



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, MURGOR & KANTAL, J.J.A.]

CRIMINAL APPEAL NO. 89 OF 2018

BETWEEN

BONIFACE OKEROSI MISERA.....1ST APPELLANT

CEPHAS KAMANDE MWAURA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment of the High Court of Kenya, (Hon. H. I. Ong'udi, J.) dated 27th June, 2018

in

Nairobi HC. ACEC No. 5 of 2018)

JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of the High Court of Kenya at Nairobi Anti-Corruption and Economic Crimes Division, Anti-Corruption Criminal Appeal No. 5 of 2018 as consolidated with Criminal Appeal No. 6 of 2018, (**Hon. H. Ong'udi, J.**) dated 27th June 2018.

The background to the appeal is that the appellants were arraigned jointly with two others before the Chief Magistrates Court at Nairobi with a total of six (6) counts preferred under both the Anti-Corruption and Economic Crimes Act (ACECA) and the **Penal Code** Cap 63, Laws of Kenya. A total of twenty-two (22) witnesses testified against the appellants and their then co-accused persons in support of the prosecution case. At the conclusion, the trial magistrate **Lucy Nyambura** (SPM) (as she then was) acquitted appellants co-accuseds on all counts, absolved the appellants of the offences laid in counts 1-4 leaving only counts five (5) and six (6) falling for them to defend themselves thereon.

In count (5), the 1st appellant faced the charge of fraudulent acquisition of public property contrary to **section 45(1)(a)** as read with **section 48** of the **Anti-Corruption and Economic Crimes Act, No. 3 of 2003**. The particulars of the offence were that **Boniface Okerosi Misera**, on or about 24th February 2009 in Nairobi within Nairobi Province (now Nairobi County), fraudulently acquired from the City Council of Nairobi (NCC), public property to wit the sum of Kenya shillings, Ten Million (Kshs. 10,000,000/=) while the 2nd appellant in count (6) also faced the offence of fraudulent acquisition of public property contrary to **section 45(1)(a)** as read with **section 48** of the said Act. The particulars were that **Cephas Kamande Mwaura**, on or about the 16th February 2009, in Nairobi within Nairobi Province (now County Government of Nairobi), fraudulently acquired public property from the City Council of Nairobi (NCC) to wit, the sum of Kenya Shillings Nine Million, three hundred thousand (Kshs. 9,300,000/=).

The trial proceedings were conducted by two magistrates, with the first hearing the prosecution evidence upto its logical conclusion while the second taking the defence evidence also up to its logical conclusion.

The incoming trial magistrate upon complying with **section 200(3)** of the Criminal Procedure Code (CPC) on 24th October 2012 acceded to the appellants request to recall all the 22 prosecution witnesses who had testified against them before the original trial magistrate for further cross examination. The State successfully applied for review of the said order vide **Criminal Revision Application No. 11 of 2013, Republic vs. Boniface Okerosi Misera & Cephas Kamande Mwaura** resulting in the High Court (**Hon. Mbogholi, J.**) setting aside the magistrate's orders of 24th October 2012 against which no appeal was filed by the appellants.

When called upon to defend themselves, the 1st appellant adopted a written statement as his defence. He was cross-examined fully on it by the State and re-examined on it by his counsel. The 2nd appellant gave oral testimony on oath. He was also fully cross-examined on it by the State and re-examined thereon by his counsel.

The learned trial magistrate analyzed the record and was satisfied that the prosecution case had been proved to the required threshold against both appellants, found them guilty as separately charged in count 5 and 6 and convicted them accordingly. They were sentenced to two years' imprisonment each. In addition, the 1st appellant was fined Kenya shillings forty (40) Million and in default, to serve a further one-years' imprisonment, while the 2nd appellant was fined Kenya shillings Thirty-Seven (37) Million and in default to serve an additional one-years' imprisonment.

The appellants separately filed Criminal Appeal Numbers 5 and 6 of 2018 respectively raising various grounds of appeal, subsequently consolidated and heard together. The learned Judge (**Hon. Ong'udi, J.**) analyzed the record, reminded herself of the role of a first appellate court as explicitly restated in the case of **Okeno vs. Republic [1972] E.A 32** and **Patrick and Another vs. Republic [2005] 2 KLR 162**. Applying the above threshold to the rival positions before the Court, the Judge rejected the appellants' complaints on appeal, holding *inter alia* that both appellants never pointed out to the Court what was defective in the charge sheet. Neither did the learned Judge detect any on her own. There was no mistrial as the appellants gave defences after the State successfully applied for review of the learned Magistrate's order in compliance with **section 200(3)** of **CPC** acceding to the appellants request to recall all the twenty-two (22) prosecution witnesses for further cross examination resulting in the High Court's order dated 3rd July 2014 reversing the Magistrate's order on recalling of witnesses and which was never reversed on appeal.

Appellants proceeded to give their respective defences. Their purported challenge to the revision order through the back door was therefore rejected because there was no miscarriage of justice or prejudice suffered by the appellants on the mode of defences adopted by them, as the 1st appellant elected to adopt a written statement as his defence while the 2nd appellant gave sworn evidence.

The appellants' constitutional rights on fair trial entrenched in **Articles 10, 25(c), 50(1) and (2) and 159** of the Constitution of Kenya were not violated as appellants were accorded a period of four and a half (4½) years to prepare adequately to defend themselves. They were also ably represented by counsel who informed the Court of the appellant's desire to adopt the mode of defences employed to defend themselves.

The prosecution case against the appellants was proved to the required threshold because the money, subject of the proceedings, was the property of NCC and therefore public money released by the then Ministry for Local Government for the purposes of buying land for a public cemetery. The advocate for NCC, **Edward Omoti** (PW17) processed documents resulting in NCC releasing the total purchase price into an escrow account opened on 11th February 2009 in the joint names of three law firms namely **Odero, Osiero & Co. Advocates, P.C Onduso & Co. Advocates** and **Alfonse Mutinda & Co. Advocates**. The bankers cheque releasing the money from NCC into the escrow account together with the letters forwarding the cheque were both dated 11th February 2009 exhibits 51(a) and (b). The account was closed on 18th March 2009 leaving no doubt in the learned Judge's mind that the account was opened specifically for receiving and disbursing the said amounts.

The 1st appellant was found culpable in the commission of the offence charged because he was an employee of the Ministry of Local Government under which the NCC fell. The very Ministry that released to NCC the total sum of Kshs.283,000,000/= vide two letters, exhibits 86 and 87. PW14's Barclays Bank account no. [*****] was used to receive kshs. 10,000,000/= from National Bank of Kenya Limited (RTGS) account No.[*****] in the name of **Odero Osiero & Co. Advocates**. The bank statements, exhibits 57 and 63 confirmed that on 13th February 2009 a sum of kshs. 117,000,000/= was transferred from the joint account of **Osiero, Onduso & Mutinda Advocates** by RTCS (the escrow account) to National Bank of Kenya (NBK) Harambee Avenue Branch. The payment of kshs. 10,000,000 into PW14's account was from the credit payments of kshs. 117,000,000/= which was part of the payment of kshs. 182,300,000/= by NCC to **Osoro, Onduso & Mutinda & Co. Advocates** (the escrow account).

PW14's evidence that he knew the 1st appellant very well as a relative and friend and that following conversation between them, Kshs. 10,000,000/= was paid into PW14's account on 23rd February 2009 and subsequently withdrawn in two batches of kshs. 5,000,000/= each and handed to the 1st appellant who was with **Chebara**, a finance officer with the Ministry of Local Government who was given kshs. 100,000/= as his lunch was plausible and therefore credible especially when the withdrawals were confirmed by **Lilian Nyambura Kamau**, a bank official. No justification was shown by the 1st appellant for the receipt of the said amount traceable back to the amount released by the Ministry of Local Government for the purchase of land for a public cemetery. On that account, the learned Judge found sufficient link between the money paid into and from the escrow account to PW14 on behalf of the 1st appellant to funds that were meant to be paid and released for the public purpose.

Turning to the 2nd appellant's culpability, it was the learned Judge's finding that: the 2nd appellant admitted receipt of kshs. 9,300,000/= allegedly for survey works on PW3's land, paid through a **Mr. Mutinda** who was PW3's lawyer. PW3 who knew the 2nd appellant as a surveyor confirmed that it is the 2nd appellant who did the survey work for the parcel of land he was selling to **Naen Rech Limited**. The 2nd appellant also admitted that he was a surveyor, but neither produced a licence to show that he was a qualified surveyor nor proof that he was a member of the Institute of Chartered Surveyors and did not, therefore need a practicing licence. Neither was an invoice produced by him to show that he raised an invoice for **Mr. Mutinda** to pay the said amount to him as survey fees, nor was **Mr. Mutinda** called to confirm that payment of kshs.9,300,000.00 was for survey work.

Exhibit 114, the document of instruction for the transfer of money dated 16th February 2009 signed by the three firms of lawyers, signatories to the escrow account and Exhibit 57 – the bank statement of the escrow account both indicated that a sum of kshs.9,300,000/= (Kenya Shillings Nine Million Three Hundred) was paid into the account of **Cephas Kamande Mwaure** account No. [*****] CFC Stanbic Bank, International Life House Branch from the escrow account, Account No. [*****] with Bank of Africa, part of what the three law firms had received from NCC for the purchase of land for a public cemetery.

On the totality of the above assessment and reasoning, the learned Judge rejected both appellants' plea of innocence and concluded as follows:

“97. On this issue, I find that there is overwhelming evidence confirming that:

- (i) The 1st appellant received kshs. 10,000,000/= through PW14’s account for unknown purposes. The 1st appellant and PW14 knew each other very well.
- (ii) The 2nd appellant received kshs. 9,300,000/= under the pretext of being a representative of Naen Rech Limited, and a land surveyor.
- (iii) The origin of both payments was NCC which was a public entity. The money was therefore public property.
- (iv)

On the legality of the sentences handed down against the appellants by the trial court, the learned Judge construed **Articles 50(2)(n)(p)** as read with **Article 25(1)(2) and (3)** of the Constitution; **section 48(1)(a)** of the **ACECA** and upon reviewing the case of **Faresh vs. Republic NRB Cr. Appeal No. 430 of 2006**, found sufficient basis for interference with the trial court’s exercise of its judicial discretion in handing down the mode of punishment handed down against the appellants, set them aside and substituted them with a fine of Kenya Shillings One (1) Million and in default one year imprisonment; but affirmed the trial court’s finding that appellants had received a benefit from public funds paid out by NCC for a public purpose which never materialized. The Judge also, found that the trial court rightly applied **section 48(2)(b)** of the **ACECA** when calculating the mandatory fines forming the amounts reflected in the fines imposed, and concluded that no misapprehension of the law either in the calculation of the mandatory fines nor the default imprisonment sentences had occurred and on that account affirmed the same; dismissed both appellants appeals against convictions but partially allowed appeals against sentence to the extent set out above.

The appellants are now before this Court on a second appeal. The 1st appellant raised a litany of twenty-eight (28) grounds of appeal subsequently compressed into nine (9) grounds of appeal in his written submissions. It is the 1st appellant’s complaint that the learned Judge erred in law by not only ignoring but also failing to appreciate that: both the 1st appellant’s petition of appeal and the supplementary memorandum of appeal fell for consideration to the prejudice of the 1st appellant; the charge was never proved beyond reasonable doubt; his right to fair trial under **Article 10, 25(c), 50(1)(2)** of the Constitution was violated; no evidence was adduced to show that there existed a principal and agent relationship between him and PW14 within the meaning of **section 38** of the **Anti-Corruption and Economic Crimes Act**; he was subjected to double jeopardy contrary to the preamble, **Article 10 and 50(2)(k)(n)(o) and (p)** of the Constitution; evidence of PW14 which required corroboration could not corroborate other evidence; the burden of proof was shifted on to him to prove his innocence contrary to law; and, lastly, that the sentence meted out against him was not only excessive but also inhuman and degrading.

The 2nd appellant on the other hand raised seventeen (17) grounds of appeal also subsequently condensed into six (6) grounds of appeal in his written submissions which may be paraphrased, the learned Judge erred in law by failing to appreciate that: the charge was not proved to the required threshold; he was not accorded a fair trial; his right to presumption of innocence was blatantly violated; there were numerous misdirections committed by the learned Judge that resulted in an unjust decision; there was unmitigated shifting of the burden of proof and, lastly, that the sentence meted out against him was unjust and should be interfered with.

The appeal was canvassed through written submissions orally highlighted by learned counsel for the respective appellants and through oral submissions by the State. Learned counsel **Mr. Ondieki** appeared for the 1st appellant, learned counsel **Mr. Wandugi** for the 2nd appellant and **Mr. Gitonga Muriuki**, the learned Senior Principal Prosecution Counsel (SPPC) appeared for the State.

Rising up to support the appeal, the 1st appellant albeit in summary form faulted the learned Judge for misdirecting herself and ignoring the Petition of appeal and focusing only on the supplementary memorandum of appeal; failing to appreciate that the 1st appellant had a legitimate expectation that the High Court would examine the petition of appeal in good faith and address the issues raised therein; collapsing the grounds of appeal into five (5) without jurisdiction all to the prejudice of the 1st appellant; casually allowing the 1st appellant a layman to give a defence unknown to law contrary to the prerequisites in **section 211** of the Criminal Procedure Code which only permits three modes of defences namely, sworn, unsworn and silence which in the 1st appellant’s opinion does not contemplate a written statement as a defence, which was highly prejudicial to him.

Likewise, the learned Judge was faulted for the failure to appreciate the nonexistence of a principal and agent relationship between PW14 and the 1st appellant within the meaning of **section 38** of the **Anti-Corruption and Economic Crimes Act**. The failure to allow the 1st appellant to recall PW14 for further cross examination for the incoming trial magistrate to gauge his demeanor was highly prejudicial to him. He was also subjected to double jeopardy as according to him there is only one single penalty that could lawfully be imposed against him namely a fine or in default a sentence of twelve (12) months imprisonment. The 2nd limb of the penalty handed down against him was, therefore, not only unlawful but also unjust. Also, that to the extent that **section 45(1) and 4(2)(b)** of the **Anti-Corruption and Economic Crimes Act, No. 3 of 2003** allows a composite punishment in the same transaction, violates the principles and the values of the Constitution, and, particularly, **Article 2(4) and 50(2)** of the Constitution as according to him, the single charge could not attract a sentence and penalty that runs both consecutively and concurrently at the same time.

Further, that: since PW14 admitted receiving kshs.100,000/= of the money allegedly received by him on behalf of the 1st appellant, that in itself made him an accomplice. It was therefore, erroneous for the learned Judge to act upon his evidence as a basis for affirming his conviction in the absence of the learned Judge warning herself against the dangers of relying on that accomplice evidence in the absence of corroboration. The learned Judge also failed to address the concept of shifting of the burden of proof under **section 111** of the **Evidence Act** raised before the High Court by the appellant. Lastly, that after terming the sentence handed down against the 1st appellant as illegal and therefore set it aside, failed to determine whether the penalty sentence was to run concurrently or consecutively especially when it was not disputed that it arose from one charge. Second, the amount of kshs.100,000.00 received by PW14 should have been factored in when computing the amount for the fine forming the second limb of the sentence. Failure to do so in the 1st appellant’s opinion caused a miscarriage of justice.

To buttress the above submissions, the 1st appellant relied on the case of Mary Wanjiku Gichira vs. Republic [1998]eKLR; James Mwangi vs. Republic [1983]eKLR; Sawe vs. Republic [2003] KLR 364; Engineer Michael Sistu Mwaura Kamau vs. Ethics & Anti-Corruption Commission & 4 Others [2017] eKLR; and Charity Kaluki Ngilu vs. Ethics & Anti-Corruption Commission & 4 Others [2017] eKLR, all for propositions/principles *inter alia* that: *suspicion, however strong, cannot provide a basis for inferring guilt of an accused person which must be proved by evidence; in a case depending on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused. Second, in order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference; the prosecution must prove its case beyond any reasonable doubt. This burden never shifts. It always rests on the prosecution. An accused person has no burden to prove his innocence; anything done in contravention of the law is invalid; whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be ordered where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors to be considered for ordering a retrial include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the questioning of the conviction were contrary to the prosecution making or not.*

The 2nd appellant on the other hand faulted the learned Judge for the failure to appreciate that the offence of fraudulent acquisition of public property was not established as the kshs. 9,300,000/= paid to him came from the escrow account and was no longer public funds. Neither PW3 who was the vendor nor NCC gave evidence implicating the 2nd appellant in the commission of any fraud against them.

The 2nd appellant relied on the High Court decision in the case of Erick Ochamu vs. Republic [2015]eKLR and faulted the learned Judge for shifting the burden of proof onto him to prove that he was a qualified and licensed surveyor and in the process negated the 2nd appellant's right to presumption of innocence resulting in his having been subjected to an unfair trial resulting in a mistrial.

Relying on the case of Johannes Matiko & Another [2014]eKLR, and **Article 50** of the Constitution for elements/ingredients on fair trial namely, the right not to give incriminating evidence, the right to remain silent and the presumption of innocence the 2nd appellant faulted the learned Judge for erroneously misdirecting herself when she held that the 2nd appellant represented **Naen Rech Limited** when there was no evidence on the record to support that finding. Second, that no reason was given as to why he was paid a large amount of money from NCC contrary to the evidence on the record that by the time the appellant received the money from the escrow account through **Mutinda Advocates**, the money had already passed to the three individual lawyers who held the escrow account. It was therefore no longer NCC money.

Opposing the appeal by the 1st appellant, **Mr. Gitonga** submitted that PW14's evidence that he received kshs. 10,000,000/= in his Barclays Bank account on behalf of the 1st appellant, was corroborated by the testimony of PW13, a bank official who produced a bank statement in support of that evidence. The two courts below found PW14's and 13's evidence truthful and therefore credible. Being concurrent findings of fact, this court has no mandate to interfere with that finding. The 1st appellant who on his own volition elected to tender a written statement as his defence, could not be heard to complain that it contained incriminating evidence, a position **Mr. Gitonga** urges us to affirm especially when it was explicit from the record that money paid into PW14's account on behalf of the 1st appellant was traced to the money that had been paid into and disbursed from the escrow account, which was money received from the Ministry of Local Government on account of NCC for the purchase of land for a public cemetery which left no doubt in the minds of the two courts below that this was money released by a public authority to a public entity for a public purpose and was therefore public money. Proof of receipt of that money by the 1st appellant provided sufficient link to the fraud as his receipt of the money meant for a public purpose was tainted. The two courts below could not therefore, be faulted for finding and affirming that he was culpable in the perpetration of the offence he faced at the trial.

On sentence, **Mr. Gitonga** submitted that this was a matter of exercise of judicial discretion. No further interference can be permitted in law beyond the interference done by the learned Judge. There was nothing unconstitutional about the two sentences handed down against the 1st appellant as these accorded with the principle of deterrence.

Turning to the 2nd appellant's appeal, **Mr. Gitonga** submitted that the two courts below cannot be faulted on their concurrent findings that the prosecution discharged its mandate in law of proving the charge against the 2nd appellant to the required threshold as he admitted receiving the amount forming the charge.

Calling upon him in the circumstances of this appeal to justify the receipt of public money meant for a public service in the circumstances where he had not rendered any service to the public entity in question was not tantamount to calling upon him to prove his innocence especially when he is on record as stating that he was paid the said money as a surveyor without laying basis for that assertion. The two courts below cannot, therefore, be faulted for rejecting his explanation for the receipt of public money. It was also not correct, as contended by him, that by the time he received payment through the escrow account, the funds were no longer public funds as there was a sufficient link between the funds paid to him and the money that came from public funds meant for a public purpose. Any payment of any portion thereof to any party for purposes other than that for which it was earmarked was unauthorized and unlawful. The escrow account was merely an emergency tool. Lastly, that the sentence meted out as rectified by the learned Judge was lawful.

In reply, **Mr. Ondieki** reiterated his earlier submission that in criminal cases, the burden of proof never shifts. It always lies on the prosecution to prove their case beyond reasonable doubt. Evidence tendered against the 1st appellant and on the basis of which the learned Judge affirmed the 1st appellant's conviction was contradictory and therefore unreliable.

Mr. Wandugi on his part also reiterated his earlier submissions and maintained that the burden of proof was shifted onto the 2nd appellant to prove his innocence. The 2nd appellant's constitutional rights were therefore violated. Counsel also maintained that the moment the money landed into the escrow account it ceased to be public money; and, lastly that the sentence was not only unjust but also inhuman and degrading, and, should not be affirmed.

This is a second appeal and by dint of the provision of **Section 361** of the **Criminal Procedure Code**, only points of law fall for our consideration. In Karingo vs. Republic [1982] KLR 213, the court stated as follows:-

“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 s/o Karanja versus (1956) 17 EACA 146).”

We have considered the record in light of the above rival submissions and legal authorities relied upon by the respective appellants in support of their appeals. The issues that fall for our consideration are the same as those raised and condensed by the appellants in their respective written submissions already set out above. We find it prudent to address those that are peculiar to the 1st appellant separately and then address cumulatively those that relate to both appeals.

Those that are peculiar to the 1st appellant are only two namely that:

- 1) *The learned Judge erred when she cumulatively condensed the 1st appellant’s grounds of appeal in both the memorandum of appeal and the supplementary grounds of appeal into five (5) and addressed them as such.*
- 2) *No evidence was adduced to show that there existed a principal and agent relationship between the 1st appellant and PW14 within the meaning of section 38 of the Anti-Corruption and Economic Crimes Act.*

Those that relate to both appeals are as follows:

- 1) *The burden of proof was shifted on to the appellants to prove their innocence.*
- 2) *There was violation of the appellants’ constitutional rights resulting in a mistrial.*
- 3) *The respective charges were not proven to the required threshold against the appellants.*
- 4) *The sentences handed down against the appellants were inhuman, degrading and therefore unconstitutional and should not be sustained.*

Starting with the first complaint, the record is explicit that the learned Judge upon appraising herself of the grounds of appeal raised by appellants in their respective memorandum of appeals and the 1st appellant’s supplementary grounds of appeal condensed these into five (5) grounds on the basis of which the appellants’ respective appeals were determined and subsequently dismissed save for minor variations in the sentences as already highlighted above.

The impugned judgment arises from criminal proceedings. **Section 169(1)** of the CPC which applies to judgments arising from criminal proceedings provides as follows:

“(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

We have construed the above provision in light of the 1st appellant’s complaint on this issue. We find nothing in the said provision that fetters the Court’s discretion requiring such a Court to address an appellants’ complaints seriatim as opposed to exercising such discretion to condense such complaints into thematic issues as done by the learned Judge and then base determination of the subject appeal thereon.

In our view, the operative words in the said provision are **“the point or points for determination and the decision thereon and reasons for the decision”**. It is, therefore, our finding that a Court seized of jurisdiction under the said provision has discretion to address complaints raised by an appellant before it either seriatim or alternatively condense these into thematic issues and address them as such as deemed fit. We, therefore find no basis in this complaint and it is accordingly rejected.

On the second single complaint, **section 38(1)** of the **Anti-Corruption Economic Crimes Act No. 3 of 2003** defines an **“agent”** as:

“means a person who, in any capacity, and whether in the public or private sector, is employed or acts for or on behalf of another person”

While **“principal”** on the other hand means:

“a person whether in the public or private sector, who employs an agent or for whom and on whose behalf an agent acts”.

Black’s Law Dictionary 10th Edition defines an **“agent”** *inter alia* as someone who is authorized to act for or in place of another, a representative etc. In its commentary there is expression that **“generally speaking anyone can be an agent who is in fact capable of performing the functions involved”** and that the agent normally binds not himself but his principal by the contracts he makes. It is therefore not essential that he be legally capable to contract. While **principal** in the same text is defined as **“someone who authorizes another to act on his or her behalf as an agent”**.

In the concise Oxford English Dictionary, **an agent** is defined as “*a person that provides a particular service*” while **principal** is defined as “*a person for whom another acts as an agent or a representative.*”

We have considered the above definitions in light of the 1st appellant’s above complaint. We find nothing in those definitions to suggest that in order for a “**principal**” and “**agent**” relationship to hold there must be a formal or structured contract between the contracting parties. This, does not, therefore, rule out an informal mutual agency contract like the one concurrently ruled by the two courts below to have been in existence as between the 1st appellant and PW14 as at the time events resulting in the prosecution giving rise to this appeal were triggered. PW14 was explicit that he knew the 1st appellant before; that the 1st appellant approached him and requested him (PW14) to receive some payment from some source on his behalf to avoid people raising eyebrows should they subsequently learn of him having received the said amount directly. PW14 acceded to the 1st respondent’s request. There is also undisputed evidence on record that indeed money was received by PW14 through his bank account and which he subsequently withdrew and disbursed to the 1st appellant. We shall expound on this when dealing with the other two issues on the shifting of the burden of proof and whether the offences charged were proven to the required threshold. In light of the above reasoning, it is our finding that in the circumstances of this appeal, it had been established to the required threshold that a principal/agent relationship was mutually created between the 1st appellant and PW14 for the specific purpose alluded to on the record. This complaint is therefore likewise rejected.

Turning to the common complaints, the first to be addressed is the complaint that the burden of proof was shifted to the appellants to prove their innocence. The position in law as we know it is as it has numerously been restated by the Court. See the case of **Ajwang vs. Republic [1983] KLR 337** for the holding *inter alia* that:

“the burden of proving the ingredients of the offence are entirely on the prosecution and the accused cannot be called upon to prove his innocence.”

The exception to the above principle is what is provided for in **section 111** of the **Evidence Act**. It provides as follows:

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2)

In **Douglas Thiong’o Kibocha vs. Republic [2009]eKLR**, the Court expressed itself on this issue as follows:

“When Parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters, especially within his knowledge. Otherwise, the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111 (1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge...”

When similarly confronted in the case of **Milton Kabulit & 4 Others vs. Republic [2015] eKLR** the Court expressed itself as follows:

“Our understanding of this Court’s reconciliation of the apparent conflict of law between sections 25A and 111 (1) both of the Evidence Act (supra) as reasoned in Douglas Thiong’o Kibocha case (supra) is that admission of information from an accused person that does not meet the threshold in section 25A of the Evidence Act (supra) is not absolutely prohibited especially where circumstances envisaged by section 111(1) of the same Evidence Act are evidentiary demonstrated to exist. The role of a court confronted with such a conflict should not then be to seek to rely solely on such impugned evidence as a basis for founding a conviction against an accused person. It should instead look for and rely on some other evidence that tends to demonstrate the truthfulness of the impugned statements.”

The Supreme Court in the case of **Republic vs. Ahmad Abolfathi Mohammed & Another [2019]eKLR** upon construing the above section expressed itself as follows:

[46] In the above context, it is our view that, while confessions under Section 25A are often made to the Police during investigations, as counsel for the respondents argued, Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only “within the knowledge” of the accused person so that if he does not offer an explanation, he risks conviction. Such a situation would arise, for instance, in a murder case where part of the prosecution case is that, prior to the deceased’s death, the accused person is the one who was last seen with him. This being our view, we find that the Court of Appeal erred in its decisions in the said cases of Douglas Thiong’o Kibocha vs. Republic [2009]eKLR, and Milton Kabulit & 4 Others vs. Republic [2015]eKLR that admissions made to Police in the course of investigations are admissible under Section 111(1) of the Evidence Act. As stated, that section cannot be

invoked at the investigation stage but in the hearing of the defence case in the course of the trial when necessary.

.....

While, as stated, a confession can of itself found a conviction, when a court is confronted with an admission, which does not amount to a confession under Section 25A of the Evidence Act, it should not base its conviction solely on such an admission. Instead, it should look for clear and credible corroboration of such an admission.

Applying the above threshold on the construction and application of **section 111(1)** of the **Evidence Act** and more particularly as now crystallized by the Supreme Court to the rival position herein on this issue, it is our finding that the circumstances prevailing in this appeal are distinguishable from what led the Supreme Court in the case of **Republic vs. Ahmad Abolfathi Mohammed & Another** [supra] to fault the Court on its construction and application of the above provision in the case of **Douglas Thiong'o Kibocha vs. Republic** [supra] and **Milton Kabulit & 4 Others vs. Republic** [supra]. our reason for holding the above view is that what triggered the appellants' complaint that the burden of proof was shifted on them to prove their innocence arose from the learned Judge affirming the trial court's finding that PW14's and 22's testimonies were truthful and therefore credible. It was, therefore, safe for the trial court to act on that evidence to find a conviction and the 1st appellate court to affirm that conviction for the 1st appellant's failure to discredit those testimonies in cross-examination of those witnesses on the one hand and for the 2nd appellant's failure to tender evidence to demonstrate that he was a qualified surveyor entitled to receive the money he admitted he had received allegedly from PW3 for survey work done at the behest of PW3. Second, for the failure to produce any document to show that he was indeed a member of the Institute of Chartered Surveyors and that, being such a member he was not obliged to be licensed to practice his profession as such. This conclusion is in tandem with the Supreme Court's conclusion and which we fully adopt that **"that section cannot be invoked at the investigation stage but in the hearing of the defence case in the course of the trial when necessary."** which was the position herein as the provision was applied to the relevant aspect of the evidence tendered by the respective appellants in their respective defences highlighted above and on the basis of which the Court arrived at the conclusion reached above that requiring appellants to shed light on the truthfulness of the evidence tendered in their respective defences on matters within their knowledge as found and affirmed by the two courts below did not amount to shifting the burden of proof on them to prove their innocence.

We, therefore, find no error on the part of the learned Judge in arriving at the conclusion highlighted above with regard to the 1st appellant's complaint because the position in law and the reason why cross-examination of witnesses is provided for in court proceedings is to test their credibility for purposes of assisting a Court to arrive at a just decision based on sound facts and the law as laid before the Court. Where facts are not controverted as was the case in the instant appeal with regard to PW14 and 22's evidence, the two Courts below cannot be faulted for holding them as truthful and therefore credible.

As for the 2nd appellant, it is him who represented himself to the Court as a surveyor and that the role he played in the circumstances that triggered the criminal proceedings resulting in this appeal was limited to the role played by him as a surveyor for PW3.

In terms of **section 111** of the same **Evidence Act** already highlighted above, these were matters that fell within not only his knowledge (the 2nd appellant) but also within his control. He is the one who should have brought them to the knowledge of the Court. The learned Judge cannot, therefore, be faulted for drawing an adverse inference against him for the failure to produce those documents.

In light of the totality of the above reasoning, we find no error in the learned Judge's finding. We, therefore, reject this complaint.

Turning to the alleged infringement of the appellant's rights to fair trial, the 1st appellant cited **section 211** of the **CPC** and **Article 50(4)** of the Constitution of Kenya in support thereof. These provide as follows:

211.(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

Article 50(4) provides:

"50(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

The 1st appellant's complaints are threefold. The first relates to the alleged denial of the right to recall witnesses. As ruled by the learned Judge and which we fully affirm, this complaint was a subject of an appeal that was never pursued to its logical conclusion. That matter was, therefore, foreclosed. We reject it.

The second relates to the trial court's conduct of allowing him, a layman to tender a written statement as his defence. It is his argument that such a defence was unknown to law in terms of **section 211** of the **CPC** which does not provide for a written statement of defence adopted by him as his defence and in respect of which he was fully cross-examined thereon by the State. The section provides for only three modes of defence namely, sworn, unsworn testimony, or silence. We have construed the above provision on our own. In our view, the operative words in this provision are the following:-

"...and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross examination, or to make a statement not on oath from the dock..."

We find nothing in the above words to suggest that the evidence to be given on oath must be oral. The provision does not, therefore, rule out the possibility of an accused person giving a written statement as such testimony, adopting it fully on oath in the manner the 1st appellant did and then offering himself/herself for cross-examination on the contents therein, a procedure adopted herein. We, therefore, rule that neither the trial Court nor the first appellate court fell into error when they allowed the 1st appellant to use that mode of procedure as his defence in the first instance and when the High Court affirmed the same process especially when the record is explicit that the Court did not probe or induce the 1st appellant into adopting that mode of defence.

The other complaint related to the trial courts' failure to sustain the 1st appellant's counsel's objection to the manner of cross-examination of the 1st appellant on his written statement of defence which according to him exposed him to self-incrimination. As ruled by the learned Judge and which we affirm, the 1st appellant was ably represented at the trial by legal counsel and if aggrieved by the trial Court's rejection of his objection on the manner the State was conducting its cross-examination on him, he ought to have appealed against that order. Second, as also ruled by the learned Judge, and which we also fully affirm, there was no indication that the cross-examination went outside the contents of the written statement the 1st appellant had adopted as his defence. Neither did he, before the learned Judge nor before us now on this second appeal, point out what he termed as incriminating aspects of his cross-examination. Just as a blanket complaint did not suffice before the learned Judge on first appeal neither does it suffice before us on a second appeal. We, therefore, find no evidence of any infringement of the 1st appellant's constitutional right under **Article 50(4)** of the Constitution.

Turning to the complaint raised by the 2nd appellant of alleged infringement of his right "**to remain silent and not to testify during the proceedings**", we find no basis for the same. Reason being that the right stems from **section 211** of the **CPC** which he does not dispute was accordingly complied with. Upon such compliance, it was incumbent upon him to exercise that right to remain silent. The moment he elected to give sworn evidence, he forfeited that right and opened himself up for cross-examination. He cannot, therefore, be heard to complain.

As for presumption of innocence, no infringement was occasioned against him. That is why his plea of not guilty was accepted by the trial court triggering the full trial in which he fully participated.

In light of the above reasoning, we find no basis in both appellants' respective complaints. They are accordingly rejected.

Turning to proof of the prosecution case to the required threshold, the two courts below made concurrent findings of facts based on both oral and documentary exhibits albeit in a summary form that NCC desired to acquire land for a public cemetery at the material time. It set in motion tendering processes for the anticipated purchase. The one that triggered the criminal prosecution resulting in this appeal was the one that was "**purportedly**" successful. We have deliberately used the word "**purportedly**" because as we shall demonstrate shortly it was nothing but a fraud involving public funds. Funds were released by the parent Ministry of Local Government. The release of those funds by the Ministry is what necessitated the opening of an escrow account in the names of three law firms variously acting for their respective clients involved in one way or the other in the fraudulent transaction. The escrow account was opened for purposes of receiving and disbursing funds towards the named public purpose. It is from this same escrow account that funds were paid out to the 1st appellant through PW14 whose evidence the two courts below found truthful and therefore credible, a position we have affirmed above. The two courts below found no justification for the 1st appellant's receipt of part of funds meant for a public purpose. There is nothing to suggest that there was a misapprehension of those facts. There is, therefore, no basis for us to interfere with the two courts below concurrent findings of facts with regard to the 1st appellant's culpability in the commission of the offence charged.

As for the 2nd appellant, he does not deny receipt of the payment. His explanation was that it was payment for survey services tendered to PW3 who raised no complaint against him for any wrongdoing. Indeed, the record is explicit that PW3 never raised any complaint of any wrongdoing against the 2nd appellant. Neither did the NCC. The above position notwithstanding, neither the two courts below nor this Court on a second appeal can find anything on the record to suggest that the funds came from PW3 so as to rule out the crystallized position that those funds came from the escrow account which we have already ruled above was opened for purposes of receiving and disbursing public funds meant for a public purpose which turned out to be a fraud.

The need for the 2nd appellant to justify the payment to him of part of the public funds did not in our view amount to a shifting of the burden of proof for him to prove his innocence as we have already ruled above. It was in line with the principle set out in **section 111** of the **Evidence Act** as crystallized by the Supreme Court in the **Republic vs. Ahmad Abolfathi Mohammed & Another** case [supra] that where evidence tendered in Court demonstrates clearly that matters on accused alluded to in the course of the criminal trial were specifically within the knowledge of an accused person in a criminal trial, he may be called upon in appropriate circumstances to prove or disprove such set of circumstances. The relevant matters highlighted by the trial court and upon which the learned Judge based her finding that they were within the respective appellants' knowledge were indeed within their knowledge as we have already highlighted above. We, therefore, affirm the learned Judge's finding that the prosecution case against both appellants was watertight and warrants no interference.

Turning to the complaint on sentence, **section 361 (1)(a)** of the **CPC** is explicit that severity of sentence is a matter of fact. Interference as of right on a second appeal only arises where the same is either unlawful or handed down without jurisdiction. The learned Judge reviewed the relevant provisions and not only laid basis but also gave reason for interfering with the sentences handed down against the appellants by the trial court. Appellants' complaints cumulatively against the respective sentences handed down against them and as revised by the learned Judge are that the sentences are excessive, unjust, inhuman, degrading, and amount to subjecting them to double jeopardy. We have no mandate under **section 361** to address such complaints. They are addressed to the wrong forum in so far as they purport to challenge the constitutionality and or the legality of the sentences as provided for in law.

The upshot of the above assessment and reasoning is that we find no merit in the consolidated appeals. They are accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR