



REPUBLIC OF KENYA



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**Wakhungu & 2 others v Republic (Criminal Appeal E039 of 2022 & 077 & 078 of 2023
(Consolidated)) [2024] KECA 1426 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1426 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E039 OF 2022 & 077 & 078 OF 2023 (CONSOLIDATED)
MSA MAKHANDIA & PO KIAGE, JJA
OCTOBER 11, 2024**

**IN THE MATTER OF
GRACE SARAPAY WAKHUNGU APPELLANT**

**AS CONSOLIDATED WITH
CRIMINAL APPEAL 077 OF 2023**

**IN THE MATTER OF
JOHN KOYI WALUKE APPELLANT**

**AS CONSOLIDATED WITH
CRIMINAL APPEAL 078 OF 2023**

**BETWEEN
ERAD SUPPLIES AND GENERAL CONTRACTS LTD APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(E. Maina, J.) dated 6th October 2022 in HC ACEC Case No. 07 of 2020)*

JUDGMENT

1. The facts which form the background of these consolidated appeals are fairly straightforward although the resultant criminal proceedings were obfuscated unnecessarily. The record shows that some time in the year 2004, the National Cereals and Produce Board (“NCPB”), floated tenders for the importation



of white maize. In August 2004, Erad Supplies and General Contracts Limited (“3rd appellant”), whose Directors were Grace Sarapay Wakhungu and John Koyi Waluke, the 1st and 2nd appellants respectively, successfully bid for the tender amongst 4 others and was allowed to import 40,000 metric tons of white maize. On 26th August 2004, the contract was executed to that effect between the 3rd appellant and NCPB, for the maize to be supplied within four weeks from the date of the contract at a consideration of USD 160,000. NCPB was, however, required to issue the 3rd appellant with a letter of credit immediately after the contract was signed. However, NCPB failed and or neglected to do so. As a result, the 3rd appellant could not proceed with the importation of the maize. The 3rd appellant, in the premises, claiming breach of contract by the NCPB invoked clause 12.0 of the contract and referred the dispute to a single arbitrator, Evans Gaturu, FCI Arb, for resolution. It should be noted that NCPB during the proceedings before the arbitrator counterclaimed for Kshs 67,654,980.62, on account of commissions it would have earned but for the breach.

2. Upon hearing the dispute, the arbitrator in an arbitral award dated 7th July 2009, found NCPB in breach of the contract for failing to open a letter of credit for the 3rd appellant as agreed and that the 3rd appellant was therefore entitled to claim for loss of profit and awarded it USD 1,960,000. The arbitrator also awarded it USD 1,146,000 for storage on the basis that the 3rd appellant’s suppliers had already stored the 40,000 tons of maize. He also awarded interest at 12% p.a from 27th October 2004, being the date by which the 3rd appellant would have performed the contract had the respondent met its part of the bargain. The counterclaim was, however, dismissed. NCPB was dissatisfied with the award and on 5th October 2009, lodged an application in the High Court at Nairobi under section 35 of the *Arbitration Act*, seeking to set aside the award on grounds that the arbitrator dealt with a dispute not contemplated by the parties; that the award smacked of mischief, corruption and or pure theft of public funds and was, therefore, against public policy.
3. After hearing the parties, in which the issue of the allegedly forged invoice for storage charges featured prominently, Njagi J. was not persuaded that a case for setting aside the award had been made. He, however, set aside the aspect of interest on costs. He accordingly dismissed the application with costs. Dissatisfied, NCPB instituted an appeal in this Court on 27th January 2012, being Civil Appeal No. 9 of 2012. The respondent successfully applied to be enjoined in the appeal as interested party so that it could be heard on the bona fides of the arbitral proceedings. Again, the issue of the allegedly forged invoice was flagged. Pursuant to the appeal, the respondent filed an application seeking leave of court to adduce further evidence being a special report of the Public Investments Committee adopted by the National Assembly on 12th November 2013. The report made reference to the genuineness or lack of it of the invoice of storage charges. Upon hearing the application interpartes, this Court (differently constituted) in a ruling delivered on 11th July 2014, dismissed with costs the application. We were told from the bar, by counsel for the appellants which was contested by counsel for the respondent, that the substantive appeal has since been dismissed. Then there followed several applications before the High Court challenging the award. One came before Odunga, J. (as he then was), who upheld the validity of the invoice. Another application to reopen the arbitral proceedings more or less on the same grounds was similarly dismissed by Kamau, J.
4. In the meantime, the 3rd appellant moved to execute the decree by way of attachment and sale of NCPB’s assets, after the High Court, on its application, had adopted the arbitral award as a judgment and decree of the court. The items so attached were, however, insufficient to satisfy the decree. Consequently, the 3rd appellant took out garnishee proceedings against NCPB. On 19th March 2013, NCPB was notified by its bank, Kenya Commercial Bank, (“KCB”) of a garnishee order attaching Kshs. 297,086,505.00 payable to the 3rd appellant. On 28th June 2013, NCPB received yet another notification from its other bank, National Bank of Kenya, (“NBK”) regarding a garnishee order



attaching Kshs. 264,864,285.00 in its account payable to 3rd appellant's advocates; but the only available balance was Kshs. 13,363,671.40 which was attached and paid out. Yet again, a third garnishee order was issued to the Co-operative Bank of Kenya ("Co-op Bank") attaching USD 24,032.50 in NCPB's USD bank account.

5. Meanwhile, as this was ongoing, the Ethics and Anti-Corruption Commission ("EACC") launched investigations against the appellants with regard to the tender, which led to their arrest and subsequent arraignment in court on 2nd August 2018. The 1st and 2nd appellants were arraigned in their capacities as Directors and shareholders of the 3rd appellant. The 3rd appellant was charged in its juristic capacity. The central thread in the allegations against the appellants was that the whole arbitration process was fraudulent as it was based on a fraudulent invoice in relation to the storage charges claimed by 3rd appellant and that the said invoice was a false document made in support of a false claim for storage charges. Accordingly, the appellants were arraigned in Chief Magistrate's Court at Milimani Anti-Corruption Case No. 31 of 2018 with five counts relating to the said acts of omission and or commission. The charges were as follows.
6. Count 1, the appellants were charged with uttering false documents contrary to section 353 as read with section 349 of the Penal Code. The particulars were that, on or about 24th February 2009, being the Directors of Erad Supplies and General Contracts Limited, within Nairobi City County in the Republic of Kenya, they knowingly and fraudulently uttered a false invoice No. 12215-CF- Erad for the sum of USD1,146,000 to NCPB purporting it to be an invoice to support a claim for costs of storage of 40,000 metric tons of white maize purportedly incurred by Chelsea Freight.
7. Count 2, the 1st appellant was charged with the offence of perjury contrary to section 108 (1) as read with section 110 of the Penal Code. Particulars being that on the same date, place, and in the same capacity while giving testimony in arbitration proceedings, she knowingly gave false evidence for claims for costs of storage of 40,000 metric tons of white maize purportedly incurred by Chelsea Freight.
8. Count 3, the appellants were jointly charged with the offence of Fraudulent Acquisition of Public Property contrary to section 45(1)(a) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* 2003 (ACECA). Particulars were that, on or about the 19th March 2013, in Nairobi City County within Nairobi in the Republic of Kenya, being the Directors of Erad Supplies and General Contracts Limited, together with Erad Supplies and General Contracts Limited, they jointly and fraudulently acquired public property to wit Kshs. 297,386,505 purporting to be costs of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight, loss of profits, and interest.
9. As to Count 4, the appellants were charged jointly with the offence of Fraudulent Acquisition of Public Property contrary to section 45(1)(a) as read with section 48(1) of ACECA. Particulars were that, on or about 27th June 2013 in Nairobi City County within Nairobi in the Republic of Kenya, being the Directors of Erad Supplies and General Contracts Limited, together with Erad Supplies and General Contracts Limited, they jointly and fraudulently acquired public property to wit, Kshs. 13,364,671.40 purporting to be costs of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight, loss of profits, and interest.
10. As to the last count, the appellants were jointly charged with Fraudulent Acquisition of Public Property contrary to section 45(1) (a) as read with section 48(1) of ACECA. Particulars were that on or about 2nd July 2013 in Nairobi City County within Nairobi in the Republic of Kenya, being the Directors of Erad Supplies and General Contracts Limited together with Erad Supplies and General Contracts Limited, they jointly and fraudulently acquired public property to wit, USD 24,032,000



purporting to be costs of the storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight, loss of profits and interest.

11. The appellants returned pleas of not guilty which set in motion their trial. The prosecution called a total of 27 witnesses in a bid to prove its case against the appellants. The trial court after considering the evidence tendered by the prosecution and the defences put forth by the appellants, found them guilty and convicted them in a judgment delivered on 22nd June 2020. The convictions were in the following terms:

- a. Count 1 – (i) The 1st appellant was found guilty whereas the 2nd and 3rd appellants were acquitted.
- b. Count 2 – The 1st appellant was found guilty.
- c. Count 3 – The appellants were all found guilty.
- d. Count 4 all the appellants were found guilty.
- e. Count 5- all the appellants were found guilty.

Thereafter, the trial court having considered the mitigation proffered by the appellants meted out the sentences as follows:

- a. Count 1 – 1st appellant fined of Kshs. 100,000/= in default to serve one (1) year imprisonment.
- b. Count 2 – 1st appellant fined Kshs. 100,000/= in default serve one (1) year imprisonment.
- c. Counts 3, 4 and 5 under section 48 (1) (a) of the Anti- corruption and Economic Crimes Act 2003:
 - i. 1st appellant fined Kshs. 500,000/= in default to serve 3 years imprisonment.
 - ii. 2nd appellant fined Kshs. 500,000/= in default serve 3 years imprisonment.
 - iii. 3rd appellant fined Kshs. 500,000/= to be paid by the 1st and 2nd appellants in default to serve 3 years imprisonment.
- f. Count 3, 4 and 5 under section 48(2)(a) being double the amount lost by NCPB:
 - i. 1st appellant fined Kshs. 594,175,125/= in default serve to 7 years imprisonment.
 - ii. 2nd appellant fined Kshs. 594,175,125/= in default to serve 7 years imprisonment.
 - iii. 3rd appellant fined Kshs. 594,175,125/= to be paid by the 1st and 2nd appellants respectively in default each of them to serve 7 years imprisonment.
- g. Count 4 – under Section 48(1)(a):
 - i. 1st appellant fined Kshs. 500,000/= in default 3 years imprisonment.
 - ii. 2nd appellant fined Kshs. 500,000/= in default 3 years imprisonment.
 - iii. 3rd appellant fined Kshs. 500,000/= and that the 1st and 2nd appellants each to pay in default each to serve 3 years imprisonment.
- h. Count 4 under section 48(2) (a) a mandatory fine two times the amount of loss suffered by the complainant NCPB amounting to Kshs. 13,364,671.40 (x2):
 - i. 1st appellant – fined Kshs. 26,729,342.80/= in default 7 years imprisonment.



- ii. 2nd appellant fined Kshs. 26,729,342.80/= in default 7 years imprisonment.
 - iii. 3rd appellant – fined Kshs. 26,729,342/= to be paid by the 1st and 2nd appellants each in default each of the accused to serve 7 years imprisonment.
 - i. Count 5 – under section 48(1)(a):
 - i. 1st appellant fined Kshs. 500,000/= in default 3 years imprisonment.
 - ii. 2nd appellant fined Kshs. 500,000/= in default 3 years imprisonment.
 - iii. 3rd appellant fined Kshs. 500,000/= to be paid by the 1st and 2nd appellant each in default each to serve 7 years imprisonment.
 - j. Count 5 under section 48(2)(a) which provides for two times of the quantifiable loss of USD 24,032:
 - a. 1st appellant fined USD 48,064 in default 7 years imprisonment.
 - b. 2nd appellant fined USD 48,064 in default 7 years imprisonment.
 - c. 3rd appellant fined USD 48,064 to be paid by the 1st and 2nd appellants in default each to serve 7 years imprisonment. The fine imposed in terms of U.S. Dollars to be paid in Kenya shillings at the prevailing market rates.
 - k. Count 5 under section 48(2)(b) being fine double the amount benefitted:
 - a. 1st appellant fined Kshs. 80,000,000/= in default to serve 7 years imprisonment.
 - b. 2nd appellant fined Kshs. 100,000,000/= in default to serve 7 years imprisonment.
12. The trial court did not stop there! It further proceeded to order that, in the event that the fine is raised, the amount equivalent to the sums lost from NCPB accounts held at KCB, NBK and Co-op Bank as charged in counts 3, 4 and 5 be paid as follows:
- i. An amount equivalent to the court (sic) in count 3 out of the fines in Count 3 be restored to NCPB.
 - ii. Count 4 – out of the fines in Count 4, amount to the extent lost sum in Count 4 be paid to NCPB.
 - iii. Count 5 – NCPB to be compensated to a tune of the money lost from Co-op as per count five.
- There were further directions that, if the fine was not paid or the amount paid was not sufficient to compensate the NCPB, it shall be at liberty to take legal action to recover the same and that the Speaker of the National Assembly and Parliamentary Service Commission were to be notified of the 2nd appellant’s conviction in compliance with section 63(1) of ACECA, pending the outcome of any appeals.
13. Being aggrieved by the convictions and sentences, the appellants filed three separate appeals in the High Court being Anti- Corruption Criminal Appeal Numbers 7, 9, and 10 of 2020 respectively. Upon hearing the appeals, the High Court dismissed them for being unmeritorious.
14. Undeterred, the appellants are now before us on a second and perhaps last appeal. The appellants filed separate appeals setting out various grounds against the judgments of the High Court. As most of the



grounds are crosscutting, it is unnecessary to set out the grounds of each appellant. Rather, we find it convenient to condense them into the following, that the learned Judge erred in law by; finding that the invoice was a forgery and did not emanate from Chelsea Freight; failing to re-evaluate the evidence tendered in the trial court and come up with its independent conclusions as statutorily required; failing to independently assess whether the elements of perjury and uttering a false document respectively were proved; not finding that the amounts paid were pursuant to a court decree that had not been set aside or varied and could not, therefore, form the basis of criminal culpability and or prosecution; ignoring and reversing the rulings in Misc. Civil Case No. 634 of 2009; failing to distinguish between payments made pursuant to an undisputed claim of loss of profits against the claim for storage charges; considering the prosecution case in isolation thereby taking a very narrow and constricted view of the evidence on record; ignoring the grounds of appeal that had been set out in the Petitions of Appeal and determining the appeal on unpleaded grounds; expressly shifting the burden of proof to the appellants having inappropriately invoked section 111 (1) of the law of *Evidence Act*, devising a finding on the probative value of mutual legal assistance that was not supported by the record; upholding the sentence imposed by the trial court that was unlawful; holding that the trial

Magistrate's finding that approximately Kshs.314,000,000.00 that was the subject matter of the trial out of the cumulative claim of approximately Kshs. 600,000,000.00 was on account of storage charges and not lost profits, interests and costs of litigation which were distinct and separate awards by the arbitrator and duly confirmed by the High Court; upholding the conviction of the 2nd appellant on counts 3, 4 and 5 without any evidence that the 2nd appellant received any of the monies specified in the said counts; upholding the trial magistrate's finding that a director of a company is criminally culpable for the offences committed by the company; upholding the trial magistrate's conduct of proceedings before her as if she was sitting on appeal against the arbitration award and the subsequent High Court proceedings confirming the award and authorizing the execution of the High Court decree; upholding the trial magistrate's misapprehension and misapplication of section 48 (1) (b) of the ACECA with the consequence that she meted out sentence that was plainly unlawful; and finally, upholding the trial Magistrate's finding that the respondent had discharged its burden of proof beyond reasonable doubt.

15. When the appeal came up for the plenary hearing on 25th April 2024, Paul Muite, senior counsel ("SC"), teaming up with Mr. O'kubasu, learned counsel appeared for the 1st appellant, Mr. Amolo Otiende, SC, Mr. Ongoya, and Ms. Ngania, learned counsel appeared for the 2nd appellant whereas Mr. Kangogo, learned counsel was present for the 3rd appellant. The respondent was on the other hand, represented by Mr. Owiti, learned Principal Prosecution Counsel. All parties had filed their respective written submissions which they relied on subject to limited oral highlights.
16. As the submissions were mainly on four thematic areas, to wit, failure by the High Court to perform its statutory duty to re- evaluate and re-interrogate the evidence tendered in the trial court so as to reach its independent conclusions; whether payments made pursuant to court orders can be the basis of criminal charges and prosecution; the presumption of innocence; whether the charges laid against the appellants were proved to the required standard; and lastly, sentence; it is not necessary for us to reproduce each of the respective counsel's detailed submissions on the issues. Instead, we propose to summarize them as follows.
17. On the first issue, it was submitted that the High Court hearing a first appeal should evaluate the evidence afresh, and come to its own conclusions. That a perusal of the judgment shows clearly that there was no such attempt, which was a serious error of law. Counsel submitted that there was no need for the court to make a statement or to announce in the judgment that the evidence had been re-evaluated when such re-evaluation is not self-evident or apparent. Counsel relied on the case of *Alexander Ongasia & 8 vs. Republic* [1993] eKLR for this submission. It was also submitted that



- failure to discharge that burden was fatal to the first appellate court's decision. For this proposition, counsel relied on the case of *Columbus Dindi Okoth vs. Republic* [2008] eKLR. That one just needs to look at paragraphs 70, 71 of the said judgment and one will certainly come to the inevitable conclusion that the High Court did not discharge that statutory obligation.
18. On the second issue, it was reiterated that payment of monies pursuant to a court decree through garnishee proceedings cannot be a basis of a criminal charge. The payments made by NCPB to the appellants were pursuant to garnishee orders issued by the High Court of Kenya. Those orders were preceded by an arbitral award, that terminated in favour of the 3rd appellant, and which was subsequently confirmed as a judgment of the High Court. The NCPB's application seeking to set aside the arbitration award was dismissed by the High Court. An appeal to this Court was also dismissed with costs. It was imperative to note that the forgery allegation was the core issue argued by NCPB in the High Court where it made several applications contesting the award and seeking that it be set aside. All the applications were, however, dismissed. We were invited to look at the rulings by Njagi, J., Odunga, J (as he then was) and Mabeya, J., in that respect. The ratio decidendi in all the rulings was that the payment was made pursuant to the High Court order and could not therefore be fraudulent. A magistrate's court is bound by decisions of courts of higher jurisdiction. This is what the hierarchy of courts is all about and if not respected, then there would be chaos and the administration of justice will be brought into disrepute. Faced with the fact that judgments of the High Court and this Court were binding on the trial court, the respondent purported to challenge those determinations by invoking section 193 (a) of the Criminal Procedure Code (CPC) and sections 45 and 48 of ACECA which provide that if there are pending civil proceedings in any court, the same were not a bar to the institution of criminal charges.
 19. However, to counsel there were no pending civil proceedings at the time criminal proceedings were initiated against appellants. If anything, all the civil proceedings initiated had all been determined in favour of the appellants. Accordingly, these provisions of the law were unavailable to the respondent. The judgment of this Court, of necessity, bound the trial and the High Court and it was not open to both courts therefore to sit on appeal and overrule a judgment of this Court as they purported to do. Similarly, it was not open to the magistrate's court to sit on appeal over the judgments and rulings of the High Court. The law so jealously guards the sanctity of judicial decisions that the validity of a decision remains even if the decision maker has subsequently changed his mind. Relying on the case of *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others* [2012] 1 eKLR, counsel submitted that our laws have not vested authority on anyone to declare a final decision of a court of competent jurisdiction invalid or illegal outside the legally prescribed avenues such as through appeal, review, or revision. Such a decision remains valid even if the whole world, including the person who made the decision, were to consider it perverse.
 20. It was submitted further that the High Court's legal reasoning was invalid for reasons that: when the learned Judge was faced with the uncontroverted fact that the subject payment giving rise to the criminal charges was ordered by the High Court and the legal position that the order was valid since it had not been successfully challenged, she formulated the main issue of determination as being whether the trial court and indeed, her court were bound by the award and the rulings of the High Court on the enforcement of the award; and, she then sought refuge in sections 44 and 45 of the *Evidence Act* and held that since the decisions of the High Court on the enforcement of the award were not in rem, she was not bound by them. Counsel submitted that, that was the first error of the court in formulating an irrelevant issue. The proper question ought to have been whether a person having obtained property vested in him by a valid court order can be held criminally responsible for obtaining that property. Counsel submitted that those property rights could only be taken away through an appeal or review; that even when a higher court, on appeal, reverses a decision of another court those who had acted on



the lower court's orders would have acted legally and they would not be held criminally responsible for complying with, executing or benefitting from the said orders.

21. Further, the trial court had no powers, during the criminal proceedings to invalidate the property rights vested in the appellants by the orders of another court. Article 50 (2) provides that an accused person has the right to a fair trial which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law. The trial court's action reversing the decision of the High Court and declaring that the appellants were not entitled to the property and that therefore everyone who benefited from it was criminally liable was tantamount to creating an offence at the point of writing the judgment and convicting the accused of that offence.
22. Relying on the case of *Trusted Society of Human Rights Alliance vs. Cabinet Secretary for Devolution and Planning & 3 Others* [2017] eKLR, counsel submitted that the concerns raised from the case would manifest differently if this Court were to uphold the decision of High Court that a person can be held criminally liable for complying, or benefitting from the fruits of a valid decision of the court. Therefore, the High Court erred in law in upholding the finding by the trial court that payment of monies made pursuant to a valid court order can sustain a criminal charge thereby departing from the specific grounds of appeal raised by the appellants.
23. Turning to the third and fourth issues, it was submitted that because of the presumption of innocence, the demands of a fair trial in a criminal case are that where the same set of facts can lead to a rational inference of innocence on one hand, and guilt on the other hand, the demands of Article 50 of *the Constitution* favour the trial court's application of those set of facts to the presumption of innocent. The payment made by NCPB was in two parts; first, general damages for loss of profits, which was never in contestation because it is the NCPB that breached the contract, and second, payment in respect of storage charges. There was no basis for the trial court to have applied the payment of that money, to storage charges instead of applying it to general damages for breach of contract. While relying on the case of *Caroline Wanjiku Ngugi vs. Republic* [2015] eKLR, it was submitted that it is basic law that the prosecution may obtain a criminal conviction only when the evidence proves the accused is guilty beyond reasonable doubt. It is necessary that the guilt should be only the rational inference from the evidence offered, taking into account the defense marshaled, if any. If there is reasonable possibility that is consistent with innocence, it is the duty of the court to so find. Here, the payment was consistent with innocence. Further, the failure by the prosecution to call a handwriting expert so that there would be proof that the invoice in question indeed emanated or did not from Chelsea Freight Limited was a complete failure by the prosecution to prove their case and the court ought not to have convicted on the basis of evidence of a director from Chelsea Freight Limited only.
24. It was further submitted that pronouncements from this Court as well as the High Court, for instance, in the cases of *Caroline Wanjiku Ngugi vs. Republic* (2015) eKLR and *Joseph Mukuha Kimani vs. Republic*, Criminal Appeal No 76 of 1983 [1984] eKLR are that the elements to be proved in cases of fraud and or forgery include: "The document is a fake one, ii) Accused used the document as genuine iii) Accused knew or had reason to believe that it was forged document; and, iv) Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document."
25. In the High Court, it had been contended that the elements of those offences had not been established in all the counts. Therefore, the High Court was expected to reconsider the evidence on record and determine whether indeed those elements of the counts had been met or not. To the contrary, the court only made passing references to those elements and failed to determine whether they were proved or not.



26. It was submitted that it was only legally tenable for a court to convict a person for an offence, if there is, on one hand, proper identification of what the person did or failed to do and on the other hand, a pre-existing law which clearly and without ambiguity or remoteness prohibits that which the person did or failed to do. In all the counts relating to the acquisition of public property, there was no evidence that the 2nd appellant received any of these amounts on the said dates. On the alleged dates, the monies had in fact only been deposited with the advocates of the 3rd appellant. Conversely, a court of competent jurisdiction had vested the property rights in the monies in the 3rd appellant, and therefore the appellants as Directors who are also shareholders were entitled to receive a share of the proceeds. In so doing, they were not getting a share of public property but were getting a rightful share of the property of a private company. There was, therefore, no basis in law to conclude that the amounts received from the 3rd appellant was acquired by the 1st and 2nd appellants through fraud. The amounts in counts 3, 4 and 5 were not shown to have been acquired fraudulently and yet the appellants were convicted. Counsel submitted that execution of a court order cannot amount to fraud. For this proposition, counsel relied on the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR. The arbitral award and the subsequent court orders of the High Court confirmed that the awards were for loss of profits, storage costs, interests, and costs of the suit. During the garnishee proceedings, it was not specified that the 3rd appellant was executing against the NCPB for the impugned storage costs. The prosecution's case being that it was the storage costs which were supported by a purportedly false invoice, it leaves the rest of the awards valid and therefore, the assumption that the whole amount was on account of storage costs had no legal basis.
27. On sentence, it was submitted that both courts below misapprehended the law on sentencing. For the mandatory fine contemplated in section 48(1)(b) of ACECA to apply there must be a quantifiable benefit or loss which was predicated upon conduct that constituted the offence. The conduct alleged to have constituted the offences, in this case was the uttering of a false document namely, an invoice. It was not contested that the invoice was evidence relevant only to the storage costs. In the award, apart from storage costs, the 3rd appellant were also entitled to compensation for loss of profits, interests and costs.
28. In executing the award, there was no itemization on what amount was paid for what purpose. Therefore, even if it was assumed that they were for storage costs, it would be required to theoretically or practically quantify what was gained or lost. The High Court confirmed that the funds paid to the appellants had no tag stating whether they were for loss of profits nor storage charges. It also follows that the funds did not have a tag stating that they were storage charges and not from profits. Further, while relying on the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, it was submitted that an amount made in compliance or execution of orders of a court does not constitute loss. Even when a decision of a court is made in error and through that error monies are paid to a party, that payment is legal and the solution would not be to prefer criminal charges. Rather, the affected party should challenge it through review, setting aside and or appeal, in which case a court of competent jurisdiction may order a refund of the monies paid. It was evident that the High Court erred in law in holding that the trial magistrate did not overlook some material or take into consideration an immaterial factor or that the sentence was manifestly excessive. The 2nd appellant having been acquitted of count 1 of uttering a false document, it would automatically follow that the other related counts should also fail.
29. Counsel in the ultimate, urged us to allow the consolidated appeals, set aside both conviction and sentence and set the appellants at liberty unless otherwise lawfully held.
30. In response, Mr. Owiti, submitted that the entire appeal turned on the invoice for storage charges which the respondent maintained was a forgery. Further, counts 3, 4, and 5 flowed directly from the



first count. This Court should ignore or decline the invitation to revisit the evidence tendered in the trial court and re-appraised by the High Court as it has been indirectly invited to do. Section 361 of the CPC prohibits such undertaking. In any event, there were concurrent findings of both courts below that the invoice was a forgery. He submitted that the High Court properly appreciated that the appellants were awarded a sum of USD 3,106,000 in an arbitral award which amount was made up for loss of profits and storage charges, together with costs and interest. It is the payment of Kshs. 313,364,671 subsequent to the garnishee orders, and being part of the award, which led to criminal charges being laid against the appellants. The High Court found that the said funds did not have a tag stating that they were for loss of profits or storage charges but that they were paid pursuant to a forged invoice. Both courts believed the evidence of PW22 that the impugned invoice was a forgery, and therefore not genuine. PW22 was the Director of Chelsea Freight in charge of the issuance of all invoices and he not only denied knowledge of the appellants and the impugned invoice but was also emphatic that the same could not have been issued by his company without his knowledge. As correctly noted by the High Court, PW22's evidence was consistent and believable and remained unshaken throughout rigorous cross-examination and he had no reason to lie against the appellants. The two courts were therefore justified in their concurrent findings not only that the impugned invoice did not emanate from Chelsea Freight, but also and more importantly that it was a forgery.

31. On the second issue, regarding whether the case against the appellants was proved, counsel submitted that the basis of the conviction of the appellants was pretty much straightforward. There was uncontroverted evidence that the 1st and 2nd appellants acting as Directors of the 3rd appellant acquired funds from NCPB using falsified invoices. The appellants accordingly obtained a benefit and caused a loss to the NCPB, a public body. The charges were accordingly proved to the required standard. Regarding whether the execution of a valid court decree can lead to criminal sanctions, counsel submitted that the arbitration award and the resultant decree were the product of a different and independent civil legal process, the existence of which is not, pursuant to section 193A of the CPC, a bar to criminal proceedings. The existence of an arbitration award and decree did not oust the preference of criminal charges against the appellants where there existed evidence of criminal culpability against them. The High Court in the exercise of its criminal appellate jurisdiction was therefore not bound by the results of any of the civil proceedings. He went on to submit that whether or not the trial and the High Court were bound by the award and the judgments referred to depended on the interpretation of sections 44 and 45 of the *Evidence Act*. The rulings and judgments did not bind the two courts below since they were not rulings and judgments in rem but in personam. To the respondent, nothing stopped the criminal courts from entertaining the criminal proceedings. Further, the appellants' assertion that the trial and High Court conducted the proceedings before them as if they were sitting on appeal against the arbitration award and subsequent determinations in civil proceedings was without any legal basis.
32. As to the calling of a handwriting expert to verify the genuineness of the impugned invoice, counsel submitted that the issue had never been raised before and was therefore being raised for the first time. In the circumstances, it should not be entertained. Even if the court was to consider such evidence, it was the submission of counsel that forensic evidence was just one of the pieces of evidence that could be used to prove an issue. In any case, such evidence was not binding on the court.
33. Counsel further submitted that the acquittal of the 2nd appellant on count 1 did not mean that counts 3, 4, and 5 did not have legs to stand on as against him. The argument was not legally sound, as one does not have to be the one that uttered a document to benefit therefrom. The moment it was proved that the acquisition resulted from an illegality, the offences of which the 2nd appellant was convicted were complete. The two courts below returned the verdict that the invoice was a forgery and therefore any payments made pursuant to it were illegal and the acquisition thereof was fraudulent.



34. Lastly, on sentence, Mr. Owiti, relying on the cases of NTN vs. Republic, State of Gujarat vs. Mohanlal Jitamalji Porwal & Another and Thuita Mwangi & 2 Others vs. Ethics & Anti-Corruption Commission & 3 Others [2013] eKLR, submitted that the appellants were clearly challenging the severity of the sentence. This Court is divested of jurisdiction as far as consideration of the severity of the sentence is concerned by dint of section 361(1) of the CPC this being a second appeal. The appellants' assertion that the learned trial magistrate misapprehended and or misapplied the provisions of section 48 (1) (b) of the ACECA, was a new issue that cannot be raised in this second appeal for the first time. In any event, the High Court considered the appellants' grounds of appeal on the trial court's alleged errors with respect to sentence and found no reason to interfere with them as there was no demonstration that the trial court had overlooked some material factor or taken into consideration an immaterial factor. Nor that the sentence was manifestly excessive or manifestly lenient in the circumstances of the case. He therefore urged us to dismiss the appeals in their entirety.

35. We have considered the record of appeal, the lengthy submissions of the respective parties, authorities cited and the law. As this is a second appeal, we are restricted under section 361(1)(a) of the CPC to the consideration of matters of law only. This remit of the jurisdiction was aptly captured by this Court in the case of Karinga vs. Republic [1982] KLR 213 thus:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari c/o Karanja vs. R. (1956) 17 EACA 146).”

36. With the above injunction and parameters in mind, we discern the following to be the issues of law that fall for our determination, being whether:

- a. There was re-evaluation and re-examination of the evidence tendered in the trial court by the first appellate court as statutorily required.
- b. Payment of monies sanctioned by court can be a basis for criminal prosecution.
- c. The offences charged were proved.
- d. Sentence imposed was unlawful.

37. On the first issue, the High Court being the first appellate court, as a matter of law, was enjoined to analyze and re-evaluate afresh all the evidence adduced before the trial court, draw inferences, and reach its own independent conclusions while bearing in mind that it neither saw nor heard any of the witnesses. This is a well-settled jurisdiction and was espoused as early as in 1972 in the celebrated case of Okeno vs. Republic [1972] EA 32, where the predecessor of this Court stated as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.” (Our emphasis)



Similarly, in *Kiilu & Another vs. Republic* [2005] 1 KLR 174, this Court on the same issue stated thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.” (Emphasis added)

38. However, we hasten to state that there is no set format to which a re-evaluation of evidence by the first appellate court should conform or be subjected to. The Supreme Court of Uganda addressed the issue in the case of *Uganda Breweries Ltd vs. Uganda Railways Corporation* [2002] 2 EA 634, thus:

“The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In *Sembuya vs. Alports Services Uganda Limited* [1999] LLR 109 (SCU), Tsekooko JSC said at 11: I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first appellate court is expected to scrutinize and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the trial court.”

39. It was also held in *David Njuguna Wairimu vs. Republic* [2010] eKLR by this Court that:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

Finally, the Supreme Court of Uganda in *Odongo and Another vs. Bonge Civil Appeal 10 of 1987 (UR)*, (Odoki, JSC) stated that:

“While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.”

40. We entirely agree with the above exposition of the law on the issue. The appellants have complained throughout that the appellate court did not re-analyze, reconsider, and re-evaluate the evidence tendered in the trial court as required by the law. The respondent on its part was however satisfied with the manner that the High Court had undertaken the statutory duty and mandate in that regard.
41. The appellants’ complaint is, however, not an idle. A first appeal always proceeds by way of re-hearing based on the evidence on record and an appellant is therefore entitled to expect that the first appellate court will go beyond a mere rehashing of what is on record or a repetition of the findings of the trial



court. What is called for, as legal duty, is a fresh, exhaustive and independent analysis and re-appraisal of the entire evidence, not a mere adoption of the trial court's findings.

42. We agree that where the first appellate court fails to evaluate the evidence and subject it to fresh scrutiny, that may be a ground for a second appeal as it turns into a point of law. That was the position adopted by this Court in *Jonas Akuno O'kubasu vs. Republic* [2000] eKLR, where it was held that:

“It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.”

43. Further, it is not enough to merely quote authorities regarding the duty of the first appellate court such as *Okeno vs. Republic* (supra), and leave it at that without actualizing the mandate. The exercise must be self-evident. It is required of the first appellate court to and must be seen to have, consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant, the only limitation being a remembrance that it is without the advantage, enjoyed by the trial court, of seeing and observing the witnesses as they testified, for which it must make due allowance. See *Pandya vs. Republic* [1957] EA 336.

44. It should not take a rocket scientist to fathom that indeed the exercise had or had not been properly undertaken. The Supreme Court of India in *Ganpat vs. State of Haryana* (2010) 12 SCC 594, set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus, with which we respectfully concur:

- a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
- b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
- c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
- d. When the trial Court has breached provisions of *the Constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. The appellate court is competent to reverse the decision of the trial court depending on the materials in question.”

45. We have carefully read and considered the judgment of the first appellate court so as to appreciate whether the above requirements was met. The learned Judge started her analysis at paragraph 57 of the judgment. It is clear that she knew very well the task that lay ahead of her if her reference to *Okeno vs. Republic* (supra) in the judgment is anything to go by. The first appellate court framed the issues for determination and proceeded to determine them. However, with great respect, it seems to us that in



doing so, it fell short of proper analysis and contextualization of the evidence. The fresh analysis was not based on the particular elements of the offences charged and was flippant, or perfunctory, to say the least. Indeed, its analysis, if at all, merely concentrated on the invoice which was the basis of the first charge and which according to it formed the *res gestae* of all other charges as per the wording of the learned Judge.

46. To our minds, this was a wrong approach. There were other charges though flowing from the first count that had different ingredients and actors that required independent proof different from the first count. It is noteworthy that the court did not even state the ingredients of the offence of perjury among others before it commenced the analysis of the evidence. We further note that the court made hast conclusions that indeed the offence of uttering false documents having been proved meant that the other counts had been answered in the affirmative. We find this conflated and conglomerate conclusion too wide as the facts were different, based on each appellant. This underlines a failure to subject the evidence to fresh scrutiny. Had it done so, it would have established, for instance, that given that the 1st appellant was found to have forged and used the forged invoice in the arbitral proceedings, there was no evidence therefore that the same forgery had been committed in cohorts with the others whom she had been charged, especially, given the dormant role played by the 2nd appellant in the day-to-day management of the 3rd appellant. We are satisfied that had the Judge analyzed the evidence on record properly, she would have come to a different conclusion as to the criminal culpability of the appellants. Why do we say so? First, the 2nd appellant was said to have never participated in the affairs of the company like the day-to-day running of its activities including the preparation and presentation of the tender. Neither did he testify before the Arbitral Tribunal where the impugned documents were uttered. Critically, there was no evidence that they had acted together in getting the invoice and neither was it proved that if there was any falsification, the other appellants participated.
47. Again, in respect of the 2nd appellant, a proper re-evaluation of the evidence would have revealed that there was no evidence that he received money in all the counts relating to the acquisition of public property on the alleged dates since the amount had only been deposited with the advocates of the 3rd appellant. Look again at the way the court handled the amounts involved in each of the counts. The amount garnished was global entailing general damages for loss of profits which was not disputed and therefore lawful; damages for storage charges, the subject of the charges; then costs, and interest, which were not in dispute. If the court had re-evaluated the evidence as required, it would have noted that the amounts in the counts were distinct and specific and required specific and separate proof. However, since the amounts garnished were global, it was difficult to assign the amount received on account of storage charges. The prosecution needed to have done more to distinguish the suspect sums from the legitimate, but did not. That being the case, on what basis could the court uphold the conviction of the appellants on those counts! The same argument will befall the sentencing by the trial court and which was upheld by the first appellate court.
48. On the issue of the forgery claim regarding the invoice, it is evident that in its in-exhaustive and not altogether thorough reappraisal of the evidence, the court did not consider that the issue had been raised in several forums and dismissed. First, the issue was raised before the arbitrator who, upon hearing both parties, dismissed it. Next it was raised in the High Court in an application to set aside the award and it was dismissed upon hearing. Undeterred, the issue was again raised in the appeal in this Court where on its application, the respondent had been joined as an interested party. It was also raised in an application in this Court to adduce further evidence in the nature of the parliamentary report. They too were dismissed. Back to the High Court, an application was made on the same issue of validity of the invoice which was dismissed by Odunga, J. who went on to uphold its validity. Finally, the respondent made last-ditch effort to reopen the arbitral proceedings on the same basis, which again Kamau, J. dismissed. Further, had the court re-evaluated the evidence properly, it would have realized



section 193 of the CPC was inapplicable since no civil proceedings were pending at the time of the institution of the criminal charges against the appellants. It is also quite apparent that the offence of uttering false documents, even if had been proved, did not automatically mean that the remaining offences had been committed as the learned Judge concluded. There is also the claim, that because of want of proper analysis of the evidence, the court ended up framing non-issues for determination, for instance, whether judgments of this Court and the High Court were binding on the trial court and whether they were in rem or personam. Had the trial court properly re-appraised the evidence it would noted that, the issue that was never raised in the trial court, nor was it raised before her in the grounds of appeal or even in the submissions by respective counsel before her. It was therefore wrong for it to be raised in the judgment without having accorded the parties opportunity to address the court on the issue. On proper appraisal of the evidence on record, the issue that the court was to consider the existing judgments/rulings vis-à-vis the parties and not whether the judgments/rulings were in rem or in personam. Needless to say, judgments of higher courts bind the lower courts unless set aside by any court of competent jurisdiction. The court in determining the question as to whether it was bound by the said judgments addressed a non-issue given that the issue that was before the court was whether a criminal charge would be based on a payment resulting from a court order, which order had not been set aside.

49. It should also be appreciated that the court was exercising appellate jurisdiction and not that of the trial court. Because of that error, it sunk into reversible errors when faced with the issue of dealing with judgments of the concurrent jurisdictions. It failed to notice that the said judgments were binding on the trial magistrate who was handling the case in the first instance. We agree that it can be argued the said judgments may not have been binding on the learned Judge as they were from courts of concurrent jurisdiction, but we are quick to point out that the same courts, if they had made a determination on an issue like uttering a false document, such finding was final and the High Court on appeal would not revisit the issue. It would appear to us that in revisiting the issue, the first appellate court was purporting to sit on appeal over the decisions of courts of concurrent jurisdiction which is not permissible. We are satisfied that the finding of the High Court and this Court about the arbitration proceedings could not possibly be ignored by the trial court as well as the High Court. Obviously, this was an assault on the doctrine of stare decisis. In the case of *Camps Bay Ratepayers and Residents Association & Another vs. Harrison & Another* [2010] ZACC 19; 2011 (2) BCLR 121 (CC); [2011 \(4\) SA 42 \(CC\)](#), the court pronounced itself on the doctrine as follows (para.28):

“What it boils down to, according to the authors, is: certainty, predictability, reliability, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis. Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.”

50. The Chief Magistrate’s Court was therefore bound by the decisions of the High Court as pertains to the transaction given that the criminal case was as a result of payment sanctioned by the courts and where the issue of allegedly forged invoice was extensively addressed and resolved. It does appear to us that after NCPB failed all the way to impugn the award in civil proceedings turned to EACC to invoke criminal sanctions against the appellants to achieve the very purpose it had been denied in civil proceedings going by the import of the sentences imposed. This appears to us as the worst form



of abuse of the criminal process. It was obviously undertaken for ulterior motives, not for bona fide vindication of any rights.

51. Our determination in respect of the two issues aforesaid are sufficient to dispose of this appeal. It is therefore not necessary to consider the other issues framed for determination.
52. As we pen off, we wish to restate that if the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which it is sacredly entrusted, it must uphold the dictate that when the courts higher in the hierarchy make decisions, the decisions bind the lower courts. Further, a court cannot sit on appeal over the decision of other courts of concurrent jurisdiction. If we allow situations where despite orders of the courts of higher hierarchy being alive, a party is allowed to move to another court implicitly challenging those orders albeit invoking a criminal jurisdiction as opposed to civil and obtain a different judgment, then the very cornerstone of our courts' architecture will give way, and with it, will disappear the rule of law and certainty in the administration of justice. Judgments of courts remain final and binding on all courts below them. They must be deferred to notwithstanding any misgivings that other judges and judicial officers may have, and quite irrespective of the noble aims that may tempt them to do otherwise.
53. Ultimately, we are satisfied that the appellants have made a case to warrant us to allow the appeal. The appeal is accordingly allowed, and the convictions and sentences imposed on the appellants are set aside. The appellants shall forthwith be set at liberty unless otherwise lawfully held.
54. This judgment is delivered pursuant to Rule 34 (3) of the Court of Appeal Rules, 2022 as Ali-Aroni, J.A has declined to sign.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

