account at KCB Maralal branch which was opened in the year 2010 in which he was the sole signatory before the elections in 2013. Being an ongoing concern, the business had capital stock, creditors and debtors. The 1st appellant added that, according to their agreement, the 2nd appellant was to refund the fuel in stock and recover money from debtors and remit to the 1st appellant.
71. He explained that the delay in delivering the letter withdrawing his signature to the bank was meant to secure the capital that was in the stock and the recovery of all the finances. The 1st appellant added that he completely ceded the authority in this account in 2015 and that between 1st May 2013 and 2nd October 2015, he was not involved in any operation issue of Oryx and he never benefited from any funds from the government paid through or otherwise transferred through Oryx.
72. He added that, he did not play any role in the procurement process or payments within the government or in the acquisition of fuel from Oryx to the government. He pointed out that the head of procurement who had been acquitted on no case to answer was the one responsible for the procurement. He emphasized that the prosecution witnesses had confirmed that the procurement was regular and the government got value for its money. He added that there was no allegation that the government did not receive value for money. He sought to rely on the fact that there was no adverse report from the Auditor General and the fact that the prosecution had previously made an application to withdraw the case.
73. In cross-examination by the prosecuting counsel and the advocate for one of the co-accused persons with the leave of the court, the 1st appellant maintained that as at the time he wrote the letter withdrawing his signature, he was not the proprietor of Oryx because there was a lease in force and he was being paid rent. He admitted that the lease was not transfer of the business name. He also admitted that between 2013 to 22nd October 2015 he was operating the Oryx account together with the 2nd appellant. He also denied that he appointed procurement and Chief Officers and maintained that they are competitively recruited by the County Service Board.
74. He added that his letter declaring interest was copied to all the Chief Officers but there was no signature of the Chief Officers who had been charged with him. The letter was delivered to the County Secretary.

2nd appellant

75. He stated that, he went to Samburu in 1997 where he had done several businesses. He stated that the 1st appellant was his landlord in Samburu from 2005 and had no blood relationship with him. He added that in 2013 immediately after the general elections, his landlord who is the 1st appellant became the Governor of Samburu.
76. He stated that after the elections, he approached the 1st appellant and shared interest in leasing Oryx and upon negotiations, they entered into an agreement which was prosecution's exhibit number 245. Under the lease agreement, he was to pay rent of Kshs 70,000/= payable quarterly on or before the 5th day of the month it fell due. He produced a bundle of 10 invoices issued to him by the landlord in respect of the rent which were for the period between 1st May 2013 to 1st December 2015 which he settled through different modes of payment as demanded by the landlord including Mpesa.



77. He stated further that he took over the operation of Oryx immediately after he signed the lease agreement. He added that he did not open a bank account because there was one domiciled in KCB-Maralal which he was introduced to as a signatory through the prosecution's exhibit 302 which is a letter dated 1st May 2013. He claimed that after he was introduced as a signatory, he started to operate the bank account immediately.
78. The 2nd appellant added that the agreement he had entered with the 1st appellant was that he should start immediately, that is 2nd May 2013. He identified prosecution's exhibit number 262 which was a transaction voucher for the Oryx which showed that he was the one who transacted in the voucher dated 9th December 2013. According to him, the justification to continue to operate the existing Oryx account was that there were many issues pending with the 1st appellant. He explained that since it was a running petrol station, there were people who owed the petrol station money and they had to maintain other customers who were being served by the station and they could not therefore close the account.
79. In these arrangements, the 2nd appellant was to receive money owed to the 1st appellant and remit it to him. He was also to refund the money which was in the account as at the time of the lease. The fuel tanks were not dry when he was handed over as the fuel tanks had stock valued at Ksh. 4,818,088/=. According to the 2nd appellant, he was to recover the debts of Kshs 6,704,912/= from the debtors and forward to the 1st appellant. He produced the agreement as an exhibit.
80. The 2nd appellant went on to explain that he had to boost capital into the business. He used the money left in the account by the 1st appellant, the fuel stock, Kshs 2,000,000.00 from sale of his land paid on 9-05-2013 and loans to boost the business. He identified the following transactions from exhibit 303 which was a statement for Oryx bank account;
- a. On 23rd March 2015 – Kshs 1,040,000/=
 - b. On the 1st April 2015 - Kshs 90,000/-
 - c. On 28th April, 2015 - Kshs 87,000/=
 - d. On the 2nd June 2015 - Kshs 783,000 from Super Sacco.
 - e. On 13th June 2015 - Kshs 2,460,000/=
 - f. On 7th July 2015 - Kshs 510, 000/=
 - g. On 12th July 2016 - Kshs 350, 000/-
81. He also identified and produced a statement for Equity account number 0420293968544 which shows that he borrowed a loan of Kshs 1.7 million. He also stated that on 21st September 2018 he was advanced a loan of Kshs 1,500,000/= by Agricultural Finance Corporation. He added that proceeds from Kenya Seeds Company was also applied to the Oryx business because that is the only business he had then. He went on to produce documents showing that he was doing other businesses and was a member of Samburu Traders Sacco.
82. The 2nd appellant stated that one Evana Wangari was assisting her to run the business and that she was the one filling the quotations and vouchers on his behalf. She was also the one supplying documents required by the government. As the manager, she was also managing his other entities. In particular, she was doing banking for Spear Hotel and Samburu Furniture and she was his accounting officer. It's through his employees that the station did business with the County.



83. The 2nd appellant stated further that fuel to the government was supplied at the market rate and the prices were dictated by the Energy Regulatory Commission (ERC). He insisted that the government was his customer and that he was never paid for any amount of fuel not supplied. He claimed that he was the least supplier of fuel in terms of volume. He pointed to the court that the Chief Officer for works testified that he was the lowest ranked supplier of fuel to his department. He alleged that he came to be a supplier of fuel to the government after he was wooed by the procurement officers and other suppliers for reasons that, if he did not engage in the supply of fuel, the other suppliers will not be pre-qualified because the minimum requirement for pre-qualification was three suppliers. By then, there were only 3 petrol stations in Maralal namely, General Energy, BO (Lekos Petrol Station) and Oryx.
84. He pointed out further that of the witnesses who testified for the prosecution, only three touched on him and were in his favour. He also sought to rely on the prosecution's application to withdraw the charges which was later abandoned. He denied being a proxy of the 1st appellant.
85. In cross-examination by the prosecuting counsel, he admitted that he was in business with the government and maintained that he acquired Oryx on the 1st May 2013. He clarified that he did not purchase the business but leased it and admitted that he had not produced a renewal agreement for the lease after three years as per the agreement. He also admitted that the business was still registered in the name of the 1st appellant. He picked out the following transactions;
- a. Kshs 1.5 million debit from Oryx to his Sacco dated 23-05-2015 which was servicing his Sacco account.
 - b. On 22nd June 2015 sum of Ksh.783, 000/- was money from Oryx to super Sacco.
 - c. On 28th April 2015 the sum of Ksh 75,000/- was money from Oryx account to Super Sacco.
 - d. Credit on 13th June 2015 of the sum of Kshs 2,460,000/= from Super Sacco to Oryx.
 - e. On the 13th June 2015 a debit of Kshs 2.6 million to Honourable Grace Muthoni.
 - f. On 7th July 2015 there is a sum of Kshs 570,000/- debited to super Sacco account.
 - g. On 12th July 2016 a sum of Kshs 350, 000/- was a debit to Super Sacco account from Oryx.
86. He also admitted that he did not have in court any document to show that he paid the 1st appellant to settle the invoices but he insisted that he paid.
87. In re-examination, he told the court that the lease was renewed orally until 2019 as the 1st appellant was busy and that he continued to pay rent beyond 2016. He pointed out that PW10 had confirmed that he sent money to the 1st appellant.
88. Evana Wangari Waithaka was the 2nd appellant's witness. She stated that she was a former employee of Oryx and that she had known the 2nd appellant since June 2014. She added that her salary was Kshs 15,000/= and that her duties included receiving and invoicing of LPO's, issuing of fuel with detail orders, keeping records, signing of quotations from their clients, banking cheques and cash and any other duty assigned to her by the 2nd appellant. She identified some cash deposit slips she had done in the course of her duty.

3rd appellant

89. He told the court that he joined the County Service on 23rd January 2015 as the Chief Officer, Land Housing and Urban Development at which time Oryx was already pre-qualified to supply fuel to the government. He added that he was not involved in the pre-qualification exercise. He stated further that



there were other suppliers of fuel and that Oryx was not favoured in the allocation for the supply of fuel against the other merchants. He admitted that he authorized payments in issue and denied interacting with exhibit number 238. He also denied ever receiving any payment from Oryx, the 1st appellant or the 2nd appellant

90. He was cross-examined by the prosecuting counsel and the counsel for the 1st accused where he stated that he was the accounting officer for the department and that he authorized the supply of fuel from Oryx. He maintained that he did not know that the 1st appellant was the sole proprietor of Oryx and that he had never come across the conflict of interest register in the cause of his duty as a Chief Officer. He pointed out that exhibit 238 was written before he was appointed and therefore, he could not have received the letter because he was not in office. During his tenure as a Chief Officer, he did not interact with each and every file in the Department.

Analysis and determination

91. The appeals were argued by way of written submissions. I have read submissions of the 1st and 2nd appellants dated 5th June 2025. Although the said submissions are titled as if they are for the 1st appellant only, I would take it that they are for both because the firm of advocates drawing the same represented both of them and during the appearances and hearing, Mr. Rene appeared for both the 1st and 2nd appellants. I have also read those of the 3rd appellant dated 15th July 2025.
92. The respondent filed its submissions dated 10th July 2025 but in a surprising turn of events, the court registry on 25-08-2025 received through its official email a notice that the respondent had withdrawn its submissions. It was not mentioned in the email whether the respondent was intending to file other submissions or it was leaving the matter to court. The circumstances necessitating the withdrawal were not explained and since I have not seen a formal notice of withdrawal of the submissions, I will not take the email into account as that is not the formal and acceptable way of withdrawing filed pleadings or documents.
93. There are indisputable facts in this matter. It is an agreed fact that the 1st appellant was the Governor of the County Government of Samburu in the period in question. It is also no longer in dispute that the government traded with Oryx which was registered in the name of the 1st appellant. It is also common ground that upon his election in march 2013, the 1st appellant did a letter dated 5-04-2013 in which he declared interest in the entity known as Oryx Service Station. It is also undisputed that the 1st appellant withdrew his signature from the account number 1124724591 held in the name of Oryx Service Station through which the money in question was transacted.
94. The 1st and 2nd appellants have argued grounds 1, 2, 3 and 4 of the petition of appeal together. The said appellants argue that the trial Magistrate failed to consider and apply exculpatory evidence from the prosecution in their favour. One of the exculpatory evidence is said to be an affidavit sworn by the prosecuting counsel, Mr. Wesley Namache on 13th October 2022 in which the counsel exonerated the applicants from culpability. I will take this as a preliminary issue before I go to the strength of the evidence produced by the parties.
95. The affidavit was made by the prosecuting counsel and not the investigating officer. A prosecuting counsel is not competent to swear on matters of facts which should be left for the court's decision. The prosecuting counsel can of course as a delegate of the Office of Director of public Prosecutions on authority under Article 157(9) of *the Constitution* make an application to discontinue criminal proceedings but cannot go to the extent of swearing affidavits on veracity of the evidence collected by the investigating officer. In any event, the intended application to discontinue the proceedings was



never prosecuted. It was abandoned and as such became irrelevant and, in my view, could not be a basis for reference nor could it inform the court's decision.

96. Turning to the strength of the evidence produced by the prosecution, I will start with the conviction on count 3 which was against the 1st appellant. Section 42(3) of ACECA under which the 1st appellant was charged and which has since been repealed by the Conflict of Interest Act No 11 of 2025 provided as follows;

“An agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body is guilty of an offence.”

97. An offence of conflict of interest is committed where a public officer possesses interest in a contract, engagement or business where the public body they work for is a party. As observed above, there is no dispute that the 1st appellant was an agent of the government and that Oryx entered into the identified contracts with the government. The question to be answered here is whether appellant knowingly acquired interest in those contracts.

98. One will be said to acquire or possess interest in a contract where it is shown that they have or are set to benefit or derive some favour from the contract or the contract is executed and performed to their benefit. In that case, the 1st appellant could only be said to have interest in the contract if it was established that he was the ultimate beneficiary of the funds paid from the government to Oryx account.

99. The appellants have argued that as at the time the contracts in question were executed and performed, the 1st appellant had relinquished his interest in Oryx. The Honourable Magistrate while addressing the issue of ownership of the bank account number 1124724591 stated that although the 1st appellant by a letter dated 1-05-2013 introduced the 2nd appellant as an agent to the account there was no change of the account name and that the appellant continued to operate the account between August 2013 to October 2015.

100. It is important to note that the appellants were undergoing trial for acts committed between March 2013 and March 2019 and as such the prosecution in my view had the duty to sieve through and draw charges which were in consonance to and matching the evidence it intended to adduce. It was therefore important that the prosecution showed that the 1st appellant did not lose or surrender its interest in Oryx for the period indicated in the charge sheet. In that regard, the observation by the trial court that the 1st appellant remained actively in operation of the account until 2015 would serve as a break to the chain of events which was necessary to proof of the charge as a whole.

101. If the 1st appellant was said to have benefitted or transacted in the bank account of Oryx up to 2015, that is what he should have been called upon to answer to. However, the charges in the case were for the period between 27th March 2013 and March 2019 and this court shall proceed on the basis that the case against the appellants were in respect of that unbroken period.

102. Having gone through the testimony of the prosecution witnesses especially PW7 and PW8, it appears to me that the trial court's observation on the period of the 1st appellant's activity was correct. There is no evidence that the 1st appellant remained in control of the business between 2015 to 2019. The appellants have explained that the two-year period which the 1st appellant remained as a signatory was meant to help in transitioning the business to the 2nd appellant. There is no evidence showing that the 1st appellant was actively operating the account after the 2nd appellant was introduced as a signatory.



103. It was claimed and the trial court acknowledged that the 2nd appellant started operating account number 1124724591 on 9th December 2013. The court also held in its judgment that it was proved through exhibits 1-231, 233, 234, 357(b), 375a(1)-(20), 375b (1)-(9) and 375 c (1)-(50) that while sitting as Governor, the 1st appellant actively traded with the government. These exhibits were payment vouchers, list of pre-qualified suppliers, IFMIs pre-qualified supplier's details, quotations registers and LPOS. These documents in my analysis do not have personal trails of the 1st appellant other than the fact that the Oryx traded with the government.
104. In my considered view, the mere fact that a business entity is registered in the name of a person does not necessarily give that person full control of the entity. Control may be reduced, affected, limited or diminished by assignments or leases. In this case, the 1st and 2nd appellants showed that there existed a lease between them in respect of the business. Actually, the lease agreements were produced by the prosecution having been recovered from the said appellants' residences and places of work which means that they in reality existed before the search which was conducted by the EACC. They could not therefore be a creation for the purposes of this case by either of the parties.
105. Prosecution exhibit 302 the 1st appellant ceded control and rights to operate account number 1124724591 for Oryx when he instructed the bank to in the words of the letter 'completely remove me from being a signatory in the above account' which instructions were confirmed to have been executed. This was on 22-10-20215 although the letter was dated 1-05-2013. It is a matter of public notoriety that such an action could only be reversed by the 2nd appellant instructing the bank to reinstate the 1st appellant as a signatory which was never done. In the circumstances, any transaction in the said account from that date onwards could only be the responsibility of the 2nd appellant. It is notable that the charges herein relate to period beyond this date up to 25th March 2019.
106. 1st and the 2nd appellants. The prosecution maintains that the 2nd appellant was just but a proxy of the 1st appellant while the appellants hold the ground that, the relationship was nothing more than landlord/tenant arrangements. The court's finding on these two divergent positions will dictate the failure or success of the charge of conflict of interest.
107. The charge of conflict of interest is leveraged on the alleged relationship between the 1
108. I have gone through the lease agreement between the 1st and 2nd appellants dated 1-05-2013. That agreement in my considered judgment ceded control of Oryx to the 2nd appellant. PW1 and PW2 who were the government employees testified that the 1st appellant never made any follow ups or interfered or influenced the procurement and payment processes. The 2nd appellant narrated that he had taken loans and sold land to finance the business after the lease. He produced his bank statements and documents showing that he sold his land and took loans from banks and Saccos where he was a member to finance the business. Such exercise and activities cannot be done by a representative but a person who takes personal risks for the business which I doubt a proxy would do on behalf of their principal.
109. The Honourable Magistrate held that there was a close relationship between the 1st and the 2nd appellants which he traced in exhibit 255 which was minutes of meeting held on 28-01-2016 in which the 2nd appellant is indicated as landlord's representative while the 1st appellant is indicated as the landlord. The meeting was for negotiations with Kenya Revenue Authority for in respect of space in an unidentified plot. I do not think that mere presence of the 2nd appellant in that meeting which had nothing to do with the transaction in question made him a proxy of the 1st appellant in respect of the transactions which are in question in this matter. It is okay for a landlord to be close with their tenants



to the level of such representation but that does not make them partners in business. There is evidence that the 2nd appellant paid rent for the leased business which in my view is lawful and legal.

110. The 2nd appellant produced invoices issued by the 1st appellant being demands for rent. The prosecution produced a report showing that the 2nd appellant sent some money to the 1st appellant which the appellants insisted were towards payment of the agreed rent. The 1st and 2nd appellants also explained that even after the agreement, the 2nd appellant would collect debts owed to the 1st appellant before the agreement and remit the same to the 1st appellant. The prosecution did not go beyond the report to establish that the moneys seen being sent to the 1st appellant by the 2nd appellant were for transactions other than the declared rent and refund for the money the 2nd appellant collected from the 1st appellant's debtors.
111. Just as the Honourable Magistrate stated, the main contention by the parties was on the ownership of Oryx after the 1st appellant was elected the Governor of Samburu County. The ownership in terms of registration is not in issue. What is in issue is the control, benefits and the operation of the accounts. The success or failure of the case was answer to the question; who was to benefit from the income from the business or at least from the money paid by the government in respect of the transaction in question? Whereas the registration of the business remained to 1st appellant one must ask whether the fruits and accruals from the business in reality belonged or went to the 1st appellant.
112. The 2nd appellant's witness one Evana Wangari Waithaka told the court that she was employed by him at monthly salary of Kshs 15,000.00 with duties of receiving LPOs, invoicing for deliveries, issuing fuel orders, keeping records, signing quotations, banking cheques and cash and other duties assigned to her by the 2nd appellant. She had no relationship or interactions with the 1st appellant. The 1st appellant was not shown to have participated in any of the procurements or influenced award of the tenders.
113. The Honourable Magistrate was of the view that the only way of divesting his interest from Oryx was for the 1st appellant to execute an instrument of transfer. He did not appreciate that ownership rights can be assigned by way of leasing out. The word lease means surrendering of the proprietorship rights for a specified period or until the term provided in the lease is extinguished. The lease can be terminated by either effluxion of time, operation of the law or termination by the parties. The lessor in this matter, the 1st appellant did not terminate the lease or recover control and operation of the business neither can I see any conduct of the parties that could be said to have given back control of the business or its bank accounts to the 1st appellant.
114. Prosecution's exhibit 245 was the lease agreement between the 1st and 2nd appellant dated 1st May 2013. The terms of the lease in my opinion are clear that the 1st appellant ceded control and benefit of Oryx to the 2nd appellant and not the premises only as the prosecution PW11 seemed to put it. In particular clause 1 of the agreement read;

“The Landlord agrees to let and the Tenants agrees to take on Lease ALL THAT petrol station by the brand name ORYX SERVICE STATION situate on Plot No. 5 (hereinafter called ‘the Premises’) for a renewable term of three years from the 1st day of May Two Thousand and Thirteen (hereinafter called ‘the term’).

115. The wording of the above clause leaves no doubt that the lease was not for the plot only but the business inclusive of the brand name. If it were for the plot only, there would not have been need to include the brand name in the agreement. The fuel supplied to the government came from this business only which the 1st appellant had given out. If it were from business located elsewhere, run and operated by



- the 1st appellant or his proved agents, one would be justified to say that the 1st appellant was trading with the government.
116. There is no clause in the agreement that shows that the 1st and 2nd appellants were to share any profits from the said business. The purport of the agreement is obviously that all the business was to be ran for and by the 2nd appellant with the 1st appellant getting a fixed rent whether or not the 2nd appellant traded.
117. A proxy is a person who by appointment either formally or informally represents another in an identified position for specific tasks and has no powers to act outside instructions of the appointing authority. The said holding by the Honorable Magistrate, with respect, went against the grain of his earlier finding that 1st appellant never participated and there was no trail of him in all documents involved in the transactions with the government. The Honourable Magistrate had added that there was no visible presence of the 1st appellant in any of the transactions. If indeed there was no such presence or visibility which I agree with, there should not have been basis for the trial court to hold that there was agent or proxy relationship between the 1st appellant and the 2nd appellant.
118. In his finding on the charge of conflict of interest, the trial court made reference to Article 73(2) (c)(iii) of *the Constitution*. He also made reference to *Leadership and Integrity Act* which makes it mandatory for public entities to open and maintain a register of conflict of interest which all state officers and public officers are to register their particulars and their registrable interests. He then went on to dismiss the register which had purportedly been kept by the government saying that it was a mockery to the law because it lacked full details and was not in the form required under the *Leadership and Integrity Act* and that the declaration should be for each specific procurement.
119. The letter dated 5-04-2013 in which the 1st appellant declared conflict of interest read as follows;
- “Following my election as the Governor of Samburu County and pursuant to Section 43 of the Public Procurement and Disposal Act No. 3 of 2005, I wish to declare my interest with Oryx Service Station situated in Maralal. As a consequence of this, I also plan to transfer the proprietorship of Oryx Service Station so as to prevent any issues of conflict of interest that may arise therein.
120. As I declare, I wish to assert that;
- a. I shall not direct or take part of any procurement of any of the petroleum, products in Oryx Service Station; and
 - b. I shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract.
121. As a result, kindly take the necessary action in regard to my declaration of conflict of interest with Oryx Service Station.’
122. The letter is shown to have been received by the County Secretary on 9-04-2013 who was in my view supposed to take the necessary action. In my assessment the 1st appellant had sufficiently declared possible conflict of interest and it was the duty of those responsible for entering the information in the conflict of interest register to make appropriate entries. Section 43 of the then Procurement and Disposal Act 2005 provided as follows;
- “An employee or agent of the procuring entity or a member of a board or committee of the procuring entity who has a conflict of interest with respect to a procurement-



- a. shall not take part in the procurement proceedings; and
- b. shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract.’

123. The evidence on record shows that the 1st appellant did not violate the above Section since the prosecution witnesses were emphatic that he did not take part in the procurement proceedings or take part in any decision relating to the procurement of the products in issue. It was not established that the 1st appellant was responsible for entering the particulars as required in the register of conflict of interest or preparing the register. The person required under Form E made under Regulation 12(1) of the Leadership and Integrity Regulations to sign the register is the person making the entry. The register should by virtue of Regulation 12(2) be in custody of the accounting officer who in my view is the County Secretary.

124. I have looked at the register in comparison to the statutory Form E of the Schedule to the Regulations and as far as I can discern, the only missing columns are those for the date of entry and update of the registered interest. I however note that the column for signature of the receiving officer has the date against the signature which in my view denotes the date of the entry. In the circumstances, it is my finding that the register substantially complies with the law and the Honourable Magistrate erred when he termed it as a mockery of the law.

125. Section 16(3) and (4) of the *Leadership and Integrity Act* which was operative then before it was repealed by the Conflict of Interest Act No. 11 of 2025 provided as follows;

- (3) A State officer or a public officer whose personal interests conflict with their official duties shall declare the personal interests to the public entity or the Commission.
- (4) The Commission or a public entity may give direction on the appropriate action to be taken by the State officer or public officer to avoid the conflict of interest and the State officer or public officer shall
 - (a) comply with the directions; and
 - (b) refrain from participating in any deliberations with respect to the matter.

126. There seems to have been no communication to the 1st appellant after the letter reached the County Secretary’s office. The law as stated above was that the state officer or public officer concerned was required to comply with any directions from the Commission (the EACC) or the entity. Neither the Commission nor the office of the County Secretary gave any directions which the 1st appellant could be accused of having failed to comply with neither is there evidence that the 1st appellant participated in any deliberations with respect to any of the procurements. This was the law then and a court of law cannot import more to the law than what was expressly provided by the Act however tempting or suspicious it may be neither could the culpability of the 1st appellant be determined using the current laws. Purposive interpretation of Article 50(2)(n)(i) of *the Constitution* would dictate that an accused person can only be tried or judged using lenses of the law as it was at the time of the alleged offence. The Article provides that;

“Every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya’



127. I find guidance on the above in *Macharia & another v Kenya Commercial Bank Limited & 2 others* (2012) KESC 8 (KLR), in which the Supreme Court of Kenya held that;

“Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50 (2) (n) of *the Constitution*. That article provides that:

Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law”.

128. The trial court was justified to infer the relationship between the 1st and 2nd appellants as that of agent and principal but it is trite law that no amount of suspicion can lead to a conviction. The inference of the closeness cannot without cogent evidence be basis of conviction. In drawing the inference, the trial court rejected the 1st and 2nd appellants’ defence of their relationship being that of landlord and tenant and held that the 2nd appellant was a proxy of the 1st appellant. In *Sawe v Republic* (2003) KECA 182 (KLR), the Court of Appeal held that;

“The burden of proving facts which justified the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence was on the prosecution. That burden always remained with the prosecution and never shifted to the accused.....

Suspicion, however strong, could not provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.’

129. By rejecting the defence as it did, the trial court was in essence saying that the two appellants had not proved their defence yet the position in law is that an accused person has no duty to prove his innocence or fill any gap for the prosecution. All an accused person is required to do to deserve an acquittal is to create a reasonable doubt. The burden of proof which must be beyond any reasonable doubt is always and throughout the trial on the prosecution. Any defence that raises a reasonable doubt as to the culpability of the accused person must be interpreted in favour of an acquittal. In that regard, it is my finding that the element of control, actual ownership and management of Oryx was not proved beyond any reasonable doubt. I therefore find that the count for conflict of interest was not been proved beyond reasonable doubt.

130. The import of what I have stated above is not to say that public officers are allowed to trade with their employers. The point I have made is that the prosecution in this particular case did not connect the 1st appellant to the trading with the government. There was no proof that the 1st appellant shared profits with the 2nd appellant or the 2nd appellant was drawing salary from Oryx as an employee or proxy of the 1st appellant.

131. I now turn to the charge of abuse of office against the 3rd appellant. The 3rd appellant who was the Chief Officer, Lands Housing and Urban Development in the government. He joined the government when Oryx was already supplying fuel. His role as far as the charge is concerned was his approval for payment of Kshs 9,030,640.00 to the 1st appellant. It is clear from the evidence of the prosecution that the Chief Officers were not involved in the procurement process. There was no evidence at all to show that the 2nd appellant knew how the procurement process was carried out.

132. Again, several witnesses including the investigating officer repeatedly stated that the procurement was regular and followed the right channels. This in my view weakened the prosecution’s case against the 3rd appellant. The prosecution did not establish any special relationship between the 2nd and 3rd appellants other than that the 2nd appellant was supplier to the government in which the 3rd appellant was an



employee. It was actually not even shown that the 3rd appellant knew the 2nd appellant at a personal level.

133. The procurement documents were not produced. The only documents produced close to procurement were the list of pre-qualified suppliers and register of suppliers and register of quotations. The investigating officer is on record saying that they were not interested in the procurement process and they that were not concerned with knowing whether the government lost money or not. He emphasized that their focus and interest was in the suspected conflict of interest.
134. If that was the case, it would be my opinion that the 3rd appellant was a wrong target. A charge of abuse of office applies where a public officer uses their position in the office to unlawfully, illegally or unprocedurally confer or influence benefits to themselves or other persons. In this case, having found that there was no proof of conflict interest as I have done above, the charge against the 3rd appellant has to follow the same route.
135. The final issue is that involving the charge of unlawful acquisition of public property. According to the charge sheet, the property alleged to have been unlawfully acquired is the Kshs 84,695,996.55 paid to Oryx. This was not money paid for goods or services not supplied or work not done. According to the respondent, the unlawful part of this acquisition was the alleged conflict of interest or abuse of office. I have already held that the offences of conflict of interest and abuse of office were not sufficiently proved. Having done so, the charge of unlawful acquisition of government property has no legs to stand on.
136. The trial court sentenced the 1st and 2nd appellants to a fine of Kshs 84,695,996.55 each under Section 48(2) of ACECA being double the money paid to Oryx divided between the two then multiplied by two. Section 48 of ACECA provides that;
1. A person convicted of an offence under this Part shall be liable to-
 - a. a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and
 - b. an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.
 2. The mandatory fine referred to in subsection (1)(b) shall be determined as follows-
 - a. the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);
 - b. if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.
137. In my interpretation of Section 48(1), I take it that there must be a quantifiable benefit to the accused or loss incurred by another person. That must arise before Section 48(2) kicks in. In the case before the court, there was no quantifiable loss to any person including the government. The court looked at what it perceived to be a benefit to the 1st and 2nd appellants. It is my view and holding that where a public entity has been supplied with the procured services or goods, the payments made pursuant to that contract cannot fall under Section 48(1)(b) of ACECA unless there is proof that the entity was disadvantaged or incurred a loss.
138. There has been no claim and indeed it was confirmed by the witnesses that the fuel paid for was delivered. There were no audit questions on the amount or prices of the fuel supplied and it is on record



that there were no procurement irregularities reported, discovered or revealed during the investigations and actually the investigating officer is on record saying that their issue in the matter was not the process of procurement irregularities but conflict of interest.

139. The trial court in reaching the fine imposed on the 1st and 2nd appellant relied on the element of benefit to the said appellants. A benefit is an advantage or profit gained from something or some acts or enterprise. The 1st and 2nd appellants cannot be said to have benefited from the entire sum of Kshs 84,695,996.55 yet there must have been attendant costs and expenses associated with delivery and supply of the said fuel. I do not think that this is the kind of benefit contemplated under the Section.
140. One would also wonder how the trial court reached a decision that the 1st and 2nd appellants benefitted in equal measure from the said amount. The investigating officer is recorded stating that all the money quoted in the charge sheet went to the 1st appellant. In my view, it was a wrong approach for the court to make assumption that the two shared the benefits, if at all, equally despite having found that the 2nd appellant was a proxy of the 1st appellant. The benefit from the transactions could only be the profits derived from the business with the government.
141. In conclusion and based on what I have discussed above, this court finds that the appeals herein are merited and are hereby allowed. The convictions and sentences meted against the appellants in Milimani Chief Magistrate's Anti-Corruption case number 3 of 2019 are set aside and consequently the appellants Moses Kasaine Lenonkulal, Hesbon Jack Wachira Ndathi and Bernard Ltarasi Lesurmat are hereby acquitted of the offences they were charged with in the said case.
142. The aforesaid appellants are set free and any fines paid by any of them shall be refunded forthwith. Consequently, the order made under Section 64 of the *Anti-Corruption and Economic Crimes Act* disqualifying the appellants from being elected or appointed to any public office for a period of ten (10) years is also set aside.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of;

Mr. Isaac Renee for the 1st and 2nd appellants;

Mr. Lesaigor/Lingale for the 3rd appellant; and

Mr. Mong'are for the respondent.

