REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAKURU

MCAC NO. E001 OF 2024

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

ESTHER MUTHONI WAMUIYA.....1ST ACCUSED

REGINA WAIRIMU WACIRA.....2ND ACCUSED

VINCENT MUIRURI WAMBUI ..... 3RD ACCUSED

SOPHIA WAIRIMU KARANJA.....4TH ACCUSED

SHADRACK KANYUNGO NDIRANGU.....5TH ACCUSED

TIMOTHY NGUNJIRI KIRAGU.....6TH ACCUSED

SIMON MWANGI NG'ANG'A.....7TH ACCUSED

JUDGMENT.

1.0 INTRODUCTION

1. Corruption in public service institutions is a serious phenomenon that is prevalent in our society and manifests itself in various forms. It has often been said and written that corruption undermines economic development, weakens democracy and the rule of law, disrupts social order and destroys public trust in governance, thus enabling organized crime, terrorism and other threats to human security to flourish. In this case there was an attempt to fraudulently defraud the County Government of Nyandarua of Kshs.

12,998,000 through irregular payments to suppliers for services that had not been rendered.

1.1 BACKGROUND

2. The County Government of Nyandarua (hereinafter referred to as the County) is one of the County Governments in Kenya established under Article 176 of the Constitution of Kenya, 2010. In the course of the Financial Year (FY) 2017/2018, a new administration took over led by PW6, **Francis Thuita Kimemia**, as the Governor. While campaigning for election as the governor, PW6 had proposed in his manifesto, to hold an investors' conference in the county, if elected, with a view to marketing the county so as to attract potential investors and tourists to build the economy of the county.
3. Soon after taking charge of the affairs of the County, a paper prepared by the 1st Accused, **Esther Muthoni**, the then County Executive Committee (CECM) in charge of Industrialization, Trade and Co-operative Development (hereinafter sometimes simply referred to as the Department of Trade),[1]

[1]Produced herein as PEXH. No. 23

conceptualising the investors conference was tabled in the cabinet, debated and approved. The conference was to be held in the course of the financial year and a committee of the whole cabinet was formed to plan for the same and report to the cabinet.

4. In the same department, the 2nd Accused, **Regina Wairimu Wacira**, was an A-I-E (Authority to Incur Expenditure) holder and the 1st Approver of payments alongside the Chief Offer. She was also the accountant in charge of the department and also acted as member of the Tender Opening and Evaluation Committees. Her designation was that of a Chief Co-operatives Auditor[2].
5. The 3rd Accused, **Vincent Muiruri Wambui**, was the Supply Chain Management Service Officer and head of procurement at the department[3], while, the 4th Accused, **Sophia Wairimu Karanja**, was his assistant[4]. The former was also a member of the Tender Opening Committee, while the later also served as a member of the Tender Opening and Evaluation committees. The 5th Accused, **Shadrack Kanyungo Ndirangu**, was a

[2] Her appointment letter was produced as PEXH. No. 95B
[3] His appointment letter was produced as PEXH. No. 95C
[4] Her appointment letter was produces as PEXH. No. 95D

Weight and Measures officer within the department[5]. He also served in the Tender Evaluation Committee of the department.

6. The 6th Accused, **Timothy Ngunjiri Kiragu**, was a secondee from the National Treasury as a member of the County support teams for IFMIS Plan to Budget and E-procurement Processes. He was therefore serving as an IFMIS Accountant at the time[6]. The 7th Accused, **Simon Mwangi Ng'ang'a**, was a CECM for the Department of Water, Environment, Tourism and Natural Resources[7].
7. As the lead department, the Department of Industrialisation, Trade and Co-operatives, had planned to procure various services to facilitate hosting of the conference in that Financial Year. Purchase requisitions were therefore prepared and authorized in 6 different categories to facilitate the preparation and floatation of Request for Quotation (RFQ) and later the bidders were invited to quote for the services.
8. The conference was however not held. However, by the end of the Financial Year, the suppliers were paid. The 2nd Accused person approved the payments. On discovery of the erroneous

[5] His appointment letter was produced as PEXH. No 95E
[6] His secondment letter was produced as PEXH. No 95F
[7] His appointment letter was produced as PEXH. No 95G

payments to the suppliers for services that were not rendered, the CECM for Finance and Economic Development, PW4, **Mary Wangui Mugwanja**, directed cancellations of the said payments and the same were refunded back from the payees' accounts as follows: -

No	**Item Description**	**Bidder**	**Date Returned**	**Bank Details**
1	Provision of Tents and Seats	Grey Apple Limited	20/07/2018	National Industrial Credit Bank, Ongata Rongai Branch. Account No: 1004763501
2	Provision of Audio-Visual Equipment	Steady Links Solution Ltd	20/07/2018	Family Bank, Kenyatta Avenue Branch. Account No. 012000022623
3	Provision of Event Management	Smart People Africa Ltd	19/07/2018	Bank of Africa Kenya Ltd, Ongata Rongai Branch.

	Services			Account No. 09214870005
4	Provision of TVC's, Videography and Live Streaming	Hans Camera Services Ltd	19/07/2018	Bank of Africa Kenya Ltd, Kenyatta Avenue Branch. Account No. 05421910007
5	Provision of Entertainment, Security and Fast Response	Enrich Associates Ltd	18/07/2018	Co-operative Bank of Kenya, Dagorreti Branch. Account No. 01148621611400
6	Provision of Printing Materials, Signage and Stage Concept	Sunlink Engineering	23/07/2018	National Industrial Credit Bank, Sameer Park Branch. Account No. 1005499492

9. Despite, the reversals, a Petition was presented by a member of the public to the County Assembly for the removal of PW4

and the 1st Accused as the respective CECMs pursuant to the provisions of Section 40 (2) of the County Governments Act; for among other grounds, illegal payments of Kshs. 13 million to the 6 suppliers hereinabove for various supplies for the alleged investments conference that was not held[8]. A special committee of the Assembly was formed to inquire into the petition. It tabled its report to the Assembly on 24/08/2018.[9]

10. The County Assembly however recommended that the illegalities and malpractices be communicated to the Directorate of Criminal Investigations (DCI) and the Ethics and Anti-Corruption Commission (EACC) for investigations. Pursuant to the recommendations, the County reported the matter to the EACC vide a letter dated 31/08/2018, wherein it informed the commission about the irregular payments and the recommendations[10].

11. Meanwhile, within the County Executive, PW6, the then Governor, had also appointed a task force chaired by his deputy, to investigate the irregular payments. The task force could not however continue with its work because all the

[8] A copy of the Petition was produced herein as PEXH. No. 10
[9] The Report was produced as PEXH. No 11
[10] The letter from the County to EACC was produced as PEXH. No 28

relevant documents had been sent to the investigating authorities, the EACC and the DCI.

1.2 THE CHARGES

12. The EACC regional office at Nyeri commenced investigations on 20/11/2018. PW22, **Esther Wabunga**, an investigator working with EACC, conducted the investigations and ultimately charged the accused persons herein with various counts of offences as follows:

Count I: Attempt to Commit an Offence of Economic Crime contrary to Section 47A(1) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003 (Hereinafter also abbreviated as the ACECA) the particulars of which allege that the accused parsons herein between May, 2018 and June, 2018, within Nyandarua County in the Republic of Kenya, being the CECM, Accountant, Head of Procurement, Supply Chain Management Assistant and Weights and Measures Officer in the Department of Industrialization, Trade and Cooperatives, IFMIS Accountant and the CECM Department of Water,

Environment, Tourism and Natural Resources respectively at Nyandarua County Government, attempted to commit an Economic crime to wit, making fraudulent payments for services not rendered to 6 suppliers in regard to a purported Investment Conference which was never held.

Count II: Conspiracy to Commit an Offence of Economic Crime contrary to Section 47A(3) as read with Section 48(1) of ACECA: The particulars are that between 25/06/2018 and 26/06/2018, within Nyandarua County in the Republic of Kenya, being CECM, Accountant, Head of Procurement, Supply Chain Management Assistant and Weights and Measures Officer in the Department of Industrialization, Trade and Cooperatives, IFMIS Accountant and the CECM Department of Water, Environment, Tourism and Natural Resources respectively at Nyandarua County Government, conspired with one another to commit an Economic crime to wit, making fraudulent payments for services not rendered to 6 suppliers in regard to a purported Investment Conference which was never held.

Count III: Knowingly Making a False Statement to One's Principal Contrary to Section 41(2) as read with Section 48 (1)(a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 where it is alleged that the 1st Accused, on or about 06th July 2018, within Nyandarua County in the Republic of Kenya, being the CECM in the Department of Industrialisation, Trade and Cooperatives at Nyandarua County Government, made a false document to Nyandarua County Government that the services towards the Investors Conference had been satisfactorily offered, a statement which she knew to be false.

Count IV: Abuse of Office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, where the particulars allege that the 1st Accused on or about 06th July 2018, within Nyandarua County in the Republic of Kenya, being the CECM in the Department of Industrialisation, Trade and Cooperatives at Nyandarua County Government, used her office to improperly confer a benefit to 6 suppliers by

signing a commitment form confirming that the services in regard to the investors conference had been satisfactorily offered yet the services had not been offered.

Count V: Wilfully Failing to Comply with the Applicable Procedures and Guidelines Relating to Incurring of Expenditure Contrary to Section 45(2)(b) as read with Section 48(1)(a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 against the 2nd Accused, the particulars of which are that between 25th June 2018 and 10th July 2018, within Nyandarua County in the Republic of Kenya, being an Accountant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, she wilfully failed to comply with the law relating to incurring of expenditures, to wit, **Regulation No 98(2) of Public Finance Management Regulation of 2015** by approving payments of Kshs 12,998,000 for services for an Investors' Conference that did not take place.

Count VI: Fraudulently Making Payment from Public Revenue contrary to section 45(2)(a) as read with

section 48(1)(a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, against the 2nd Accused, alleging that between 25/06/2018 and 10/07/2018, within Nyandarua County in the Republic of Kenya, being an Accountant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, being person concerned with the administration and management of public property/ revenue, she fraudulently made payments of Kshs 12,998,000 from public revenue to 6 suppliers for services not rendered.

Count VII: Abuse of Office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, against the 2nd Accused, alleging that between 25/06/2018 and 10/07/2018, within Nyandarua County in the Republic of Kenya, being an Accountant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, she used her office to improperly confer a benefit to 6 suppliers by approving payments of Kshs 12,998,000 to the said suppliers

for services of an Investors' Conference that did not take place.

Count VIII: Wilfully Failing to comply with the Applicable Procedures and Guidelines Relating to Procurement contrary to Section 45(2)(b) as read with Section 48(1)(a) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 against the 2nd, 4th and 5th Accused whose particulars allege that between 24th May 2018 and 25th May 2018, within Nyandarua County in the Republic of Kenya, being the Tender Evaluation Committee members at Nyandarua County Government, jointly wilfully failed to comply with the law relating to procurement, to wit, **Section 80(2) of the Public Procurement and Asset Disposal Act, 2015** (hereinafter abbreviated as PPPADA) by recommending award of tenders for the Investors' Conference without following the criteria provided in the Request for Quotation.

Count IX: Fraudulent Practice in a Procurement Process contrary to Section 66(1) as read with Section

176 (i) of the PPADA where the 3rd Accused has been charged, with allegations that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, being the head of procurement in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, he committed a fraudulent act to wit fraudulent practice in procurement process by making false documents namely Request for Quotation purporting to be the genuine Requests for Quotation filled by the suppliers.

Count X: Fraudulent Practice in a Procurement Process contrary to Section 66(1) as read with Section 176 (i) of the PPADA where the 4th Accused has been charged, with allegations that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, as a Supply Chain Management Assistant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, she committed a fraudulent act to wit fraudulent practice in procurement process by making false documents namely Request for Quotation for

Shatress General Merchants Limited purporting to be the genuine Requests for Quotation filled by the said supplier.

Count XI: Fraudulent Practice in a Procurement Process contrary to Section 66(1) as read with Section 176 (i) of the PPADA where the 5th Accused has been charged, with allegations that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, being a Weights and Measures Officer, in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, he committed a fraudulent act to wit fraudulent practice in procurement process by making false documents namely Request for Quotation for Beazzer Supplier purporting to be the genuine Requests for Quotation filled by the said supplier.

Count XII: Making a Document Without Authority contrary to Section 357(a) of the Penal Code whose particulars alleged that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, the 3rd Accused, being the Head of Procurement in

the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, with intent to deceive, without lawful authority or excuse, made a false document namely Request for Quotation purporting to be the genuine Requests for Quotation filled by the suppliers.

Count XIII: Making a Document Without Authority contrary to Section 357(a) of the Penal Code whose particulars alleged that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, the 4th Accused, being a Supply Chain Management Assistant in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, with intent to deceive, without lawful authority or excuse, made a false document namely Request for Quotation for Shatress General Merchants Limited purporting to be the genuine Requests for Quotation filled by the supplier.

Count XIV: Making a Document Without Authority contrary to Section 357(a) of the Penal Code whose particulars alleged that between 17/05/2018 and

24/05/2018, within Nyandarua County in the Republic of Kenya, the 5th Accused, being a Weights and Measures Officer, in the Department of Industrialisation, Trade and Co-operatives at Nyandarua County Government, with intent to deceive, without lawful authority or excuse, made a false document namely Request for Quotation for Beazzer Suppliers purporting to be the genuine Requests for Quotation filled by the supplier.

Count XV: Fraudulent Practice in a Procurement Process contrary to Section 66(1) as read with Section 176 (i) of the PPADA where the 7th Accused has been charged, with allegations that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, being the CECM for the Department of Environment, Tourism and Natural Resources, he committed a fraudulent act to wit fraudulent practice in procurement process by making false documents namely Request for Quotation purporting to be the genuine Requests for Quotation filled by the suppliers.

Count XVI: Making a Document Without Authority contrary to Section 357(a) of the Penal Code whose particulars alleged that between 17/05/2018 and 24/05/2018, within Nyandarua County in the Republic of Kenya, the 7th Accused, being the CECM for the Department of Environment, Tourism and Natural Resources, at Nyandarua County Government, with intent to deceive, without lawful authority or excuse, made a false document namely Request for Quotation purporting to be the genuine Requests for Quotation filled by the suppliers.

2.0 PROSECUTION'S CASE

13. The prosecution called 22 witnesses, and produced several documentary exhibits. The prosecution's case and evidence can be summarised as follows. During the Financial Year (FY) 2017/18, the County had vide an advertisement in Standard Newspaper of 18/12/2017, advertised for prequalification of suppliers[11]. The applicants were duly evaluated and the County came up with a list of prequalified suppliers for the FY[12]. The 6

[11] The advert was produced as PEXH. No. 22
[12] The List was produced as PEXH. No. 20

suppliers herein were prequalified for the various categories which they applied for and for which the impugned payments herein were made. The County had allocated a budget to the tune of Kshs. 20 million for the conference in the Department of Trade via a Supplementary Budget in that FY[13]. The investors' conference was an idea that came with the new administration and was not therefore part of the procurement plan for the department in that FY. The plan was therefore duly amended to include it with an allocation of Kshs. 13 million[14].

14. PEXH. No 23, the Cabinet Paper from the Department on the progress of the conference was tabled in a cabinet meeting or an Executive Committee Meeting for the County on 03/05/2018 by the 1st Accused[15]. It was then agreed that a Steering Committee be formed to take charge of the planning and execution of the Conference. During the meetings of the committee, tentative dates were set to be on 24th and 25th May 2018. However, in a meeting held on 08/05/2018, the dates were settled for 15th to 17th August 2018[16].

[13] The Itemized Budget Estimates were produced as PEXH. No. 9
[14] The plan was produced as PEXH. No 21.
[15] The minutes for the Cabinet were produced as PEXH. No. 24
[16] The minutes for the committee were produced as PEXH. No. 18.

15. The Department raised 6 requisitions for the conference as per the items serialized in the first column of the table hereinabove. They were produced herein as PEXH. Nos 1A – F. According to the document examiner, PW21, **Jacob Oduor**, the requisitions were raised by the 4th accused person herein, and approved by the Chief Officer. That the Chief Officer had appointed the tender opening and evaluation committees vide the **letters** which were produced as **PEXH. Nos 96A** and **96B** respectively. The 2nd, 3rd and 4th accused were appointed for the tender opening; while the 2nd, 3rd and 4th accused were part of the membership of the evaluation, committees.

16. 24 Request for Quotations (RFQ) had been floated to 24 suppliers and the quotations were opened and evaluated on 24th and 25th May 2018. The 6 suppliers above were successful[17], while 24 others were unsuccessful[18]. After opening the quotations, the Opening Committee prepared the opening register with the opening minutes as required[19], listing the quotations as they were being opened in the quotation

[17] Quotations for the 6 suppliers produced as PEXH. No 2A - F
[18] Quotations for unsuccessful suppliers produced as PEXH. No 2G - Z
[19] Quotation Opening Minutes produced as PEXH. Nos 3

opening register[20]. The quotations were then evaluated using the criteria provided for and the 6 suppliers herein emerged successful[21]. It is the prosecution's evidence, mainly from the document examiner, PW21, that the minutes of the Evaluation Committee were signed by the 2nd, 4th and 5th Accused persons herein. A fourth member of the committee did not sign. After the evaluation, the report was handed over to the head of procurement for a professional opinion.

17. PW1, **Phillip King'ori**, the County Director of Supply Chain Management at the time, confirmed that the 6 files for the supplies herein amounting to Kshs. 12 to 13 million were brought to his desk. He went through the files and made a dissenting professional opinion to the accounting officer of the department, who was the chief officer. He based his dissent on the fact that it was against the PPADA to split the contract since the amount involved was above Kshs 12 million. That they were required, in that case, to do open tendering for the whole conference. He therefore advised that they be retendered. His **professional opinion** dated 28/05/2018, was

[20] Quotation Opening Registers produced as PEXH. Nos 4A - F
[21] The minutes of the Evaluation Committee produced as PEXH. Nos. 5A – F.

produced as **PEXH. No. 6**. That after doing the professional opinion, he consulted the procurement officer in charge of the department, the 3rd Accused, who also concurred with his opinion. He was therefore surprised when later on the 3rd accused informed him that the files had been paid. He went through the files again and found a letter from the Chief Officer, the accounting office, disagreeing with his dissenting opinion. The **letter** was produced as **PEXH. No. 7**. He confirmed that he never saw an investors' conference being conducted in the county. He knew all the accused persons herein and confirmed that they participated in the tendering and payment processes He stated that the 2nd accused person was the accountant at the department.

18. In cross-examination, he confirmed that it was the responsibility of the accounting officer, who is the departmental Chief Officer, to appoint an Inspection and Acceptance committee. That no such committee was appointed herein. That members of the committee would be subordinate to the accounting officer. That this therefore mean that the 1st accused who was the CECM could not be appointed as a

member. He also confirmed that CECMs do not participate in any of the procurement committees, whether for opening or evaluation of tenders. He also confirmed that the professional opinion was not copied to the CECM. That the buck stopped 100% with the Chief Officer. That the junior officers such as the 2nd accused had to comply with the directions of the Chief Officer. He further agreed that the 3rd accused, as the departmental procurement officer, had the role of raising, or the authority to raise, the RFQs. He also stated that the evaluation process herein was not perfect.

19. After disregarding or disagreeing with PW1's professional opinion, the accounting officer, who is the chief officer, proceeded with the process. Local Service Orders (LSOs) were then raised by the department, voted for and approved by the chief officer himself, in favour of the 6 suppliers herein[22]. Thereafter, payment vouchers were raised in favour of the 6 suppliers. It is the prosecution's case that the same were raised by the departmental accountant, who was the 2nd accused person herein. She also voted the voucher confirming the

[22] The LSOs were produced as PEXH. Nos 13 A - H

availability of the funds and then went further to authorise their payments as the A-I-E holder using 3 different signatures. The **payment vouchers** were produced herein as **PEXH. Nos 12A – K**.

20. The payment vouchers were then captured in the IFMIS system. It is then the prosecution's case that the 6th accused person, being the IFMIS accountant, validated the vouchers using the credentials of PW7, **Susan Kibwi**, and PW8, **Edward Kihiri Githei**.

21. PW7, Susan Kibwi, an accountant at the County, informed the court that she was working as a departmental accountant at the Department of Health at the material time herein. That she was a validator, that is she validates payment vouchers from the user departments. By validation, they log in the payments details into the IFMIS system and then forward the same to Approver 1. She denied being aware of the conference herein. That she only came to be aware of the same when she was recording down her statement during the investigations herein. That that is when she was informed that her credentials had been used to validate the payments in the vouchers

herein. That she was shown the 3 validation forms concerning her which indicate that she is the one who sent them to the approver. The **3 forms** were produced as **PEXH. Nos. 29A**, **B** and **C**. The back of the forms has her user name as the validator. That she was surprised because she never worked for the Trade department which was the originator, and neither had she shared her credentials with that department. She however confirmed that they used to exchange their credentials with the officers whom they were working with. That it was necessary to do so at the department of Health where she was working, in case of an emergency which required to be sorted out faster. She however denied that she is not the one who validated the payments for the 3 vouchers herein. She confirmed that the 2nd accused was known to her as a colleague accountant in charge of the department of Trade. That the 6th Accused is also a colleague of hers.

22. In cross-examination, she insisted that she could share her credentials with colleagues because of emergency situations. That validation merely involved data entry which is basically clerical in nature. That that does not amount to payment. That

the 6th accused was an IFMIS officer which is a support system linking the department with the County Treasury. That the 6th accused person was in fact her trainer.

23. PW8, Edward Kahiri Githei, also confirmed that he is an accountant with the County. That in the FY 2017/18, he was an accountant at the Finance Department. That his role at the department included making payment vouchers, validating and invoicing payments. That he never heard of the investors conference till when he was called to record statements during investigations herein. That sometimes in July, 2019, he was summoned by the investigating officer herein to their Nyeri office. He then realised that there was a validation of payment for an Investors' conference that was made by his colleague, the 6th Accused person herein. That he did not however know why and how the 6th accused made the payments because he was sick at the time and payments could still have been made his absence notwithstanding. That this was because his credentials were necessary to validate the payments. That the validations herein were done on 26/06/2018, a date when he was unwell. A **medical document** proving his sickness was

produced as **PEXH. No 30**. He stated that on the material date, he was contacted by the 6th Accused, who requested him to assist him with his password because there were many payments that were taking place at the time. That he had to give him the password so as to prevent the payments and work from staling. The **validation forms** relevant for his case were produced as **PEXH. Nos 31A**, **B** and **C**.

24. In cross-examination, he stated that the validations were done when he was recuperating. That the validations were done on 26th of June, yet he was in hospital from 29th May to 01st June. He confirmed that he has no document to prove that he was sick on 26th June when the validations were done. He did not also have any document to prove or show that he was on sick-off or any off-duty during the date of the validation. That he gave out the password to the 6th accused through a phone call conversation - he dictated the credentials to him. He however confirmed that he did not have the call logs to prove the conversation. He confirmed that he had no document to corroborate his testimony that he gave out his password to the 6th accused who used the same.

25. After the vouchers were validated, it is then common ground herein that the 2nd Accused approved them as IFMIS Approver 1 (AIE holder for the department) using her IFMIS allocated credentials[23]. It is then the prosecution's case that on 06/07/2018, the chief officer signed a commitment form where he confirmed that the services had been offered to the satisfaction of the department. That the form was then endorsed by the 1st accused as the CECM on the same date.[24]

26. Payments were then channelled to the respective bank accounts for the suppliers through the internet banking and the Central Bank (CBK)[25]. Account statements for the respective payee suppliers were investigated and showed that the payments had reached their accounts. PW22, the investigating officer, further testified that her investigations revealed some communications between the 7th accused and a Lillian concerning some of the payments herein. That Lilian was however not called as a witness herein.

27. The funds were however refunded back to the County from the various banks through the CBK between 18/07/2018 and

[23] The validation forms were produced as PEXH. Nos. 14A – F.
[24] The Commitment form with the endorsement was produced as PEXH. No. 15
[25] The internet banking printout was produced as PEXH. No. 32

23/07/2018. The investigating officer were not able to get the payment invoices and acceptance letters from the bidders.

28. All the documents supplied herein were however copies and not originals. PW22, the investigating officer, informed the court that the County could not supply them with the original documents because the same had been forwarded to the DCI who were conducting other investigations with regard to the same FY[26].

29. The documents that were received were subjected to document analysis by PW21. PW21, Jacob Oduor, introduced himself as a forensic document examiner working with EACC. He informed the court that he has 17 years' experience and holds bachelor of Educations (Arts) from Kenyatta University. That he has acquired training in document examination from the DCI forensic laboratory and other international institutions. He confirmed that he conducted the analysis and produced his **reports** as **PEXH. Nos 89**, **92**, **93** and **94**. He testified that his analysis confirmed that the **LSOs**, **PEXH. Nos. 13A** – **H**, were voted by the 2nd Accused, confirming that the funds were

[26] The letter from the DCI requesting for the same documents was produced as PEXH. No. 26. Other correspondence between the EACC and the DCI dated 08/10/2020 and 16/12/2020 confirmed that they were still using the documents was also produced as PEXH Nos. 110A and B.

available. That the payment vouchers, were also raised by the 2nd accused and also voted by herself. That the 2nd accused also examined the payment vouchers and authorised payments as the A-I-E holder using 3 different signatures as confirmed by the document examiner. The analysis further confirms that the **Commitment form**, **PEXH. No. 15** was voted by the 1st Accused person confirming that the services had been rendered satisfactorily to the department. That there is further confirmation that the **Evaluation Reports** produced as **PEXH No. 5A-F** were signed by the Evaluation Committee members who are the 2nd, 4th and 5th Accused persons herein. The analyses further confirmed that half of the RFQs were filled by officials from the County, mainly the 3rd Accused person. That the 3rd Accused filed RFQs for Supply Emporium Ltd, Intestate Kenya Ltd, Roseke Quality Suppliers, Kimna Builders and Reka Holding Ltd. That the 4th Accused filled RFQ for Shirtless General Merchants, while the 5th Accused filled for Beazzer Suppliers. The 7th Accused was found to have filled for Sunlink Engineering, Gray Apple Ltd, Bultech Ltd, Volia Monzoon and Peg Earth drillers.

30. In cross-examination, the document examiner confirmed that he examined certified copies of the originals. That the number of times a document is photocopied has an impact on the quality of the analysis. That he could however not tell the number of times the documents had been photocopied. Neither could he tell the Machine that was used to photocopy the documents. He also confirmed that he was not availed the known handwriting and signature for the 7th accused. Further, he confirmed that he did not make an elaboration of his findings, i.e. on the character construction or any specific attributes. That these aspects and others such as the weight of the pen, can only be credibly confirmed when relying on the originals. He further clarified that as per his **report** in **PEXH. No. 89**, the 2nd accused had 2 formations of signatures. He confirmed that a person can have more than one handwriting and 2 or more persons can have a similar handwriting. He further confirmed that he had no evidence that his reports were subjected to peer review.

31. In cross-examination, the investigating officer, PW22, stated that though the funds were returned to the County, the offence

had already been committed. As to the effect of the endorsement by the 1st Accused on the commitment form, PEXH. No. 15, the officer confirmed that the 1st accused, being a CECM had no role in endorsing the same. That none of the accused persons herein is a director or a shareholder in the companies that were paid. That the document examiner confirmed that the 2nd accused person acted as both the examiner and the A-I-E holder. She further confirmed that the reversals were done by the County on its own motion and that EACC allows for such self-corrective measures. She also confirmed that none of the suppliers complained or made report against any of the accused persons herein. She further confirmed that she did not collect any sample signatures from the suppliers herein. As to whether there was a conspiracy amongst the accused persons herein, the officer stated that all the processes herein leads to a conclusion of a conspiracy amongst the various persons involved, who are the accused person herein. She further confirmed that there is no evidence or any documents herein bearing the name of the 6th accused as a validator.

3.0 NO CASE TO ANSWER SAVE FOR 2ND ACCUSED IN 5TH COUNT

3.1 PRIMA FACIE CASE

32. After hearing all the witnesses for the prosecutions, and going through the entire case for the prosecution, the evidence contained therein, and the submissions thereon[27]; on 28.10.2025, I came to a conclusion that a *prima facie* case has been disclosed with respect to the 2nd accused person in the 5th Count only. Pursuant to the finding, I did call upon her to make her defence in that count as required under section 211 CPC

33. I however, did not find such a case disclosed with respect to the other accused persons herein and in all the remaining counts. So as not to prejudice, affect, or otherwise, influence the defence of the 2nd accused in the remaining count V herein, I reserved my reasons for the findings therein which I have included in this part of this judgment.

34. The charges against all the accused persons herein in all the counts, except count V, were therefore dismissed pursuant to the provisions of section 210 of the Criminal Procedure Code.

[27] Submissions by the 1st, 2nd, 5th, 6th and 7th accused persons only.

Consequently, all the Accused persons herein were acquitted of the offences of Attempt to Commit an Economic Crime c/s 47A (1) of the ACECA, and Conspiracy to Commit an Offence of Economic Crime contrary to Section 47A (3) as read with Section 48(1) of the same Act. The 1st Accused person was further acquitted of the offences of Knowingly Making a False Statement to One's principal c/s 41(2) as read with 48(1)(a) of the same Act and Abuse of Office c/s 46 as read with section 48(1) of the same Act. The 2nd Accused was acquitted of the offences of Fraudulently Making Payment from Public Revenue c/s 45(2)(a) as read with section 48(1)(a) of the same Act and Abuse of Office c/s 46 as read with section 48(1) of the same Act. Meanwhile, the 2nd, 4th and 5th Accused were also acquitted of the offence of Wilfully Failing to Comply with the Applicable Procedures and Guidelines Relating to Procurement c/s 45(2)(b) as read with section 48(1)(a) of the same Act. The 3rd, 4th, 5th and 7th Accused were acquitted of the offence of Fraudulent Practice in a Procurement Process c/s 66(1) as read with Section 176(1) of the PPADA. Finally, the 4th, 5th and 7th Accused

persons were acquitted of the offence of Making a Document without Authority c/s 357(a) of the Penal Code.

35. At the prima facie case stage, we were at the 'case to answer' stage of the trial. The main issue at this stage was therefore a simple one, namely whether the prosecution, in discharging its burden of proof, had established a *prima facie* case that required me to call upon the accused persons herein to make their defence as required by section 211 of the Criminal Procedure Code[28]. If no such case was established, then I was to act accordingly under section 210 CPC[29], and acquit the accused persons herein as per their respective counts. This was held by Lordship, Katiti, J. (as he then was) of Tanzania High Court in the case of ***Jonas Nkize vs Republic [1992] T.L.R. 213 (HC)*** at page 218 as follows:

> ***If it appears to the court that the case is not made out against the accused person sufficiently to require him to make a defence, either in relation to the offence with which he is charged, or in relation to any other offence of which under provisions of sections...he is***

[28] Cap. 75, Laws of Kenya
[29] *Ibid*

liable to be convicted, <u>he shall dismiss the charge, and acquit the accused person</u>. [Emphasis supplied]

36. In ***<u>Anthony Njue Njeru vs Republic</u>*** *[2006] eKLR*, the Court of Appeal of Kenya was surprised by a High Court Judge's decision to call upon the appellant to make his defence, even after the judge had expressed himself in a ruling at this stage, on a case to answer, as follows: -

I have considered the evidence before me. The evidence shows that the accused shot the deceased David Sila Kimuyu on 18th July, 2002 at Chiromo University Campus within Nairobi area. There is no eye-witness evidence as to how this happened. All witnesses who gave evidence arrived at the scene of crime after the deceased had been shot and had died. This includes the evidence of John Musyimi Kamwanza, PW2 who testified that he was with the accused but ran away before the accused shot the deceased dead. <u>The relevant evidence on record which attempts to explain the circumstances under which the shooting took place are (sic) on the level of hearsay evidence</u> (underlining supplied)

37. The Court of Appeal then commented as follows:

> ***Having expressed himself so conclusively, we find it difficult to understand why the learned Judge found it necessary to put the appellant on his defence. Was there a prima facie case to warrant the trial court to call upon the appellant to defend himself? It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one*** **"which on full consideration might possibly be thought sufficient to sustain a conviction".** [Emphasis supplied]

38. *Prima facie* is a Latin word defined by **Black's Law Dictionary, 8th Edition** as '***Sufficient to establish a fact or raise a presumption unless disproved or rebutted***'. *Prima facie case* is defined by the same dictionary as '***The establishment of a legally required rebuttable presumption***'. To digest this further, in simple terms it means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with.

39. The standard of proof as to whether the prosecution has established a prima facie case or not was laid down in the celebrated case of ***Ramanlal Trambaklal Bhatt vs Republic***

[1957] E.A. 332 where their Lordships, Newham Worley, P., Sir Ronald Sinclair, V. P., and Bacon JA (as they then were) explained the concept at page 334 as follows: -

> ***(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima face case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.***
>
> ***(ii) The question whether there is a case to answer cannot depend only on whether there is 'some' evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence*** *(underlining for emphasis is mine)*

40. The same Court in ***Wibiro alias Musa vs Republic*** ***[1960] E. A.*** at 186 revisited with approval the ***Ramanlal Case*** above on the issue of *prima facie* case. The courts in East Africa

including our own have cited these cases with relish and for a good reason: it is good law.

41. For example, in the case of ***Republic vs Kennedy Otieno & 6 Others (1998) eKLR,*** the High Court of Kenya relying on the above cited authorities, gave a simpler explanation of what constitutes a *prima facie* case. The High Court held that it is a case where there is sufficient evidence upon which the court would convict the accused if no explanation is given.

42. This therefore means that as at the close of the prosecution's case, and where the burden of proof does not shift to the defence, the prosecution should have laid out a case that can convict the accused, assuming that the accused has no defence in rebuttal[30].

43. Justice Odunga in the case of ***Republic vs Alex Musau Jimmy [2022] e KLR***, held that an accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival[31].

[30] See Justice Mutuku's decision in REPUBLIC VRS ABDI IBRAHIM OWL [2013] eKLR
[31] Cited by the learned counsel for the 1st accused

44. Nyakundi J. on his part in ***Republic vs Silas Magongo Onzere alias Fredrick Namema [2017] e KLR***, aptly stated that:

> ***Where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. Defence case is not meant to fill in the gaping gaps in the prosecution case[32].***

45. It is trite that for a prosecution's case to convict, it must meet the evidential threshold of proof. Further, and as aforestated, it is trite law that the standard of proof in criminal cases for purposes of a conviction is beyond any reasonable doubt. It is further trite that in a criminal trial, the burden of proof squarely lies upon the prosecution to prove its case

[32] Ibid

beyond any reasonable doubt. As correctly stated in the case of ***Peter Mwangi Kariuki vs Republic (2015) e KLR*** the burden of proof does not shift and it remains constant throughout the trial.

46. Further, this burden of proof on the prosecution must be discharged without necessarily weighing or capitalizing on the weaknesses of the defence case. In the case of ***State of Punjab vs Jagir Singh (1974) 3 SCC 277,*** the Indian Supreme court had this to say: -

> ***A criminal trial is not like fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged ... In arriving at the conclusion about guilty of the accused charged with commission of the crime, the court has to judge the evidence by the yard stick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts....***

47. Here in Kenya, Justice S. Mutuku in ***REPUBLIC VRS HASSAN MOHAMUD OSMAN [2013] eKLR***, commented as follows:

> ***The burden of proving a criminal case lies with the prosecution and never shifts to the accused unless where the law specifically provides the same. Even where the court calls upon an accused person to testify in his defence, it is not so as to prove himself innocent. Courts do so with a view to allowing an accused person to have his day in court and perhaps adduce evidence that may rebut the prosecution evidence and raise the much valuable doubt. Even in cases where the defence of insanity or other statutory defence available to an accused person exists the accused is only required to prove such defence on a balance of probability and not beyond reasonable doubt.***[33]

48. It is incumbent upon the trial judicial officer to weigh the evidence at hand and make a finding that considering the circumstances of the case and the evidence at hand, it would be safe to convict. It has been accepted in legal circles and indeed in numerous precedents that it is better to acquit ten

[33] See also the Court of Appeal's decision (S. E. O. Bosire, E. O. O'kubasu and J. W. Onyango Otieno, JJ.) in ANTHONY NJUE NJERU VRS REPUBLIC [2006] eKLR

people who are guilty than to convict one innocent person **(See *J.O.O. vs R (2015) e KLR***). For a court to convict, the prosecution must therefore adduce the necessary evidence to prove all the main ingredients of the offence/s.

3.2 Accused Persons' submissions

49. Only the 1st, 2nd, 5th, 6th and 7th Accused persons filed and subsequently highlighted their respective written submissions.

3.2.1. 1st Accused Person's Submissions

50. Learned counsel for the 1st Accused, **Mr. Nick Omari**, submitted that the crux of the prosecution case was that she signed a 'Commitment Form' (PEXH. No. 15) confirming that services were 'satisfactorily' rendered to the County towards the botched investors' conference. Counsel however submitted that this singular commitment form would not be sufficient to make out a prima facie case against the 1st accused person to warrant her be put on her defence, and that she stood exonerated with or without the 'commitment form', because of the following reasons: -

i. That the first accused person as CECM played no role in the procurement process. That her role as CECM revolves around developing, implementing, and reviewing county policies, sector plans, and budget by dint of Article 183 of the Constitution of Kenya. That all the major witnesses, including the investigating officer conceded to this common fact. That at any rate, no evidence was tendered to demonstrate that the 1st accused person was a member of the Acceptance and Inspection Committee which is the legally recognised institution responsible for confirming the quality of services rendered. There is therefore no way that the 1st accused would be committing to something not within her ambit. That the purported commitment form is foreign both in procurement law and practice as was confirmed by the prosecution witnesses and as such it cannot form the basis of making any payments.

ii. That the botched investors’ conference was approved and budgeted for as confirmed by the prosecution witnesses, particularly the then Governor, PW6, as well as the County

Secretary, PW5, **Hiram Mwangi Kihiro**, and the investigating officer.

iii. That all funds that were released were recalled and not a single coin belonging to the County was lost. That in explaining why the funds were recalled, the word 'error' rung through and through during the hearing of the prosecution case. That it was therefore not open for the prosecution to shift goalposts belatedly by criminalising an error and imputing a criminal motive on the 1st accused.

iv. That there was no link with the beneficiary companies to prove conspiracy. That no evidence (even remotely) was led to show that the 1st accused person had a stake in the proceeds/ funds erroneously wired to 3rd parties (which were in any even recovered).

51. On the evidential value of the commitment form, learned counsel submitted that the said form had no evidential value based on the following arguments:

i. That the impugned form, in its plain reading, clearly shows that the actual commitment regarding the

rendering of services was being given by the Chief Officer, Trade, and not the 1st Accused person. That the issue of endorsement is neither here nor there as one cannot tell what was being endorsed. That the full meaning and import of the purported endorsement is therefore a matter of speculation and conjecture.

ii. That an examination of the commitment form further reveals that it makes no reference to the botched investors’ conference. That it could very well be that some of the listed items could have been supplied before for a different occasion. That as such, the endorsement, or the form, has no direct link to the charges before court.

iii. That the authenticity of the commitment form that is alleged to have been endorsed by the 1st accused is in doubt as the prosecution did not produce the original exhibit before court for examination. That they instead availed a copy of the document which on the face of it was rather faint especially on the part purportedly endorsed by the 1st accused person. That no plausible reason was proffered as to why the original document was

not availed. That no indication was given as to whether the documents were lost or could not be traced to warrant the use of copies. That this is despite the fact that the county secretary confirmed that the originals were available.

52. Learned counsel further attacked the credibility of the evidence of the document examiner, PW21. Counsel submitted that the examiner conceded that he used copies in the examination and that that could jeopardise the final findings of his report as certain key features such as 'pen press' could have been missed. That notably, the examiner could not tell the number of times the documents he was examining had been photocopied since the photocopying was not done in his presence. That the examiner did not elaborate with exactness which characteristics of the signatures were noted, or where the similarities and dissimilarities were, nor did he elaborate with specifics which pen lift characteristics were similar or dissimilar. Learned counsel therefore submitted that the document examiner's report should not be taken as the absolute truth without interrogation and corroboration. To

fortify his submissions, learned counsel cited the case of ***Samson Tela Akute vs Republic* [2006] e KLR**, where a 2-judge bench of an appellate court held thus: -

> ***The witness was not present when the document was photocopied and cannot in our view candidly say that it was not manipulated or superimposed….***
>
> ***…. We would have expected that the expert would have explained to the Court in detail the particular features of similarity or dissimilarity regarding characteristics of the signatures and the pen lift so that the Court could be in a position to appreciate the weight of his technical evidence and on examining the said characteristics would have assisted him arrive at his own opinion…. This rather casual approach to an otherwise serious matter is deprecated.***

53. Against this backdrop, the learned counsel proceeded to submit that the veracity of the commitment form hangs in limbo and any doubt thereto should be resolved in favour of the 1st accused person. Learned counsel went to further submit that the evidence of the handwriting expert is opinion evidence and that the court is at liberty to accept or reject it. On this point, the learned counsel referred the court to the case of

***Republic vs Podmore* (1930) 46T LR 365** as cited in ***Samson Tela Akute vs Republic* (supra),** that: -

> ***…the evidence of handwriting experts is sometimes misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is the person who habituated to the examination of handwriting, practiced in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That and no more than that, is his legitimate province…***

54. In ***Samson Tela Akute vs Republic* (supra)** the court held that: -

> ***The evidence of an expert is a mere opinion which is not binding on the trial court. The court has to make its own independent evaluation and finding, the opinion of the expert notwithstanding. The court has to examine the documents itself and come up to the conclusion with such assistance as can be furnished by the experts in the field, whether a particular writing is to be assigned to a particular person.***

55. Learned counsel further cited the decision in ***Delay v Republic* (1995-1998) 1 EA,** where the Court of Appeal

considered the position of expert evidence generally and held that: _

> ***While courts were obliged to give proper respect to the opinions of experts, such opinions were not binding on the courts. Expert evidence had to be considered along with all other available evidence and where there was a proper and cogent basis for rejecting an expert opinion, a court was perfectly entitled to do so. A trial court had the duty of deciding whether or not it believed the expert and give reasons for its decision.***

3.2.2. 2nd Accused Person's Submissions

56. For the 2nd accused person, it was also submitted that the prosecution **did not** establish a prima facie case to warrant the court put the 2nd accused to her defence. With respect to the offence or charge in the first count, learned counsel, **Mr. Nderi** submitted that:

a. The charge sheet in this particular count failed to disclose material information with specificity as regards the 2nd accused person as to the nature of the alleged crime as well as the amount of the subject of the economic crime. That this failure contravenes Article 50(1) (b) of the

Constitution which grants an accused person the right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it.

b. In ***Ewoi & 2 others -vs- Republic Criminal Appeal E034 of 2023 [2024] KEHC 319 [1KLR],*** the High Court stated inter alia –

> ***The main ingredients of an attempted offence are intention to commit the said offence, whether or not the same is actually carried out to fruition or not. This intention is what constitutes the criminal intent or men rea of the offence while actual execution of any act in an attempt to commit the crime is the actus reus***

c. The evidence adduced by the prosecution in support of this particular count as against the 2nd accused person did not prove in any respect the two critical ingredients of an attempted crime. That the evidence of PW22 the investigating officer stated that they did not find nor establish any direct or indirect link between the 2nd accused person and the six suppliers involved in the investor's conference. That in actual fact PW10, PW11, PW12, PW13, PW14 and indeed all the suppliers in support

of the prosecution case testified that they had never seen or met the 2nd accused and that they had no connection with her.

d. Save for the prosecution producing payment documents and alleging the same to have been signed by the 2nd accused person as an A.I.E holder, the prosecution did not establish that indeed the 2nd accused person intended to commit an economic crime.

e. PW2, PW4 and PW9 while testifying exonerated the 2nd accused person noting that she was merely an accountant in the department and that she was bound to heed to the instruction of the then Chief Officer and the Accounting Officer. That it was their evidence that the accounting officer bore the ultimate fiscal responsibility and that no payment would have been made without his authorization. That they further testified that the 2nd accused was just confirmed as an A.I.E holder and that the investor conference was budgeted for, which was a matter of fact.

f. An offence must be constitute both mens rea and actus reus. That in this count, the prosecution failed to prove mens rea, and the said count must therefore fail.

57. With respect to the charge or offence of Conspiracy to commit an offence of Economic crime contrary to Section 47(A) (3) as read with S.48(I) of the Anti-Corruption and Economic Crimes Act, 2003 as charged in the 2nd Count, learned counsel submitted that the said charge is also defective and unconstitutional in so far as the charge sheet failed to disclose material aspects of the offence. That for the offence of conspiracy, the alleged agreement and/or conspiracy between 2nd accused person and the others ought to have been materially disclosed to the 2nd accused person as required under Article 50(I)(b). That the count as presented and prosecuted upon is also therefore an infringement of the 2nd accused right to a fair trial and a derogation of that right contrary to Article 25(c).

58. Learned counsel went further to cite the case of ***Ngamau & another -vs- Republic (Criminal Appeal E018 of 2021),*** where the High Court held that; –

The term conspiracy as it relates to criminal offenses inputs a common intention between 2 or more co-conspirators. Ngenje J, (as she then was) stated as follows in the case of Rebecca Mwikali Nabutola & 2 others -vs- Republic [2016] EKLR:

The Black's Law Dictionary 9th Edition at Page 351 defines conspiracy as:

> ***"An agreement by two or more persons to commit unlawful act coupled with an intent to achieve the agreements motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose ……. in order to proof an offence of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud the public."***

59. That from the evidence adduced, the prosecution did not prove the two critical ingredients of the offence of conspiracy. That it was the evidence of suppliers mainly PW10, PW11, PW12, PW13, PW14 that they did not have any direct or indirect link with the 2nd accused nor had they ever met, negating existence of any agreement or conspiracy between them. That the failure of the prosecution to demonstrate existence of an

agreement between the 2nd accused, her co-accused and the supplier to defraud the public, makes this count fall flat. That further, the failure of the prosecution to charge PW4 and PW9 being persons who facilitated the requisition for the funds and the actual payment and its failure to establish a common intention between the 2nd accused and her alleged co-conspirators make the charge untenable.

60. On the third count of Wilfully failing to comply with the applicable procedures and guidelines relating to incurring expenditures contrary to Section 45(2)(b) as read with S.48 (I) (a) of the Anti-Corruption and Economic Crimes Act, 2003, learned counsel for the 2nd accused submitted that the use of the word wilfully was not made without a reason by the law makers. That the word denotes a deliberate and intentional disregard for the applicable procedure and guidelines as the case may be. Counsel cited the case of ***Daudabdullahomar vs Republic (Criminal Appeal E094 of 2023)*** where the court tried to contextualize and give the words used in Section 45(2)(b) of ACECA full and proper meaning and quoted **Black**

Law Dictionary, Tenth Edition which defines the term 'wilful' thus: -

> ***The word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent.***

61. Based on the above definitions, learned counsel submitted that PW2, PW4 and PW5 testified that the 2nd accused was under express instruction from the accounting officer. That it was the evidence of PW22, the Investigating Officer, that the professional opinion by PW1 the then County Director of Supply Chain Management was never made available to the 2nd accused. That the professional opinion as variously testified by various witnesses challenged the legality of the procurement process but which professional opinion was only addressed to the accounting officer. That it cannot therefore be said that the 2nd accused person wilfully failed to comply with the applicable

procedures and guidelines. That in any event, it was testified that the investor's conference had a budget allocation the subject of which the 2nd accused confirmed its existence without prejudice by filing in payment vouchers. That the prosecution failed miserably in discharging its evidential burden of proof beyond reasonable doubt for it did not adduce evidence to even suggest let alone prove a bad or evil purpose on the part of the 2nd accused within the meaning given by the above quoted case law. That furthermore, the act of actual payment for the impugned event was made by PW9, **Joseph Wahome**.

62. As to count 4, on the offence of Fraudulently making payments from Public Revenue contrary to Section 45(2)(a) as read with S.48(I)(a) of Anti-Corruption and Economic Crimes Act, 2003, learned counsel for the 2nd accused submitted that none of the prosecution witnesses gave evidence in support of this charge. Counsel submitted that fraud is defined as an activity that relies on deception in order to achieve a gain. That fraud becomes a crime when it is a knowing misinterpretation of the truth or concealment of a material fact to induce another

to act to his/her detriment. Counsel then submitted that the prosecution did not adduce any evidence to prove that the 2nd accused person made fraudulent payments contrary to the law. That there was overwhelming evidence from PW1, PW4 and PW9 that the accounting officer was the person by law established who was responsible for both procurement and payment functions. That it was the evidence of the three quoted prosecution witnesses that the chief officer ignored the professional opinion proffered by PW1. That it was also the evidence of PW1 and PW22 that the 2nd accused person was not aware of the existence of the professional opinion. That assuming that the 2nd accused signed the payment vouchers; she did so without knowledge that her professional opinion had adversely affected the entire transaction. That it cannot therefore be inferred fraud or indeed any intention to defraud the county on the part of the 2nd accused person.

63. In count 6, where the 2nd Accused was charged with the offence of Wilfully failing to comply with the applicable procedures and guidelines relating to procurement contrary to Section 45(2)(b) as read with Section 48(I)(a) of the Anti-

Corruption and Economic Crimes Act, 2003, learned counsel submitted that the prosecution did not discharge its evidential burden in proving the charge. That there was overwhelming evidence from PW1 that after issuing his professional opinion which extensively challenged the procurement process as a whole, legally, the process ought to have been stopped. That on cross examination, PW22 admitted that once the professional opinion was issued by PW1, the recommendations of the tender evaluation committee became a nullity given that PW1 was the Head of Procurement function in the County. That the law makers in promulgating the Public Procurement and Disposal of Asset Act and requiring the provision of a professional opinion upon evaluation of a tender was to create a legal buffer to avert irregularities and/or illegalities that may be committed by tender evaluation committees. Learned counsel therefore submitted that if there were any irregularities and/or illegalities as alleged by the prosecution, the same were nullified by the professional opinion of PW1. Learned counsel further submitted from the definition given as regards the words used in Section 45(20(b) of ACECA, it cannot be said that

the 2nd accused person's actions in the tender committee amounted to wilful failure to comply with the law. Finally, learned counsel submitted that the lack of any link or connection with the suppliers and overwhelmingly demonstrated by PW22 and the suppliers exonerates the 2nd accused as no bad purpose or evil intent can be inferred from her actions.

64. Learned counsel for the 2nd accused, further submitted on the credibility of the evidence adduced by the handwriting expert. Counsel submitted that it is important to scrutinize the evidence adduced by the handwriting expert on its cogency or lack thereof. Counsel cited the decision in ***Gari & 2 others -vs- Republic [1990] KLR*** where the court stated as follows: -

> ***The most than an expert on handwriting can properly say is that he does not believe a particular writing was by a particular person or that the two writings are so similar as to be indistinguishable. A magistrate is entitled to accept or reject the opinion of a handwriting expert.***

65. Learned counsel then went further to submit that the Handwriting expert called by the prosecution demonstrated a

very high level of authoritativeness as opposed to giving his opinion as required of such an expert. That he alleged that certain signatures appearing on the payment vouchers were those of the 2nd accused person alleging that they had a very high level of disguise. That the court must be careful not to be swayed by a highly opinionated expert opinion which relied on copies of documents and not the original source documents. That it was the evidence of the handwriting expert that he used copies and that he did not collect specimen signature from the 2nd accused nor did he see her sign. That he could not under cross-examination account for the age of the specimen signatures he used even though he admitted that handwritings change with age. That further, the independence of his report was put to question as he is an employee of the Ethic and Anti-Corruption Commission and his report was thus highly skewed in support of the alleged offences. Learned counsel therefore urged the court to be wary of basing any of its finding on such a highly challenged expert report.

66. Learned counsel concluded his submissions by seeking to illuminate the prosecutions conduct of bias in the investigations

of the instant criminal case. Learned counsel cited the High Court in ***George Joshua Okungu & another -vs- Chief Magistrate Court – Anti-Corruption Court & another [2014] EKLR*** **at Paragraph 76** – where it inter alia stated:

> ***….. it is, however clear to us that to selectively prefer criminal charges against the petitioners while saintly, as it were, treating the said author as a prosecution witness is not only selective but discriminatory as well and contravenes the principles of promotion of constitutionalism which binds the DPP in making a decision whether to prosecute and who to prosecute.***

67. Learned counsel then submitted that it was evident from cross-examination that PW2, PW4 and PW9 had powers to stop payments the subject of the instant criminal case. That Section 103(2) of the Public Finance Management Act provides that:

> ***The County Treasury shall comprise: -***
>
> ***a) The County Executive Committee Member for Finance;***
>
> ***b) The Chief Officer; and***
>
> c) ***The department or departments of the County Treasurer responsible for financial and fiscal matters.***

68. That it was therefore worth noting that PW4, **Mary Mugwanja**, was the officer referred under Section 103(2)(a), PW2, **John Gitau Njoroge**, was the officer referred at S.103(2)(b) while PW9, **Joseph Wahome**, was the Director of County Treasury within the meaning of S.103(2)(c) of PFMA. That **t**he three officers under Section 105(1)(b) had the power to stop the payment of the investors conference in line with the County Treasury's mandate under Section 104(1)(i) of the PFMA, 2015. That it emerged during cross-examination that the three officers facilitated requisition of funds from the controller of Budget into the County's account even when they knew that the investor's conference had not taken place. That the three officers admitted during cross-examination that the requisition of funds and the payments were not supported by minutes of the inspection and acceptance committees which is a mandatory requirement certifying that indeed service have been rendered or that good have been delivered. That it is extremely disheartening that even with such glaring acts and omissions attributable to the three officers who facilitated actual payments into the accounts of the six suppliers, the

investigating officer and the office of the DPP did not find it necessary to charge them. That it was the evidence of PW9 that he was the final approver in Internet Banking 2 (IB2) and that he actually made the payments. That the three were saintly converted to prosecution witnesses to testify against person who bore little or no fiscal responsibilities. That in the case of ***George Joshua Okungu & another -vs- Chief Magistrate Court – Anti-Corruption Court & another, supra,*** the court stated that '***Selective prosecution is done by the DPP is an act of bias, unconstitutional and abuse of the court process.'***

69. Learned counsel therefore submitted that the selective prosecution exemplified by the prosecution taints the entire criminal case herein and any finding as against the accused person will lead to travesty of justice and fairness. He further submitted that no charge should be made to hold or indeed the 2nd accused person and all the accused persons should not be found to have a case to answer in the midst favouritism, bias, unconstitutional and abuse of the court process exemplified by the prosecution. Learned counsel therefore beseeched this

court to find that the conduct of the prosecution is a violation of the accused person right under the Article 27 of the Constitution which states inter-alia that every person is equal before the law and has the right to equal protection and equal benefit of the law.

3.2.3. 5th Accused Person's Submissions

70. For the 5th Accused, learned counsel, **Ms Kimotho**, acting under instructions of **Ms Wairimu Gathii**, submitted that the 5th Accused person was duly appointed as a tender evaluation officer by the Chief officer of the relevant department at the time. That in his role as a tender evaluation officer, the 5th Accused's job description was within specific parameters as provided for under the procurement laws and specified in the Request for proposals and filter out the lowest bidders from the submitted proposals for recommendation. That the 5th accused only had one administrative role after bids had been received, which was bid evaluation well in line with **Section 26(3)(c) of the PPADA** which requires that all procurement procedures should be '***handled by different offices in respect of procurement initiation, processing and receipt of goods,***

works and services. That ***s***ave for bid evaluation, the 5th Accused was not involved in any processes that involved payment for services allegedly not rendered, in any way, or at all. That from the testimonies available, the procedure followed when requesting for proposals up to tender evaluation was properly conducted. That illegality, if any, started when the professional opinion was ignored and processes continued unchecked, which had absolutely nothing to do with the 5th Accused. Learned counsel referred to the case of ***Rebecca Mwikali Nabutola & 2 others vs Republic [2016] eKLR*** and further submitted that at that stage, no offence can be said to have been committed, to warrant placing the 5th Accused person on his defence.

71. As relate to the charge in Count I, that is the offence of Attempt to commit an offence of Economic Crime contrary to Section 47A (1) as read with S. 48(1) of the Anti-Corruption and Economic Crimes Act, 2003, learned counsel submitted that the procurement process came about as a result of an Investment Conference, which was a genuine event that was scheduled to take place and was part of Nyandarua Governor's agenda and

had been duly budgeted for. That the investigating officer herein confirmed to Court that the 5th accused person did not make any payments as far as Counts I & II concerned. That this confirmation by the investigating officer, PW22, was further fortified by the evidence of PW1, PW2 and PW3 all who confirmed that all procedures had been complied with, up and until the point of the professional opinion done by PW1. That the prosecution's star witness, being PW1, completely exonerated the 5th Accused by stating that all procurement procedures up to and including evaluation were done accordingly, PW1's only faulted the method proposed being by way of request of quotations, which decision was not in the docket of 5th Accused. That as established in ***Republic v Shivaji Shivji Patel [1965] EA 605***, an attempt requires proof of an overt act which unequivocally manifests an intent to commit the offence, going beyond mere preparation and the prosecution had to demonstrate both ***mens rea*** (intention to commit the crime) and ***actus reus*** (a direct act toward its execution). That in the present matter, the evidence tendered shows that the 5th accused was involved in the planning of an

investment conference which, though ultimately not held, was a legitimate administrative undertaking at the material time. That being a member of the evaluation committee equally formed part of routine preparatory work and did not amount to an overt criminal act, and no personal gain was realized or was to be realized by the 5th Accused. Learned counsel went further to submit that the prosecution had also not demonstrated any unlawful authorizations of payment on the part of the 5th Accused. Counsel relied on the case of ***Nyabuto & Another vs Republic [2019] eKLR***, where the Court emphasized that the mere failure of an initiative or project cannot, without more, be construed as an attempt to defraud unless there is cogent evidence of fraudulent intent and action. On this count, learned counsel submitted that the charge in this count is unsupported by evidence of deliberate fraudulent conduct or any direct step toward the commission of an economic crime.

72. As relate to the charge in Count II, i. e Conspiracy to commit an offense of economic crime contrary to Section 47A (3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003, learned counsel reiterated earlier

submissions on whether the necessary ingredients constituting 'Conspiracy' have been established to the required standard. She also cited the case of ***Ngamau & Anor -vs- Republic (Criminal Appeal E018 of 2021) [2023] KEHC 1065 (KLR) (Anti-Corruption and Economic Crimes) (16 February 2023) (Judgment)*** and submitted that the Investigating Officer confirmed in cross-examination that the conspiracy alleged to be committed under Count II ran through the whole procurement process and not at the point of making payments alone. That this assertion in itself ought to exonerate the 5th Accused because all other evidence points to the fact that any illegality began at the point of approving payments arising from a process that had been recommended by PW1 to be nullified, and processes that effected payments for services not rendered. Learned counsel further cited ***Archibold's Criminal Pleadings, Evidence and Practice, 2010 (Sweet & Maxwell)***, where at pages 3025 and 3026 it is observed;

> ***The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons… so long as a design rests in intention only, it is not indictable; there must be an agreement……***

Proof of the existence of a conspiracy is <u>generally a matter of inference deduced from certain criminal acts of the parties accused</u>, done in pursuance of an apparent criminal purpose in common between them.

73. Counsel further cited the decision in ***<u>Ann Wangeci Mugo & 6 others vs Republic</u> [2022] eKLR*** where it was stated thus on proof of conspiracy: -

To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in Court (see Republic v Anne Atieno Abdul & others [2017] eKLR). Further Halsbury Laws of England Vol. 25 observes that;

It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, <u>it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose</u>.

74. Learned counsel therefore went ahead to submit that in order to prove an offence of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud the public. That by sitting in the tender

evaluation committee, the 5th Accused did not engage in any criminal acts. That further by the fact that the prosecution failed to show any agreement, and consent among the accused persons to conspire, fortified by the witnesses who failed to show a link between all the processes and the persons involved since all had different and distinct functions in the chain, furthered by the fact that the ultimate beneficiaries all testified as not knowing the 5th Accused, nor engaged with him, the 2nd count must fail, at least as against the 5th Accused.

75. As relates to the charge in Count VIII i.e. Wilfully failing to comply with the applicable procedures and guidelines relating to procurement contrary to Section 45(2)(b) as read with Section 48(1)(a) of the Anti- Corruption and Economic Crimes Act, 2003, learned counsel referred the court to the provisions of section 80(2) of the Public Procurement and Asset Disposal Act which state as follows;

80. Evaluation of tenders.

(2) The evaluation and comparison shall be done <u>using the procedures and criteria set out in the tender documents</u> and, in the tender for professional services, shall have regard to the provisions of this

Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

76. Learned counsel then submitted that the Request for Quotations produced (PEXH. Nos. 2a-f) show that the RFQs do not give an evaluation criterion. That they simply mandated the bidders to quote the final unit price including all costs for delivery, discount, duty and sales tax, failure to which they will be disqualified. That the evaluation reports produced (PEXH. Nos 5a-f) show that the evaluation committee recommended suppliers who gave the lowest bids. Learned counsel then submitted that no evidence was tendered to prove that the 2nd, 4th and 5th accused persons failed to follow the criteria provided in the Request for quotations as they discharged their duties. That equally, no witness who testified before Court confirmed that the 2nd, 4th and 5th accused persons failed to follow the evaluation criteria while discharging their duties as evaluation committee members. That, in fact, PW1 confirmed that all the procedures from tender opening to tender evaluation were done in accordance to the laid down procedures, and that no

wrongdoing or offence had been committed up to that point. That the evidence of PW1 as the principal witness therefore effectively exonerates the 5th Accused from this charge.

77. As relates to the charge in Count XI i.e. Fraudulent practice in a procurement process contrary to Section 66(1) as read with Section 176(i) of the Public Procurement and Asset Disposal Act, 2015., counsel referred the court to the provisions of Section 66(1) of the Public Procurement and Asset Disposal Act which read as follows;

> ***66. Corrupt, coercive, obstructive, collusive or fraudulent practice, conflicts of interest.***
> ***(1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice, or conflicts of interest in any procurement or asset disposal proceeding.***

78. Counsel further referred the court to the provisions of section 176(i) of the same Act which relate to prohibitions and offences where it provides that a person ought not to commit a fraudulent act. That fraudulent practice has been defined under S. 2 of the Act as follows: -

Fraudulent practice includes a misrepresentation of fact in order to influence a procurement or disposal process or the exercise of a contract to the detriment of the procuring entity or the tenderer or the contractor, and <u>includes collusive practices amongst tenderers prior to or after tender submission designed to establish tender prices at artificial non-competitive levels and to deprive the procuring entity of the benefits of free and open competition</u>.

79. Learned counsel then submitted that the Investigating officer's testimony in Court confirmed that she had not recorded any statements for any director for Beazzer Suppliers whom she confirmed she did not know the name. That she equally confirmed to court that none of the directors or employees from the company had been availed as witnesses. That it was the IOs evidence that Beazzer Suppliers was not among the successful bidders recommended by the evaluation committee. That upon inquiry on whether the RFQ was disowned by the directors of the company, it was the IOs evidence that no complaint had been lodged by anyone from the company, stating that they had not filled the RFQ. It was the IOs evidence that she made the decision to charge the 5th

accused person since the writings on the document were similar to the 5th accused persons. Counsel submitted that that still does not disclose any offence on the part of the 5th Accused as no handwriting or signature samples were collected from the directors of Beazzer Suppliers, or their employees. That in any event, the alleged writings, being the name and address of the supplier, and as confirmed by PW1 are filled out by the requesting department. That as it stands, the 5th accused person stood trial over a document in which no one has made a complaint saying that the same was forged. That moreover the forensic examiner (PW-21) specifically excluded 5th Accused as the person that signed the document in question.

80. As to the charge in Count XIV, i.e. Making a document without authority contrary to Section 357(a) of the Penal Code, learned counsel referred the court to the provisions of Section 357(a) of the Penal Code which states as follows;

357. Making documents without authority.

Any person who, with intent to defraud or to deceive-

(a) Without lawful authority or excuse, makes, signs or executes for or in the name or on account of

another person, whether by procuration or otherwise, any document or electronic record or writing;

81. Counsel then cited the Court of Appeal in ***Mary Syevotha Peter vs Republic (2019) eKLR*** which identified the ingredients the prosecution ought to prove for an offense contrary to section 357 of the Penal Code as follows; -

This Court while discussing the components of the offense of making a false document in Joseph Muriithi Manyita vs R [2017] eKLR expressed:

> ***'That the offense is committed by the making, signing or executing a document, electronic record or writing, for or in the name of another person. In addition, the making, signing or execution must be without lawful authority or excuse, and with intent to defraud or deceive.***

82. Learned counsel submitted that the forensic document examiner gave the opinion that the signature on the RFQ for Beazzer Suppliers was not signed by the 5th accused person, indicating a difference in authorship. That this begs the question, of who is the author of the RFQ in question, which question and doubt must be resolved in favour of the 5th accused person.

83. Learned counsel for the 5th Accused further submitted that the charge in Count XIV is defective. Counsel cited the case of ***Daniel Lopeyok v Republic [2022] KEHC 730 (KLR)*** where it was held as follows: -

> ***The Appellant was charged under the wrong section of the Penal Code. This was not a mere technicality curable under section 382 of the Criminal Procedure Code, Cap 75. In our jurisdiction a criminal offence in the context of this appeal, must be created by a specific section of a specific statute. The statute here is the Penal Code. The section thereof alleged to have been breached did not create the offence charged.***
>
> ***As for Counts II and III (he was acquitted of Count III), the alleged offence charged –***
>
> > ***"Making a document without authority contrary to section 357(a) of the Penal Code"***
>
> ***is not of itself an offence. It is merely the actus reus of the offence of forgery defined in that section 357. The mens rea is the intent to defraud or deceive mentioned in the definition of forgery under section 345 aforesaid. Intent to defraud is more particularly explained in section 348 of the Penal Code. It is axiomatic that mens rea of itself does not constitute***

an offence. The offence is completed when there is also the actus reus!

The charge sheet was also defective for other reasons that I need not go into now. <u>Suffice it to say that the Appellant was convicted upon fatally defective charges. The convictions cannot stand. They are hereby set aside</u>.

3.2.4. 6th Accused Person's Submissions

84. For the 6th Accused/ learned counsel, **Mr. Mbiyu**, submitted that no case was made out against the 6th accused in the 2 counts in which he has been charges for the reasons that: -

i. The prosecution failed to produce evidence that the 6th Accused was employed as an IFMIS ACCOUNTANT in Nyandarua County.

ii. The prosecution failed to produce evidence that the 6th Accused was working as an IFMIS ACCOUNTANT in Nyandarua County on the days or dates mentioned in the 2 counts brought against him. That the medical evidence in favour of Edward Kihiu showed that he was not on duty on 29th May, 2018 to 2nd June, 2018 whilst the validation was alleged to have been done on 26/06/2018 and

payments made on 10/07/2018. That there is real possibility that Edward Kihiu and Susan Kibui were on duty on 26/06/2018 when the alleged validation was done as the prosecution did not produce evidence showing that the two were not at work on 26/06/2018 and these were the people employed to do validation. That the two, Edward Kihiu and Susan Kibui, did produce evidence showing that they shared their credentials with the 6th Accused person or that on the 26/6/2018 when validation was alleged to have been done they were not in office.

iii. The name of the 6th Accused person does not appear in the validation forms. The witnesses who testified did not give evidence that the 6th Accused validated the documents. That, in fact, the name of the 6th Accused did not appear in all of the documents produced in court.

iv. The evidence before the court was that validation does not constitute payment, and is basically clerical in nature. The person undertaking validation only enters word for word the physical documents into the system.

v. The evidence before the court show that the report cancelling the tender was never shared with the 6th Accused person.

vi. There was no evidence that the people or entities who won the tenders were either known to the 6th Accused or had promised to pay or gift the 6th Accused person money or any benefit known to law. That in fact, the said suppliers all said that did not know the 6th Accused person.

vii. There was no evidence that the 6th Accused person attempted to commit an offence involving corruption or an economic crime in term of section 47(A) (1) of the Anti-Corruption and Economic crimes Act. No. 3 of 2003.

viii. There was no evidence that the 6th Accused conspired with another to commit an offence of corruption or economic crimes in terms of section 47 A (3) of the Anti-Corruption and Economic crimes Act, No. 3 of 2003. That there is no evidence of a meeting or meetings or telephone calls or SMS or WhatsApp messages produced in court to show that the 6th Accused person conspired

with the other accused person or the suppliers or person or entity or entities to commit an offence of corruption or economic crimes.

ix. The evidence on record clearly showed that if there was any wrong doing the person or person responsible were other persons and not the 6th Accused person. That the work alleged to have been carried out by the 6th Accused person was clerical in nature and no responsibility as defined under the Public Procurement and Asset Disposal Act, 2015 was attached to him. That the 6th Accused could not make any decision to either commit funds or pay or rescind or alter or change any process before him. That furthermore the 6th Accused person was not involved in the planning or execution of the alleged ill-fated Investors Conference.

3.2.5. 7th Accused Person's Submissions

85. Learned counsel for the 7th Accused, **Mr. Nick Omari**, opened his submissions by wondering why the 7th accused was charged in the first place. That not a single witness led

evidence as to the 7th Accused person's involvement in the procurement process that culminated to the instant proceedings. That it was confirmed that the 7th Accused was CECM in charge of Water within Nyandarua County at the material time yet the botched investor's conference was a Department of Trade function. That the singular attempt to link the 7th Accused person to the charges was through the document examiner's report to push a narrative that he filled some third party RFQ for Sunlink Engineers. Learned counsel however reiterated his earlier submissions on the credibility of the document examiner's report.

3.3 DETERMINATION.

86. Having considered each party's case, I considered the following as the main issues for this court's determination: -

a. ***Whether the charge sheet was defective in counts 1, 2, 7, 12, 13, 14 and 16.***
b. ***Whether all the essential ingredients or elements of the charges had been proved beyond reasonable doubt as at the close of the prosecution's case.***

3.3.1 Whether the charge sheet was defective in Counts 1, 2, 7, 12, 13, 14 and 16

87. With respect to the defect in the charge in the first count, learned counsel, Nderi submitted that the charge sheet in this particular count failed to disclose material information with specificity as regards the accused persons as to the nature of the alleged crime as well as the amount of the subject of the economic crime. That the charge in this Count did not meet the constitutional threshold as set out in Article 50(1) (b) which grants an accused person the right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it.

88. In short, the 2nd accused is arguing that the charges as drawn do not disclose the full particulars of the charge. In my view, the allegations raised before this court challenging issues of non-disclosure of full particulars does not qualify as breach of one's fundamental rights. This was held by the High Court in ***William S.K. Rutto & Another vs Attorney General Nairobi HCC No. 1192/05 (2010) eKLR*** where the court

stated that the fact that a charge is defective does not in itself raise a constitutional issue.

89. I thus do hereby similarly find that the issues raised before me as regards the charges in counts 1 and 2, though couched as a breach of the Constitutional right to a fair trial as provided for under Article 50 (1) (b) of the Constitution, are not substantive constitutional issues but rather procedural issues which must have a remedy at the close of the proceedings.

90. Section 134 of the CPC provides that:

> ***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

91. The Court of Appeal in Criminal Appeal No. 27 of 2018 ***Benard Ombuna v Republic*** held that:

> ***The test whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at***

least he was confused with charges preferred against him and as a result, he was not able to put up an appropriate defence.

92. I however found that the offences in counts 1 and 2 are specific for any reasonable person to understand what he or she is being charged with. The element of lack of specificity is too remote in the circumstances. The accused persons herein are all aware that they are alleged to have conspired with one another to commit an Economic Crime of making fraudulent payments for services not rendered to the 6 suppliers herein, in regard to the botched investors' conference herein. In fact, the 2nd accused person was charged separately in Count 5, with the economic crime of fraudulent payments to the same suppliers for the same services not rendered. At the conclusion of the proceedings herein, I do not find any substantive prejudice caused to the accused persons herein in the manner in which the charges in Counts 1 and 2 were framed.

93. I however found that the charges in Counts 8, 9, 10, 11, 12, 13, 15 and 16 were inadequately framed. They referred to attached RFQ forms which were however not supplied. Noting

the number of documents produced and or relied on herein, the accused persons in these charges cannot be said not to have been substantively prejudiced by not knowing which of the RFQs produced in evidence herein applied to their respective cases. I thus found that the charges in Counts 8, 9, 10, 11, 12, 13, 15 and 16 were substantively defective and the accused persons could not have adequately fashioned their defences in the counts. That finding formed the main part of the reasons why I dismissed the charges therein under section 210 and acquitted the accused of the offences therein.

94. As regards the defects in Counts 12, 13, 14 and 16, learned counsel for the 5th Accused argued that the charges therein are defective. Count 14, as well as Counts 12, 13 and 16 have the offence of Making a Document Without Authority c/s 357(a) of the Penal Code. Going by the decision in the case of ***Daniel Lopeyok v Republic, supra,*** I had to agree that the charges therein are incomplete, as they only incorporate the *actus reus* of the offence of forgery, and are not complete offences in themselves. No accused person can be convicted of such an offence not known in law such as the one in Section 357(a) of

the Penal Code and for that reason, I found that the charges in these counts were also fatally defective and the accused persons could not be convicted upon such fatally defective charges, hence the dismissal of the charges and the resultant acquittals under section 210 of the CPC.

3.3.2. Whether all the essential ingredients or elements of the charges had been proved beyond reasonable doubt as at the close of the prosecution's case.

95. Having found the charges in Counts 8 to 16 as substantively, and hence fatally, defective, I find it superfluous to engage in the academic exercise of analysing the evidence in relation to them. That shall amount to an academic exercise with no much consequences herein. I was therefore left to consider all the grounds surrounding the sufficiency of evidence under this broad issue with regards to the charges in Counts 1, 2, 3, 4, 6 and 7.

Count I:

96. In ***Ewoi & 2 others -vs- Republic* Criminal Appeal E034 of 2023 [2024] KEHL 319 [1KLR],** it was stated inter alia: -

> ***The main ingredients of an attempted offence are intention to commit the said offence, whether or not the same is actually carried out to fruition or not. This intention is what constitutes the criminal intent or men rea of the offence while actual execution of any act in an attempt to commit the crime is the actus reus***

97. I also make reference to section 388 of the Penal Code which states as follows: -

> ***(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.***
>
> ***(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.***

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

98. From the above legal provisions, the main ingredient of an attempted offence is the intention to commit the said offence, whether or not the same is actually carried out to fruition or not. This intention is what constitutes the criminal intent or mens rea of the offence while the actual execution of any act in an attempt to commit the crime is the actus reus. Thus, in the present case, and as charged in Count 1, the main ingredients for attempt to commit an offence of economic crime would be the intention to make the fraudulent payments to the 6 suppliers herein and the actus reus would be the actual act that would likely to lead to making the payments herein which subsequently failed. It follows then that the acts of the accused persons must be considered and determined as to whether they were intended to make the fraudulent payments to the suppliers herein.

99. Let me first comment that I found this charge superfluous and/or a duplication of the offence of conspiracy in the second

count. If the prosecution is to be believed, then this charge was clearly unnecessary as the fraudulent payments being alluded to herein, had not merely been intended to be made, but had actually been made. The facts as presented herein are that the fraudulent payments had already been made. Whether the same were made in errors and not fraudulently as at the time of their reversals or recalls, they had already been paid to the respective suppliers' accounts. A charge is however the foundation of a trial in a criminal case, and a case must therefore succeed or fail within the confines of the charge. Noting that the fraudulent payments forming the basis for the attempt in this count had indeed been made, I did therefore find that the charge herein had therefore not been proved, and had therefore to fail as framed.

100. With the exception of the 2nd and the 6th accused persons, I did not find any role that the other accused persons had in making any fraudulent payment herein. The 2nd, 3rd, 4th, and 5th accused persons were involved in the procurement process that led to the fraudulent or erroneous payments herein. The procurement process came about as a result of the planned

Investors' Conference, which was a genuine event that was scheduled to take place and was part of Nyandarua Governor's agenda and had been duly budgeted for. It was evidently clear herein that, with the exception of the 2nd and 6th accused, none of the accused persons herein had a role in payments of the suppliers herein. It was established in ***Republic v Shivaji Shivji Patel [1965] EA 605***, that an attempt requires proof of an overt act which unequivocally manifests an intent to commit the offence, going beyond mere preparation and the prosecution had to demonstrate both ***mens rea*** (intention to commit the crime) and ***actus reus*** (a direct act toward its execution).

101. In the present matter, the evidence tendered shows that the 2nd, 3rd, 4th and 5th accused in their role in the planning of the investors' conference which, though ultimately not held, were performing a legitimate administrative undertaking at the material time and their being members of the various procurement committees equally formed part of routine preparatory work and did not amount to an overt criminal act, and no personal gain was realized or was to be realized by

them. Save for the 2nd and, probably, 6th accused, there was no evidence of any unlawful authorizations of payment on the part of the rest of the Accused persons. On this point, I do refer to the case of ***Nyabuto & Another vs Republic [2019] eKLR***, where the Court emphasized that the mere failure of an initiative or project cannot, without more, be construed as an attempt to defraud unless there is cogent evidence of fraudulent intent and action.

102. Furthermore, there was not established any direct or indirect link between all the accused persons and the six suppliers involved in the investor's conference. The attempt to link the 7th accused with one of the purported suppliers did not materialise as there was no evidence tendered of the alleged link. In actual fact PW10, PW11, PW12, PW13, PW14 and indeed all the suppliers in support of the prosecution case testified that they had never seen or met the accused persons herein and that they had no connection with them.

103. On the 6th accused, the prosecution failed to produce evidence that the 6th Accused was working as an IFMIS

accountant in Nyandarua County on the days or dates mentioned in the 2 counts brought against him. The medical evidence in favour of PW8, Edward Kihiu, showed that he was not on duty on 29th May, 2018 to 2nd June, 2018, whilst the validation was alleged to have been done on 26/06/2018 and payments made on 10/07/2018. There is therefore real possibility that PW8, Edward Kihiu, and PW7, Susan Kibui, were on duty on 26/06/2018 when the alleged validation was done as the prosecution did not produce evidence showing that the two were not at work on 26/06/2018 and these were the people employed to do validation. The two, Edward Kihiu and Susan Kibui, did not produce evidence showing that they shared their credentials with the 6th Accused person or that on the 26/6/2018 when validation was alleged to have been done they were not in office. The two by having their credentials used in validating the fraudulent payments herein ought to be considered as the prime suspects in the validation process herein, as I considered then accomplices herein. This is because whether they directly validated or facilitated the validation as claimed by them, they still aided in the validation

and hence facilitating the fraudulent payments herein their evidence should be treated as accomplice evidence.

104. Section 141 of the Evidence Act however provides that an accomplice is a competent witness. It reads as follows: '***An accomplice shall be a competent witness against an accused person and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice'***.

105. In the case of ***John Bosco Ndwiga & 2 others vs Republic (2017) eKLR***, the court elaborated on who is an accomplice when in ***Antony Kinyanjui Kimani v Rep [2011] eKLR*** when it said the following:-

> ***What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of*** *Watete v Uganda [2000] 2 EA 559****, the Supreme Court held that 'in a criminal trial a witness is said to be an accomplice if, inter alia, he***

participated as a principal or an accessory in the commission of the offence, the subject of the trial'. The same definition was restated by the same court in the case of *Nasolo v Uganda [2003] 1 EA 181* ***where the court further stated:***

> ***On the authorities, there appears to be no one accepted formal definition of 'accomplice'. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case.***

106. In the case of ***Michael Murithi Kinyua v Republic (2002) eKLR*** the court confirmed that indeed an accomplice evidence is admissible when it said under section 141 of the Evidence Act , Cap 80 Laws of Kenya an accomplice is a competent witness and a conviction based on his evidence is not necessarily illegal or irregular. However, there is a firm rule of practice that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if satisfied that the accomplice witness is telling nothing but the whole truth, and upon the court duly warning itself on the dangers of doing so.

107. As held by Justice Wendo in ***Nyongesa v Republic (Criminal Appeal E008 of 2025) [2025] KEHC 13572 (KLR) (30 September 2025) (Judgment),*** before corroboration can be considered however, a court of law dealing with accomplice witnesses must first make a finding as to the credibility of the witnesses. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence, and unless there is some other evidence, the prosecution must fail. If the court decides that the witness, though an accomplice witness, is credible, then the court goes further to decide whether the court is prepared to base a conviction on the evidence of the accomplice witness without corroboration. If this is so, the court must direct and warn itself accordingly. On the other hand, if the court decides that the accomplice witness, though credible, requires corroboration, the court must look for, find, and identify the corroborative evidence.

108. Again in ***Evans Ongochi and another v Republic (1994) e KLR***, the Court reiterated that: -

> ***When considering the evidence of an accomplice, the first duty of a Court is to decide whether that evidence is credible. If such evidence is not at all credible, then the issue of warning oneself before acting on it, or looking for corroboration for it cannot and does not arise for a lie cannot be corroborated. Nor can one act on a lie on the pretext that one has warned oneself on the dangers of acting upon such lie. It is only when it has been found as a fact that the evidence of an accomplice or any other evidence requiring corroboration is credible that one starts to look for corroboration – see Geoffrey Nguku v Republic [1982 – 1988] 1 KAR 818. If the evidence given by the accomplice is credible and there is corroboration for it, then the question of a Court warning itself before acting on such evidence does not arise. The need for the Court to warn itself arises only on those rare occasions when the Court is prepared to base a conviction solely on the uncorroborated evidence of an accomplice.***

109. In the cases of ***Ayor & Another vs. Republic (1968) EA 303*** Page 305 and ***Karanja & Another vs. Republic (1990) KLR 589,*** the Court of Appeal observed that the court must

always warn itself of the danger of convicting on the uncorroborated evidence of an accomplice before basing a conviction on such evidence. In ***Kinyua vs Republic (2002) KLR 256*** page 267 paragraph 30, the Court of Appeal again stated that in appropriate circumstances, the court may convict on the uncorroborated evidence of an accomplice if it is satisfied that the accomplice witness is telling the truth.

110. In the instant case, I have already found PW7 and PW8 to be accomplices to the fraudulent validation of the fraudulent payments herein as they directly confirmed in their evidence that they aided in the fraudulent validation herein. They are the ones who gave out their credentials to be used in the fraudulent validations. Their *alibis* were not well supported or covered and they failed to prove the conversations that they made with the 6th accused. Even if they could have indeed made the disclosures of their credentials to the 6th accused or other third parties as alleged, that would have still made them responsible for the fraudulent validations herein. Credentials apply in personam and are therefore not shareable.

111. I thus found that the evidence of PW7 and PW8, mainly against the 6th accused requires corroboration. ***In <u>Republic Vs Baskerville</u> (1916) 2 KB 658 at 667*** the court held that: -

> ***Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with crime, in other words, it must be evidence which implicates him, that is, which confirms in some material particular not only evidence that the crime has been committed but also that the person committed it, the nature of corroboration will necessarily vary according to the particular circumstances of the offence charged, it would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except which shows or tend to show that the story of the accomplice that the accused committed the crime is true, not merely, that the crime has been committed but factually it was committed by the accused.***

112. I did not however find any form of corroboration herein. The name of the 6th Accused person does not appear in the validation forms. The witnesses who testified did not give evidence that the 6th Accused validated the documents. In fact,

the name of the 6th Accused did not appear in all of the financial documents produced in court expect his deployment records. I thus found no credible and admissible evidence that the 6th Accused person attempted to commit an offence involving corruption or an economic crime in term of section 47(A) (1) of the Anti- Corruption and Economic crimes Act.

113. All these led me to the finding that the offence in the first count was unnecessary or had not been proved to the required standard against all the accused persons and that was the reason why I dismissed the same and acquitted all the accused under section 210 of the CPC.

Count II:

114. On the charge of conspiracy to commit an offence of economic crime as charged in the 2nd Count, the accused argued that the charges could not stand without any evidence of the essential ingredient of common intention. The charge of Conspiracy to commit an economic crime is provided for in Section 47A (3) which defines the offence as follows: '***47A. Attempts, conspiracies, etc. '..... (3) A person who***

conspires with another to commit an offence of corruption or economic crimes is guilty of an offence……'

115. The term conspiracy as it relates to criminal offences imputes a common intention between two or more co-conspirators. Ngenye J, (as she then was) stated as follows in the case of ***Rebecca Mwikali Nabutola & 2 others v Republic [2016] eKLR:***

> ***The Black's Law Dictionary 9th Edition at page 351 defines conspiracy as:***
>
> > ***An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement's motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose.***
>
> ***In Archibold's Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell), at pages 3025 and 3026, it is observed as follows:***
>
> > ***The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons…….. so long as a design rests in intention only, it is not indictable; there must be agreement…The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it…. Proof of the existence of a conspiracy is generally***

a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.

In order to proof (sic) an offence of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud the public.

To prove this offence there must be evidence, beyond reasonable doubt, of an agreement between two or more persons, the agreement must be to commit an unlawful act, there must be an intent to achieve the objective of that agreement and action or conduct that furthers that agreement.

In order to proof an offence of conspiracy to commit an offence of economic crime, the elements to be proved are therefore the existence of an agreement and the intention to defraud the public. The first issue to consider is whether or not there was an agreement to execute an unlawful act. An agreement may either be express or implied from the circumstances of the case. As expressed in the

Halsbury's Laws of England Vol. 25 Criminal Law at para. 73:

> ***It is not enough that two or more persons pursued the same unlawful object at the same place or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other.***

In Archbold's Criminal Pleadings, Evidence and Practice (supra) it is stated that an agreement in a charge of conspiracy 'may be proved in the usual way or by proving circumstances from which the jury may presume it' and that 'proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.

116. This requires that a common purpose between or among the subject parties is proved. Common intention is set out in section 21 of the Penal Code as follows:

> ***When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the***

prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

117. In the present case, it was alleged in count II that all the accused conspired with one another to commit an economic crime, to wit, making fraudulent payments for services not rendered to the 6 suppliers herein in regard to the botched investors' conference which was never held.

118. From the facts set out in this case, there is no evidence of an express agreement among the accused persons herein to make the fraudulent payments herein. The conspiracy can only be proved or disproved from the facts revealed. The trail leading to the commitment and payment of the monies in question is borne from the evidence of PW1, Phillip Kingo'ri**,** who testified that sometimes in 2018, he was the Director of Supply Chain Management in the County, when the files for the 6 suppliers herein were brought to his desk. That they were for supplies for the investors' conference herein. He confirmed that all the procurement; processes had been duly undertaken at the time,

and that his only concern was that the tender had been split and advised that it be redone through open tendering method. Further evidence adduced prove that the chief officer who was the accounting officer disregarded PW1's professional opinion and went ahead to award the tenders and approve the payments. It is thus not true that accused numbers 1, 3, 4, 5 and 7, whose roles related to procurement processes herein, and were not members of an acceptance and inspection committee, conspired with the accounting officer, the A-I-E holder (2nd accused) or the alleged validator (6th accused) to proceed with the tendering process and approve or make the payments.

119. I found that from the evidence adduced, the prosecution did not prove the two critical ingredients of the offence of conspiracy. It was the evidence of suppliers, mainly PW10, PW11, PW12, PW13, and PW14, that they did not have any direct or indirect link with the accused persons nor had they ever met, negating existence of any agreement or conspiracy between them. The failure of the prosecution to demonstrate existence of an agreement between the accused, and the

suppliers to make the fraudulent payments, made this charge fall flat.

120. It was confirmed that the 1st and 2nd accused persons as CECMs played no role in the procurement and payment processes. All the major witnesses herein concede that their roles as CECMs revolve around developing, implementing, and reviewing county policies, sector plans, and budget by dint of Article 183 of the Constitution of Kenya. I therefore found that no evidence was tendered to demonstrate that the 1st and 2nd accused persons were members of the Acceptance and Inspection Committee which is the legally recognised institution responsible for confirming the quality of services rendered. There is therefore no way that the 1st accused would be committing to something not within her ambit. I further found that the purported endorsement by the 1st accused person on the commitment form (PEXH. No. 15) is foreign both in procurement law and practice as was confirmed by the prosecution witnesses and as such it cannot form the basis of making any payments. I further do agree with the impressive submissions by the counsel herein that the full meaning and

import of the purported endorsement by the 1st accused person is a matter of speculation and conjecture and had no effect in any conspiracy that the 1st accused person could have been part of the conspiracy to make any fraudulent payment as charged in the 2nd count.

121. There was further no link established between the accused persons herein with the beneficiary companies to prove conspiracy. There was no evidence that was led to show that the accused persons herein had a stake in the proceeds/ funds erroneously wired to the suppliers herein.

122. I further do agree with the learned counsel for the 2nd accused that the failure of the prosecution to charge PW4 and PW9 being persons who facilitated the requisition for the funds and the actual payment leaves the evidence of conspiracy to make the fraudulent payments herein untenable as it leaves the evidence therein short of establishing a common intention between the accused persons and alleged co-conspirators who made the actual payments. This is given that the request of funds, the expenditure of which gave rise to the above fraudulent payments herein was made by PW4. From the

testimonies available, the procedure followed when requesting for the funds, and the eventual payment was improperly conducted, what the prosecution referred to as 'an error'.

123. With the above in mind, I found that the evidence is not sufficient to prove a meeting of minds between the accused persons who were charged herein, without the involvements of PW4 and PW9, and the suppliers herein to effect the payments herein which have been termed as not fraudulent, but erroneous. I was unable to find, and could not hold, that PW4 and PW9, who were not subject of the trial herein, worked in cohort with the accused persons herein with an intention to make the payments herein, whether fraudulently or erroneously. The entire charge had therefore to fail, and hence the dismissal and acquittal under section 210 of the CPC.

Count III:

124. The 1st Accused was charged in Count 3 with the offence of Knowingly Making a False Statement to One's Principal contrary to Section 41(2) as read with Section 48(1)(a) of the ACECA. Section 41(2) of the Anti-Corruption & Economic Crimes Act

states: '***41(2) An agent who, to the detriment of his principal, uses, or gives to his principal, a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence.***'

125. Section 38 (1) of the Anti-corruption and Economic Crimes Act defines an agent as a person who, is in any capacity, whether in the public or private sector is employed by or acts for or on behalf of another person. For all intents and purposes therefore the 1st Accused who was employed by the County was an agent of the County.

126. The false document that the 1st accused is alleged to have made to the County was an endorsement in PEXH. No. 15. That endorsement was indeed found to be false as there was no such document recognised in public finance management. Whether it was false or not, the prosecution had to prove beyond reasonable doubt that it was made by the 1st accused person. Since no one testified that he or she witnessed the 1st accused make the endorsement, the prosecution relied on the

circumstantial evidence, mainly in the form of the expert opinion evidence of the document examiner, PW21.

127. Having stated so, was the reliance on the evidence of the document examiner sufficient. The accused persons in their submissions think otherwise. The document examiner found that the faint signature of the CECM Industrialisation, Trade and Co-operative Development in the document was similar to that of the 1st accused.

128. As aforestated, there was no eye witness to the offence. The parties herein agree that the document which was examined by the expert was not an original but a photocopy. No plausible explanation was offered by the prosecution why the original was not submitted to the forensic examiner. The examiner went into detail on how he arrived at his conclusion and the fact that essentially, he did not explain his methodologies in the report. No explanation was given why the photocopy was used by the examiner. Ideally and as provided under section 67 of the Evidence Act Cap 80 Laws of Kenya all documentary evidence ought to be proved by primary evidence. Section 68 thereof provides instance when secondary

evidence could be used. From the evidence as presented at the trial there is no reason why the document examiner did not use the original documents. It was confirmed that the original documents were available and some had been forwarded to the DCI who were conducting parallel investigations. Thought the document examiner conceded that there would be some slight but not much variation, in a situation such as this it is prudent to always submit primary evidence. This court will however not assume that there could be no difference between the original as well as a photocopy. I do believe that the legislature had every reason to indicate that when and where to use secondary evidence.

129. In the case of ***Republic Vs Podmore*** ***(1930) 46T LR 365*** relied by the court in ***Samson Tela Akute Vs Republic*** ***(2006) eKLR,*** the court stated as hereunder.

> ***…let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is the***

> ***person who habituated to the examination of handwriting, practised in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That and no more than that, is his legitimate province….***

130. In the instant case PW21 stated as follows: -

> ***Signatures by arrow in blue ink on A43(ii) and specimen signatures B2(i-ii), C6-C7 indicated by arrows in black ink are written in similar formation and style; similar initial letter 'O' and terminal stroke letter 'e', In my opinion signatures were made by the same author***

131. As found in ***Samson Tele Akute (supra)*** the expert in my view failed to give particular details of the features of similarity or dissimilarity as regards the character construction initial and formal strike, pen lift or inkflow neutral. Its trite law therefore that the evidence of an expert is a mere opinion and may not hold sway to the findings of the court. All that the expert stated herein is concluding that the person that signed the endorsement in the commitment form, PEXH. No.15 is that found in the specimen signature.

132. I was not satisfied that it was the 1st accused who made the faint signature that was being analysed in the photocopied document, PEXH. No. 15. Consequently, it would have been unfair to sustain the charge based on the shaky evidence on record and hence the dismissal of the charge and acquittal under section 210 CPC.

Count IV

133. The 1st Accused faced an additional charge in count IV of abuse of office contrary to Section 46 as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act for conferring a benefit to the 6 suppliers by signing a commitment form confirming that the services in regard to the investor' conference had been satisfactorily offered yet the services had not been offered.

134. The offence under Section 46 is couched in the following terms: ***'A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.'*** The ingredients of the offence of abuse of office, were set out in ***Philomena Mbete Mwilu vs DPP & Others***

***[2018] eKLR*;** that a public officer uses a public office to improperly confer on himself or on another person a gift, loan, fee, favour, advantage etc. which he or that other person was not otherwise entitled to.

135. First, I found that this charge may be defective as it failed to describe or state the benefit that the 1st accused is alleged to have conferred on the 6 suppliers herein. However, applying the substantive test, I did find that the 1st accused must have been aware that the benefit that was conferred to the 6 suppliers herein was the monetary payment that was fraudulently or erroneously made to their accounts. Thus the 1st accused was not prejudiced by this omission.

136. However, from the analysis already set out above, and having doubted that the 1st accused signed the endorsement in PEXH No. 15 as alleged herein, I further did find that the prosecution had been unable to prove this charge against the 1st accused person to the required standard and hence the dismissal of the charge and the resultant acquittal under section 210 CPC.

Count VI:

137. The 2nd Accused was also charged under count VI with the offence of fraudulently making payments from public revenues contrary to Section 45(2)(a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act. Section 45(2)(a)(iii) of the Anti-Corruption and Economic Crimes Act provides that:

> ***An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person— fraudulently makes payment or excessive payment from public revenues <u>for services not rendered or not adequately rendered</u>.*** *(Emphasis mine)*

138. The subject payment was Kshs. 12,998,000 made to 6 suppliers herein. It is apparent that the payments herein were approved by the 2nd Accused. The 2nd Accused worked in the department of trade and was in fact the A-I-E holder for the department. Her function as the departmental accountant and the A-I-E holder concerned the administration, custody, management, receipt or use of the public funds. As an A-I-E

holder for the department, she must have been aware that the investors' conference was not held and therefore services for which payments were sought had not been rendered. The payment was also not supported by crucial documents such as an inspection and acceptance report etc.

139. The Public Procurement and Assets Disposal Act provides for a procedure for requisition and authorization for provision of goods and services. Procurement according to the Act involves all processes needed to certify the provision of goods and services. All employees of public entities, without any exception, are bound by this law.

140. I find that the absence of an inspection and acceptance report herein denotes that the procurement procedure was not followed to the end as required under the Act. This just demonstrates the irregular manner in which the 2nd Accused acted in approving, hence making, payments without justification.

141. Taking the above cumulatively, I find that the 2nd Accused, being the departmental accountant, approved and therefore facilitated payments for services that had not yet been

delivered. As I have reasoned later on herein, the 2nd accused's action in my view amounted to wilful or careless failure to comply with applicable laws and procedure in incurring the expenditure. However, from the facts revealed, I also found that charging the 2nd Accused with two different offences arising from the same set of facts amounted to duplication of charges. Both of these offences (counts V and VI) arise from the same set of facts, the act of the 2nd Accused approving the payment of Kshs. 12,998,000/-. This in my view, amounted to improper splitting of charges which could result in double convictions on the same facts. I found that the circumstances in this case better suit the 5th count and that is the reason why I proceeded to dismiss the charge in count VI, and acquitted the 2nd Accused under section 210 CPC.

Count VII:

142. The 2nd Accused faced an additional charge in count 7 of abuse of office contrary to Section 46 as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act for conferring a benefit to the 6 suppliers by approving payments

of Kshs. 12,998,000 for services of the botched investors' conference.

143. As aforestated, the ingredients of the offence of abuse of office, were set out in ***Philomena Mbete Mwilu v DPP & Others [2018] eKLR***; that a public officer uses a public office to improperly confer on himself or on another person a gift, loan, fee, favour, advantage etc. which he or that other person was not otherwise entitled to.

144. From the analysis already set out above, it is not disputed that a sum of Kshs. 12,998,000/- was paid to the 6 suppliers herein. Under **Section 2** a benefit means ***'any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage.***' The prosecution was under a duty, in proving the offence to show that the 2nd Accused improperly used her public office to confer a benefit. It was also crucial as part of the ingredients to show the nature of benefit conferred. The 2nd Accused, being the accountant and A-I-E holder in the Department of Trade was a public officer within the meaning of the law. I had from the outset of analysis as regards this count, stated that this was an

additional offence on the 2nd accused, basically emanating from the same transactions and facts. Having been found to have a case to answer in the 5th Count for disregarding laws and procedures before incurring public expenditure, the next issue that was to be determined under this charge is whether that failure amounted to an abuse of office on her part and further that the amount alleged the Kshs. 12,998,000/- as having been irregularly or erroneously paid amounts to a benefit in the context of section 2.

145. As I had found hereinabove, the 2nd accused's action in my view still amounted to wilful or careless failure to comply with applicable laws and procedure in incurring the expenditure. However, from the facts revealed, I further found herein that charging the 2nd Accused with three different offences arising from the same set of facts amounted to duplication of charges. All these offences (counts 5, 6 and 7) arise from the same set of facts, the act of the 2nd Accused approving the payment of Kshs. 12,998,000/-. This in my view, further amounted to improper splitting of charges which could result in multiple convictions on the same facts. I found that the circumstances

in this case better suit the 5th count and that is the reason why I proceeded to dismiss the charge in count 7, and acquitted the 2nd Accused under section 210 CPC.

146. In making the acquittals herein, I referred to the case of ***Joan Chebichii Sawe vs Republic*** ***[2003] eKLR***, where the Court of Appeal expressed itself thus: '***The suspicion may be strong, but this is a game with clear and settled rules of engagement. The prosecution must prove the case against an accused beyond any reasonable doubt***'.

147. I also wish to adopt the position of the Supreme Court of India in the case of ***State of Punjab vs Jagir Singh*** ***[1974] 3 SCC 277*** that:

> ***A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged...In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final***

analysis would have to depend upon its own facts...

148. Therefore, in acquitting the accused, the court does not necessarily make a definite finding that the accused is factually innocent of the offence with which he is charged. It simply makes a finding that the prosecution has failed to prove his guilt and he is therefore constitutionally deemed to be innocent. That is what our law provides. While some people may be unhappy with the presumption of innocence, it is a time-tested principle in all jurisdictions which apply democratic principles and unless we opt to go the dictatorship mob way, we have no option but to endure it.

149. Since the Constitution of Kenya prescribes the rule of law as a binding national value, then the law is paramount and as was appreciated in ***Dr. Christopher Ndarati Murungaru vs AG and Another*, Civil Application No. NAI. 43 of 2006 (24/2006)**, at page 12:

... [t]he Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the

annoyance of the public...We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy: our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In dictatorship, we could simply round up all these persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decision

150. Bagmall, J. in ***Crowcher vs Crowcher [1972] 1 WLR 425, 430*** stated that: '***...[t]he only justice that can be attained by mortals, who are fallible and are not omniscient is justice according to the law: the justice that flows from the application of sure and settled principles to proved or admitted facts’.***

4.0 DEFENCE CASE: CASE TO ANSWER IN COUNT 5 FOR THE 2ND ACCUSED

4.1 EVIDENCE FOR THE DEFENCE

151. The 2nd Accused was called upon to make her defence in the 5th Count. She gave her defence on 22/01/2026 in which she testified on oath as DW1. She confirmed that she was an accountant in the Department of Trade from the year 2015 till 2020. That her immediate supervisor was the Chief Officer in the department who was also the accounting officer. She confirmed that she was part of the procurement process for the investors conference. She further confirmed that she approved the payment vouchers. That before she approved the same, she confirmed that the payments had been budgeted for and that it was as per the procurement plan. She also confirmed that there were funds in the vote book and the signature of the Chief Officer. She also confirmed that there was an endorsement letter signed by the Chief Officer. She stated that she would only have failed to sign the approvals if she would have had the adverse opinion of the procurement officer. She

therefore denied that she wilfully failed to comply with the financial regulations as charged. That she did what she was told by her superior who gave her the endorsement letter confirming that the services had been offered. That since he had already signed his part, she had no option but to comply.

152. In cross-examination, she confirmed that as the accountant in the department, her duties were to prepare payments through the payment vouchers and manage the vote book of the department. That she had been duly appointed as the A-I-E holder of the department.

4.2 Issues for Determination

153. The burden and standard of proof are still the same even after the close of the defence. The issue is still whether the prosecution has at the close of the defence, still been able to prove its case against the 2nd accused in the 5th count to the standard of beyond reasonable doubt.

4.3 Defence Submissions

154. On this point, learned counsel for the 2nd Accused, Mr. Nderi, has submitted that the prosecution has failed to adduce any direct evidence to prove the offence and more particularly, that he 2nd accused wilfully failed to comply with the laid down procedure on authority to incur expenditure, A-I-E. That the 2nd Accused was just an accountant under the directions of the Accounting Officer and that she was under express instructions by him and given that he had given an undertaking that the works and services had been rendered, the accused without prejudice had no choice but to heed to the instructions of the Accounting Officer.

155. Learned counsel referred this court to the decision of the Court of Appeal in ***Omar vs Republic [2024] KECA 1670***, where the court stated at Paragraph 29 thus: -

> ***Given the full circumstances of the case, it seems to us that on a proper reading of the charge, and giving the words of section 45 (2)(b) of ACECA full and proper meaning, the appellant's action cannot be said to have amounted to a wilful or careless failure to comply with the law.***

Black's Law Dictionary, Tenth Edn. defines the term "wilful@ thus; The word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent."

156. Learned counsel urged the court to apply the above decision and find that the 2nd accused signed the payment vouchers as an A-I-E holder on the basis of a duly signed endorsement form by the Accounting Officer and the CECM of the department certifying that the works and services had been rendered.

157. Counsel went further to submit that the 2nd accused did not harbour a bad purpose or an evil intent. That this is evident by the fact that the prosecution failed to establish any link between her and the suppliers and therefore she did not intend to confer a benefit unto herself which would obviously constitute bad purpose or evil intent.

4.4 DETERMINATION

158. **Section 45** of the Anti-Corruption and Economic Crimes Act deals with offences related to the protection of public property and revenue. As per the Act Public property '***means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body***.'

159. Section 45(2)(b) provides that:

> ***An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—***
>
> > ***(b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures****.*

160. Based on Section 45(2)(b) of the Anti-Corruption and Economic Crimes Act (ACECA), No. 3 of 2003 (Kenya), the ingredients of the offence of wilfully failing to comply with the

applicable procedures and guidelines relating to incurring of expenditures are as follows:

i. The Accused person is a pubic officer or its equivalent. This means that the accused must be a person whose functions concern the administration, custody, management, receipt, or use of any part of public revenue or public property.

ii. Failure to comply with applicable procedure: The accused must have failed to comply with the specific law, regulations, procedures, or guidelines regulating the management of funds or the incurring of expenditure, in this case, Regulation 98(2) of the Public Finance Management Regulations of 2015.

iii. The failure was 'wilful' and not accidental or negligent; it must be done deliberately or intentionally. This requires proving that the accused knew of the correct procedure and knowingly chose not to follow it.

iv. Direct relationship to expenditure: The non-compliance must directly relate to the incurring of expenditures, management of funds, or procurement, which results

in, or has the potential to result in, loss of public funds. Even if no actual loss to public property is proven, the *wilful* failure to comply with the prescribed procedure constitutes the offence.

v. Not a mere administrative flaw: For the action to be criminal, it must transcend a mere clerical mistake or minor administrative anomaly and rise to the level of a deliberate breach of the applicable rule

161. Regulation 98(2) of the Public Finance Management Regulations 2015 provides that no advance payment shall be paid to suppliers of goods and services unless provided for in the contractual terms and conditions contained in a valid contract signed between the procuring entity and the supplier.

162. Evidence in criminal cases such as the instant one should be considered as a whole; see ***Okale Okethi and Others vs. Republic [1965] EA 555***. I have therefore considered the evidence herein as a whole as required, i.e. from PW1, right through PW22 to DW1.

163. The accused person herein testified on oath and thus her evidence forms part of the evidence to be considered as a whole. I find that her evidence contains several admissions that corroborate and support the impressive evidence by the prosecution that she was duly appointed as an accountant and the A-I-E for the department. Apart from being an accountant and the A-I-E holder, she was also appointed and serving in various procurement committees as confirmed herein. Whereas these appointments appear to conflict with her role as the departmental accountant and at the same time the A-I-E holder, thereby eroding the principles of separation of powers, check and balances, I may not entirely fault her for this given that she was not the appointing authority.

164. The 2nd accused performed all these roles in the Department of Trade and it cannot be said that she did not know that the investors conference was not held and that the services that she actively participated in procuring were not rendered.

165. As the A-I-E holder for the department she bore heavy responsibilities and I do find her case not to be in all fours with

the facts in ***Omar vs Republic, supra***. In ***Omar vs Republic***, there was a clear case of an emergency which necessitated quick actions. I do not find an emergency situation that prevailed with regards to the investors conference herein that required such an urgent and irregular approval without following the law.

166. The question therefore, is whether the 2nd Accused's actions amounted to wilful failure envisaged under Section 45(2)(b). I find that her defence that she was bound to approve the payments because her bosses had endorsed the same untenable. She took responsibility when she received the payment vouchers and gave the approval for their payments. She worked in the department and even participated in the preparations for the investors conference and it therefore appears to me that in this context, the 2nd Accused, being the department's A-I-E holder, incurred the expenses without reference to above regulations. In my view, the actions and omissions of the 2nd Accused amount to wilful failure in this regard. As the accountant and the A-I-E holder in the department, she was enjoined to ensure that expenditure in

her department were incurred in accordance with the law and procedures. I find that this charge has been proved.

167. As aforestated, the 2nd accused cannot hide behind the fact that there were some endorsements by the Chief Officer, her boss, and the CECM, as it has been confirmed that there was no inspection and acceptance committee report confirming that the services procured had been rendered. She cannot also hide behind the fact that she had no known link with the suppliers or that no public fund was lost. The absence of loss is not a defence to such a charge as the one herein. Furthermore, having been aware that the services had not been rendered, she ought to have performed the role of a whistle blower rather than to continue with the payment process without following the law. I thus do hereby find her guilty of the offence in the 5th count and consequently do hereby, pursuant to the provisions of section 215 of the CPC, convict her of the offence of Wilfully Failing to Comply with the Applicable Procedure and Guidelines Relating to Incurring of Expenditure c/s 45(2)(b) as read with section 48(1)(a) of the ACECA.

DATED, **SIGNED** AND **DELIVERED** AT **NAKURU** IN OPEN COURT

THIS_24th __DAY OF___March__,2026

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Prosecution's Counsel: Macharia

1st & 7th Defence Counsel: n/a

2nd Defence Counsel: Nderi

3rd Defence Counsel: n/a

4th Defence Counsel: n/a

5th Defence Counsel: n/a

6th Defence Counsel: n/a

1st Accused: n/a

2nd Accused: Present

3rd Accused: n/a

4th Accused: n/a

5th Accused: n/a

6th Accused: n/a

7th Accused: n/a