



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MILIMANI

ANTI-CORRUPTION CASE NO. 31 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

1ST ACCUSED..... GRACE SARAPAY WAKHUNGU

2ND ACCUSED.....JOHN KOYI WALUKE

3RD ACCUSED.....ERAD SUPPLIES & GENERAL CONTRACTS LTD

JUDGMENT

The three accused persons here in were arraigned before court, they were jointly charged in counts 1, 3, 4 and 5 while the 1st accused was separately charged in count 2. The 1st and 2nd accused being directors of the 3rd accused which is a legal entity (a juristic person). The charges were preferred are as follows:

Count1: Uttering a false document contrary to section 353 as read with Section 349 of the Penal Code CAP 63, Laws of Kenya

The particulars of the offence are stated that the 1st, 2nd and 3rd accused on or about the 24th day of February 2009 being the directors of Erad Supplies and General Contractors Limited, together with Erad Supplies and General Contractors Limited within Nairobi county in the Republic of Kenya, knowingly and fraudulently uttered a false invoice No 12215-CF-ERAD for the sum of US Dollars 1,146,000 as evidence in the arbitration dispute between Erad Supplies and General Contractors Limited and National Cereals and Produce Board purporting it to be an invoice to support a claim for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

Count 2: Perjury contrary to Section 108(1) as read with Section 110 of the Penal Code CAP 63, Laws of Kenya. (against the 1st accused)

The particulars of the offence are that the 1st accused on or about 24/02/2009, being a director of Erad Supplies and General Contractors Limited within Nairobi county in the Republic of Kenya while giving testimony in an arbitration dispute between Erad Supplies and General Contractors Limited and the National Cereal and Produce Board knowingly gave false evidence for decisions for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

Count 3: Fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of the ACECA

2003.

The particulars are stated that the 3 accused persons on or about the 19th day of March 2013, in Nairobi City County, within Nairobi in the republic of Kenya, being the directors of Erad Supplies and General Contractors Limited together with Erad Supplies and General Contractors Limited, jointly and fraudulently acquired public property to wit Ksh 297,086,505.00 purporting to be the cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

Count 4: Fraudulent acquisition of public property contrary to section 45(1) as read with Section 48(1) of the ACECA 2003.

The particulars of the offence are outlined that the 1st, 2nd and 3rd accused persons herein, on or about 27/06/2013 in Nairobi City County within Nairobi in the Republic of Kenya being the proceedings between Erad Supplies and General Contractors Limited together with Erad Supplies and General Contractors Limited jointly and fraudulently acquired public property to wit Ksh 13,364,671.40 purporting to be cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight loss of profit and interest.

Count 5: Fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of the ACECA 2003.

The particulars of the offence being that the 1st, 2nd and 3rd accused persons herein on or about the 2/7/2013 in Nairobi City County within Nairobi in the Republic of Kenya, being the directors of Erad Supplies and General Contractors Limited, jointly and fraudulently acquired public property to wit US Dollars 24,032.00 purportedly to the cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight and loss of profit and interest.

The prosecution called for a total of 27 witnesses in support of its case which in brief is that the 3rd accused won a tender from the National Cereals and Produce Board (hereafter referred to as NCPB) but were not issued with a letter of credit like the other four firms which had equally won the tender. The third accused did not supply the 40,000 metric tonnes of white maize despite submitting its tender documents and executing the contract for the supply of the 40,000 metric tonnes of white maize. The contractual period expired, and the 3rd accused and its directors, the 1st and 2nd accused (co-accused) herein successfully filed an arbitration for an award for storage charges and loss of profit plus interest and cost of the arbitration.

The prosecution brought these charges on allegations that the invoice which was the basis of the claim for storage charges and which was an exhibit in the arbitration proceeding was not genuine hence the claim was based on fraud. The accused persons are now charged for the money which was paid to them from NCPB bank accounts pursuant to an alleged false claim and a fraudulent invoice.

When all the three accused were placed on their defence, the 1st and 2nd accused opted to give evidence on oath and the third accused relied on the testimony of the 1st accused in its defence. They did not call witnesses.

The defence case in brief is that the 3rd accused lawfully and successfully won a tender to supply 40,000 metric tonnes of white maize to NCPB. That the directors supplied and met all the requirements for the bid and executed a contract between the 3rd accused and NCPB for the supply of the maize, that since the contract stipulated the period of supply of the maize the accused person commenced the process to acquire the maize from Ethiopia using Chelsea Freight and stored it awaiting delivery upon being furnished with the letter of credit.

That the accused persons were not given the letter of credit by the NCPB despite having won a tender and having signed a

contract, that the accused persons incurred storage costs as such they filed an arbitration proceeding and were successfully awarded the cost of storage, loss of profit, costs of the case and interest. That to date a part of the claim has been realised leaving the balance which the accused persons are claiming from the complainant (NCPB).

The prosecution's case was opened by a Ms Anne Gathoni Kamau (PW1) who served as a legal officer and later the company secretary of NCPB between the years 1996 and 2012. That she served as a legal officer between 1996 – 1997, thereafter she was promoted to the position of company secretary, a position she held until 2012 when she moved to the Kenya Biosafety between 2012 and 2016 and at the time when she testified (2019) she was the company secretary of Kenya Meat Commission.

PW1's evidence is that while at NCPB, in the year 2004, there was a scarcity of maize in the country and the Government of Kenya instructed NCPB through the Strategic Grain Reserve to import maize. Her evidence is that the importation took place. She later learnt that some issues arose in September 2013, when she was summoned to EACC to record her statement regarding the firms which had been awarded the tender.

PW1 availed the minutes of the tender committee which was held on 10/08/2004 to adjudicate and award the tender. Her evidence is that the board adjudicated the tender for the supply of 180,000 metric tonnes of white maize. She availed the tender opening minutes, PEX 1 and confirmed that there was a contract between NCPB and the 3rd accused for the supply 40,000 metric tonnes of white maize at the cost of USD 233 per metric tonne. She identified the contract which was produced to this honourable court as PEX 2.

Her evidence is that she only took part in the tender opening process even so she was absent with apology during the tender opening. Her evidence is that seven (7) companies were recommended for the award of the tender by the Tender Evaluating Committee, further that finally five (5) firms were awarded the tender by the main tender committee, namely:

- i. Hala General Trading LLC
- ii. Versatrade International CC
- iii. Erad Supplies and General Contractors Limited (3rd accused)
- iv. Purma Holdings Ltd
- v. Freba Investments

Her testimony is that at the end only two firms supplied the maize namely:

- i. Hala General Trading LLC
- ii. Versatrade Investments CC

That the 3rd accused filed an arbitration proceeding against NCPB.

On cross examination PW1 testified that at the technical evaluation level, the 3rd accused was recommended for an award to supply 20,000 metric tonnes of white maize and at the subsequent tender committee meeting the award to the 3rd accused was enhanced to 40,000 metric tonnes of white maize.

Her evidence is that a letter of credit was supposed to be issued to the 3rd accused, that there were two other firms which were given the letter of credit but did not supply the maize and that the money was not enough, that the money ran out mid-way the supply of the maize. According to PW1 they filed an appeal from the arbitration award and the matter spiralled to the Court of Appeal, it is yet to be resolved, her evidence is that NCPB had no information of impropriety at the time and did not raise any objection to the invoice (PEX 43) during the arbitration proceedings.

Her testimony in a nutshell is that 5 companies were awarded the tender to supply white maize to NCPB and out of the five, four were issued with the letter of credit and that only the 3rd accused was not given the letter of credit. Out of the 4 firms which were given the letter of credit, two supplied the maize and two did not supply.

Mr Cornel Kipng'etich Ngelechei, PW 2, the General Manager Finance at NCPB. His evidence is that in the year 2004 he was holding the position of Deputy Chief Accountant and that he was appointed as one of the members of the Tender Evaluation Committee to recommend an award for bids to supply 180,000 metric tonnes of white maize. He availed a letter dated 5/08/2004 (PEX 3) which listed the 12 office holders, nine (9) drawn from NCPB, one each from the ministries of Agriculture, Finance and office of the president who were constituted the technical tender evaluating committee.

His evidence is that they evaluated bids from 9 firms namely:

- i. Hala Trading Company Limited
- ii. Versatrade International CC
- iii. Erad Supplies and General Contractors Limited
- iv. Purma Holdings Ltd
- v. Freba Investment Ltd
- vi. Mano Styles Ltd
- vii. Wanizame Trading Ltd

- viii. Mombasa Maize Millers Ltd
- ix. Devji Meghji and Bros Ltd

And after the technical evaluation and out of the nine they recommended an award of tender to 7 (seven) firms as follows:

- i. Hala Trading Co Ltd to supply 40,000 metric tonnes at the cost of USD 229 per metric tonne.
- ii. Versatrade International CC to supply 40,000 metric tonnes of maize at the cost of US D 229 per metric tonne.
- iii. Erad Supplies and General Contractors Limited to supply 20,000 metric tonnes at the cost of US D 233 per metric tonne.
- iv. Purma Holdings Ltd to supply 20,000 metric tonnes at the cost of USD 189 per metric tonne.
- v. Freba Investments Ltd to supply 20,000 metric tonnes at the cost of USD 190 per metric tonne.

vi. Mano Styles Limited to supply 20,000 metric tonnes of white maize at the cost of USD 192 per metric tonne.

vii. Wanizame Trading Limited to supply 20,000 metric tonnes of white maize at the cost of USD 225.75 per metric tonne.

The report of the technical tender evaluation committee was taken to the main tender committee meeting which adjudicated the tender and awarded five (5) firms to supply the 180,000 metric tonnes of white maize which are as follow:

i. Hala General Trading Co Ltd to supply 40,000 metric tonnes of white maize.

ii. Versatrade Investment CC to supply 40,000 metric tonnes

iii. Erad Supplies and General Contractors Limited to supply 40,000 metric tonnes

iv. Purma Holdings Ltd to supply 30,000 metric tonnes

v. Freba Investment Limited to supply 30,000 metric tonnes

PW2 testified that the letter of credit for the 5 firms was at the cost of 4.8 Billion but NCPB had only received 3.1 Billion hence there was a shortfall of Ksh 1.7 Billion that caused the deficit and they could not open a letter of credit for the 3rd accused, that the 3rd accused was dissatisfied hence it filed an arbitration case against NCPB and it was successfully awarded damages for breach of contract, storage charges, cost of the case plus interest and that the arbitration award was adopted by the High Court. That on the 19/03/2013 PW2 received a letter from KCB on Garnishee order attaching Ksh 297,386,505 payable to the 3rd accused. The letter dated 19/03/2013 was produced as PEX 5. PW2 also availed the NCPB KCB bank statement reflecting the payment of the money as PEX 5(a).

PW2 further stated that on 28/06/2013 he received a letter from Mr D Kaburi, Manager Customer Service at National Bank of Kenya (NBK). The bank also alleged to have received a Garnishee order attaching Ksh 13,363,671.40 to the lawyer of the decree holder. The letter from NBK dated 28/06/2013 was produced as PEX 6. He produced an advice slip dated 24/06/2013 showing that the money was paid to the law firm of Messrs Ahmednasir Abdikadir and Co Advocates.

PW 2 also produced an advice slip from the Cooperative Bank of Kenya showing that the NCPB's US Dollar account also paid out USD 24,032.50 to the law firm of Ahmednasir Abdikadir and Co Advocates on 2/07/2013. He availed the bank statement from Cooperative Bank PEX 7(b) reflecting the payment of Ksh 14,952,309 also made to Ahmednasir Abdikadir and Co Advocates the same date (2/07/2013), however this amount (Ksh. 14,952,309) has not raised anywhere else in this case.

On cross examination by Mr Okubasu Advocate for the 1st accused. PW2 confirmed that the 3rd accused was not involved in the initiation of the tender process rather it was a successful bidder and that the 3rd accused met all the technical requirements and that there was a duly executed contract between the 3rd accused and NCPB for the supply of white maize which was signed by the then NCPB General Manager Mr Tirop Kosgey (PW9) who had the mandate to execute the contract.

PW 2 also admitted that under Clause 8 of the contract either party had the option to terminate the contract, but the contract was not terminated by NCPB. PW 2's evidence is that all the other successful bidders were given letters of credit except the 3rd accused, he could not tell why the 3rd accused was not given the letter of credit.

On further cross examination by Mr Havi Advocate for the 2nd accused, PW 2 told this honourable court that Mrs Grace S

Wakhungu (the 1st accused) signed the contract on behalf of the 3rd accused. That the 2nd accused did not sign the contract (PEX 2). PW 2's evidence is that the 3rd accused was to supply 40,000 metric tonnes of white maize within 4 (four) weeks from the date of contract which was signed on 26/08/2004. That NCPB was bound to issue the 3rd accused with the letter of credit to guarantee payment.

His evidence is that NCPB participated in the arbitration proceedings and that he (PW 2) testified before the arbitrator for NCPB and that the 3rd accused was seeking an award for loss of profit and storage charges. Further that NCPB filed a counter claim for Ksh 67,654,980.62 which was dismissed, and the award granted in favour of the 3rd accused. That NCPB sought to set aside the award at the High Court which was in vain. PW 2 also testified on cross examination that NCPB discovered that Ropack Company does not deal with maize, rather transport. He said that the invoice dated 22/01/2005 was from a non-existing company.

PW3, Mr Arun Shankar Mathur, a retired CEO of I&M bank testified that he issued a bid bond for Erad Supplies and General Contractors Limited (3rd accused) upon the application by KAPU Kenya. He availed a contract between KAPU Kenya, and the 3rd accused for the supply of maize to NCPB. PW3's testimony is that the bid bond was valid until 2/11/2004 he produced the bid bond as PEX 12. His evidence is that the letter of credit was not issued by NCPB.

On cross examination PW3 said that the storage charges had no relations with the bid bond, that he did not know the 2nd accused, that he only dealt with Sundip Patel (PW 18) of KAPU Kenya on behalf of the 3rd accused who were on a joint venture in the bid. That he also dealt with Ropack, a South African entity who were to supply the 40,000 metric tonnes of maize. PW 3 could not tell whether Ropack was a legal entity. He further said that the I&M Bank only issued a bid bond but declined to issue the performance bond.

PW 4, a Mr John Mwenda Gichuru testified that he was an employee of NCPB, that in this matter he participated in the technical tender evaluation committee which evaluated bids from 36 bidders and found that 29 were not qualified and nonresponsive, that 7 firms met the qualifications. The seven firms were then forwarded to the main tender committee with recommendations. He enumerated the seven firms in which included the 3rd accused herein (list of the seven firms supra)

PW 4's evidence is in line with that of PW 2 that they had recommended the 3rd accused to supply 20,000 metric tonnes, however the main tender committee reviewed the recommendations and awarded the tender to five companies and the 3rd accused was awarded the bid to supply 40,000 metric tonnes of white maize. On cross examinations PW 4 testified that out of the five firms which were awarded the tender, only 2 firms performed the contract and that three firms did not supply the maize.

PW 5, Mr James Cheruiyot Boit, a retired NCPB employee testified that he was holding the position of Research and Business Development Manager at the time of this tender, that he was appointed the chairman of the technical evaluation committee which evaluated the tender then approved and recommended seven firms however the tender committee reduced the firms to 5 (five), which were awarded the tender and enhanced the award of the tender to some firms, including that of the 3rd accused, from 20,000 metric tonnes to 40,000. On cross examination, PW 5 said that there was no fraud in the tender evaluation process. His evidence is that his work on this matter ended at the tender evaluation level.

PW 6, Mr Rajab Ahmed Karume, a former employee of Dubai Bank testified that the Dubai Bank issued the performance bond to the 3rd accused and that there were three signatories to the account through which the performance bond was applied for namely Jacob Juma, the 2nd accused (John Waluke Koyi) and the 1st accused (Grace Sarapay Wakhungu) and that the mandate was that all to sign. He stated that the letter of credit was not issued hence the performance bond thus expired. He produced the performance bond whose validity was valid for 90 days as PEX 17.

PW 7, Mr Kiprob Harun Kipyego testified that in the year 2004, he was a member of the tender technical evaluation committee for the supply of 180,000 metric tonnes of white maize. His evidence is on the technical evaluation committee report (PEX 4), his

evidence is in line with that of PW 2 and PW 4. He identified his name as number 6 on PEX 4 that they (the tender evaluation committee) recommended seven bidders for the award but the main tender committee revised the recommendation and awarded the tender to five bidders. He was at the time the chief supplies officer and denied having interacted with any of the accused persons. On cross examination PW7 admitted having also participated in the main tender committee where they awarded the tender to five firms which had been recommended by the evaluation committee. He denied having been approached by anyone or influenced to make the award.

PW 8, Robert Kimutai Langat, a retired employee of NCPB testified that he was the technical manager at the time of the tender herein and rose in rank to retire as General Manager Machinery when he retired in the year 2009. His evidence is that in the year 2004 he participated as a tender evaluation committee member which carried out the technical evaluation of bids for the supply of maize, his evidence is in material similar to that of PW 2, PW 4, PW 5 and PW 7.

He confirmed that they recommended seven firms to be awarded the tender, that the tender committee reviewed the report (PEX4) and awarded the tender to five firms.

PW 9, Mr Tirop Kosgey said that he was a retired Managing Director NCPB between the years 2003 and 2006 testified that he retired from active public service on 19/06/2013, by then he was the Permanent Secretary in the Ministry of Housing.

His (PW9) evidence is that in the year 2003 there was insufficient food production in the Country, that NCPB did not get sufficient maize, NCPB was expected to have a reserve of 6,000,000 bags of maize in its store. That they were given authority by the then Permanent Secretary Mr James Ongwae to import 200,000 bags of white maize. He availed the letter dated 19/07/2004 which was produced as PEX 18. That the then minister of finance the late Mr David Mwiraria issued a legal notice No 90 dated 5/08/2004 which was produced as PEX 19 for the importation of the maize.

That they floated the tender for the importation of maize, according to PW 9 they went to their data base of suppliers and came out with about 30 companies whom they invited to buy the tender documents. He further stated that other companies within the country and others from foreign countries got to learn of the tender and they also purchased the bids. That about 80 companies purchased the bid documents.

PW 9 constituted the tender technical evaluation committee drawn from NCPB employees and 3 trustees from the SGR (Strategic Grain Reserve) who were:

1. The Ministry of Finance
2. Ministry of Agriculture
3. Ministry in charge of special programs, together with
4. NCPB employees.

And that the technical evaluation committee prepared a report, PEX 4 which was submitted to the tender committee. PW9 identified PEX 1, which were the minutes.

PW 9's evidence is that the technical evaluating committee recommended 7 (seven) firms in PEX 4 and the tender committee reviewed the recommendation and awarded the tender to five (5) firms, namely:

- i. Hala General Traders
- ii. Versatrade International
- iii. Erad Supplies and General Contractors Limited (the 3rd accused)
- iv. Freba Investments
- v. Purma Holdings

He testified that the tender committee redistributed the amount to supply. That the five firms were required to avail their performance bonds then sign contracts and that PW 9 was to sign all the contracts on behalf of NCPB. PW 9 availed the contract which he signed between NCPB and the 3rd accused which was produced as PEX 2.

According to PW 9, the conditions for the supply of the maize had been set, including the quality parameters. That the payment was through opening letters of credit. Further that the letters of credit were issued upon receipt of invoices indicating the time lines of the supply and that the letters of credit were issued to the successful bidders on first come first served basis upon the presentation of the performance bond and invoices.

PW 9 testified that the letter of credit for the 3rd accused was not issued because by the time they were ready with their performance bond, the available funds had been exhausted. That out of the five firms that won the tender, four were issued with the letters of credit, that it was only the 3rd accused which was the last firm to be ready whose letter of credit was not opened. This was because by the time they availed their performance bond and invoice the funds had been depleted, and that the expected funds were delayed.

PW 9's evidence is that even out of the four firms whose letters of credit were opened, only two delivered the maize namely:

1. Hala General Traders
2. Versatrade International

The other two, namely Purma and Freba did not supply the tender.

PW 9 produced a demand letter from the advocates of the 3rd accused seeking for the letter of credit. The demand letter was produced as PEX 21. The letter was addressed to him (PW 9), by Mr Tom Onyango Advocate of Messrs Ochieng Kibet Onyango and Ohaga Advocates. That Mr Tom Onyango Advocate later rescinded the demand letter vide another letter of 27/10/2017 which was produced as PEX 20.

According to PW 9, the 3rd accused had 3 directors, led by the 1st accused, the Late Jacob Juma and the 2nd accused. He further stated at NCPB had not issued a letter of credit to the 3rd accused hence the duty was on the accused persons to avail documents in support of the process they had undertaken in the importation of the alleged maize.

On cross examination by Mr Okubasu Advocate, PW 9 confirmed that the letter of credit was not issued to the 3rd accused as the funds for the importation of the maize ran out. He also confirmed that none of the accused persons approached him during the tender award process and that the contract PEX 2 was freely entered between NCPB and the 3rd accused.

PW 9 said that NCPB did not lose any money in the contract PEX 2 and that the tender by the third accused was valued at USD 9,000,000. His testimony is that this case was as a result of the money paid out of the NCPB bank accounts to the accused persons and their advocates.

On cross examination by Mr Havi Advocate, PW 9 confirmed that the payments were made to the accused persons and their advocates pursuant to an arbitration award which was confirmed by the High Court. He also said that the accused persons submitted other invoices and that those invoices were forged. He said that the 3rd accused could not import the maize on their own without the requisite letter of credit. That the accused persons also availed a second invoice which was found to be invalid and that at first it was difficult for the 3rd accused to avail the tender documents.

PW 10, Mr Batista Tambiti Okado testified on how they received the Garnishee order at KCB and how the subsequent process was carried out until the money was paid out of the NCPB bank account at KCB. He identified the Garnishee order issued by the court on the 27/02/2013 which was produced as PEX 24. He gave evidence in detail on how the bank (KCB) was served with the Garnishee nisi then absolute and a letter from Mr Protus Saende Advocate which directed KCB to pay the money to a tune of Ksh 297,386,505 to the bank account number 0948421941 domiciled at Barclays Bank, Market Branch in the name of Messrs Soita and Saende Advocates.

On cross examination, PW 10 testified that upon receipt of Garnishee nisi order, they froze the account and waited for further instructions. That when they got the Garnishee absolute order and a letter from Soita and Saende and Co Advocates which letter and order were verified by the bank lawyer, Mr Oraro Advocate, they effected the payment of Ksh 297,386,505 to the Barclays Bank account in the name of Soita and Saende Advocates. That they (KCB) notified NCPB of the debit and the Garnishee orders. That afterwards NCPB got an order to set aside the Garnishee order to free the account for further transactions.

Mr Dickson Kaburi, PW11, the Branch Manager of the National Bank of Kenya, Harambee Avenue Branch testified how they received a Garnishee order attaching the NCPB account. Mr Kaburi testified that the Garnishee order was to attach Ksh 264,864,285 in the NCPB account at Harambee Avenue branch but the available bank balance which was attached and paid out was Ksh 13,364,671, it was paid to the bank account belonging to Messrs Ahmednasir Abdikadir and Company Advocates at First Community Bank. That NBK sent a notice of the attachment of the money to their customer, NCPB.

PW 12, Ms Damaris Kitinti Lenges, the Regional Manager at Cooperative Bank of Kenya testified that the bank was served with a Garnishee order which attached the USD bank account belonging to NCPB and that they were directed to pay USD 24,032.52 to the bank account in the name of Messrs Ahmednasir Abdikadir and Company Advocates USD account at First Community Bank and that was done. She testified in detail on the service of the documents and court order on Cooperative bank. She confirmed that the amount was paid out of the USD account of the NCPB.

PW 13 Mr Joshua Nyawara Advocate for the NCPB testified that the advocate representing NCPB in the arbitration cause filed by the 3rd accused. His evidence is that the claim arose from a contract PEX2 for the supply of 40,000metric tonnes of maize. That the 3rd accused was seeking USD 1,838,000 and USD 1,960,000 totalling the award to USD 3,798,000 being the storage charges and damages for loss of business, respectfully.

PW13 testified that he defended NCPB at the arbitration proceedings, PEX 41 and at the High Court where the award was confirmed. PW13 testified in detail how he challenged and made effort to set the award and the case ended up at the Court of Appeal.

PW 13's evidence is that Mr Saende Advocate prosecuted the arbitration for the 3rd accused and that the 1st accused was a witness in the arbitration for the 3rd accused. PW13 told this court that the arbitrator made an award for the 3rd accused as follows: A total sum of the USD 3,106,000 together with interest from 27/10/2007 until payment in full, plus the cost of the arbitration. That

the arbitrator was Mr Evans Gaturu Advocate. The award from the arbitration was produced as PEX 42.

According to PW13 the 3rd accused availed 2 (two) invoices, one from Ropack and another from Chelsea Freight. PW 13 stated that the arbitrator indicated that the 2nd accused attempted to bribe him and that the arbitrator reprimanded him (the 2nd accused) in the proceedings. PW13 could not tell on cross examination if the Chelsea Freight invoice was genuine or not. According to PW13 Chelsea Freight did not exist and Ropack only dealt with transport and not in maize.

PW 13 on cross examination testified that the NCPB counterclaimed for the storage charges during the arbitration against the 3rd accused for the storage facility which was not expended on account of the 3rd accused's failure to supply the maize however the counterclaim was dismissed.

PW 14 Mr William Kipyegon Korir testified that he was a retired employee of NCPB, that he was in charge of coordination of importation and export of cereals at the time of the tender. He had the mandate to open the letters of credit once the contracts are signed.

On this case PW14 testified that he was aware that NCPB signed a contract with the 3rd accused and that the contract PEX 2 was forwarded to him (PW14) that while he was waiting to issue the letter of credit, he had asked the 3rd accused to avail the details of the vessel which was to ferry the maize and to indicate where it will dock at the port of Mombasa.

He confirmed that out of all the five companies the 3rd accused supplied their performance bond last. PW14's evidence is that he did not open the letter of credit for the 3rd accused. He said that he testified in the arbitration proceeding where the 3rd accused won an award. On cross examination by Mr Okubasu Advocates for the 1st accused PW 14 could not tell why he was not prompted by the 3rd accused to issue the letter of credit.

PW15, Mr Francis Nyange an employee of the KCB bank gave evidence which was in material similar to that of PW 10, he testified that NCPB bank account held with KCB Moi Avenue branch was attached by a Garnishee court order and consequently Ksh 297,386,550 was paid from NCPB account to that of Messrs Soita and Saende Advocates bank account at Barclays Bank. He produced the bank statements reflecting the payments.

PW 16 Mr Philip Momanyi Omambia an employee of First Community Bank confirmed that bank account numbers:

- i. 0095301005 USD Account and
- ii. 0095301004 Ksh Account

The accounts belonged to Messrs Ahmednasir Abdikadir and Company Advocates at the First Community Bank. He confirmed having supplied the bank statement in compliance with a court order of Misc. Application 2438/17. He produced the bank statements for the two accounts as PEX 47 and 48, respectively.

PW17, Mr Benson Okwiri, an employee with Barclays Bank of Kenya testified that the bank account no 0948421941 belongs to Messrs Soita and Saende Advocates that he also issued the bank statement and documents pursuant to a court order in Misc. 2441/17. He produced the account opening documents for the law firm of Soita and Saende Advocates as PEX 52 and the bank statement as PEX 53.

PW 18 a Mr Sundip Jagdish Patel testified that he was introduced to the 1st accused by his friend Brenda Koech. That the 1st accused needed money to win a tender with NCPB for the supply of maize, that PW18 advanced to the 1st accused a sum of between

Ksh 10,000,000 and Ksh 11,000,000. Further that the 1st accused needed a bid bond and PW 18 secured it from I&M Bank.

His evidence was that at the time he was operating his company called KAPU Kenya as the Managing Director that it operated between 1989-2014 when it closed down. According to PW18, the bid bond was to be in the name of the supplier Ropack, but he was advised to have the bid bond in the name of the 1st and 3rd accused, which he did.

PW18's evidence is that he initially attempted to get the bid bond from Giro Bank but it declined, hence he approached I&M Bank and was given a bid bond for USD 1,000,000 in favour of NCPB and that PW18 executed an indemnity for I&M bank from KAPU Kenya also that of his late father who was a co-director. That the 1st accused gave PW18 cheques as security for the payment. Further that his company (KAPU Kenya) paid to I&M Bank Ksh 1.2 Million for the bid bond. He testified that they agreed to share with the 3rd accused the expenses and income from the tender at the ratio of 50:50. That they entered into an agreement to that effect.

Mr Katwa Kigen Advocate, holding watching brief for the complainant (with the leave of the court) cross examined this witness who said that they filed a suit against the 3rd accused, that he is yet to recover the money. His evidence is that the other directors Mr Jacob Juma and the second accused denied having dealt with him. PW18's evidence is that he only dealt with the first accused.

On further cross examination by Mr Okubasu Advocate, for the 1st accused PW18 testified that he spent money to a tune of Ksh 15,000,000 in this transaction on the trust of his friend Brenda Koech and the personal cheques that were given as security by the 1st accused.

PW18 told the court that he did not participate in the arbitration but has sued the 3rd accused for Ksh 150 million being half of the amount awarded in the arbitration of Ksh 300 million. His evidence is that the maize was not imported as the letter of credit was not opened for the 3rd accused. His evidence is that he is entitled to the refund of the Ksh 15,000,000 which he invested in the joint venture. On further cross examination by Mr Saende Advocate PW18 testified that he first met the 1st accused, then later met Mr Jacob Juma (the late) and the 2nd accused.

PW19 Mr Irungu Evan an employee of Cooperative Bank confirmed that on the 2/07/2013 USD 24,032.50 was transferred through RTGS from NCPB, USD account number 02120007611 600 to USD bank account number 0095301004 at First Community Bank which was held by Ahmednasir Abdikadir and Company Advocates. He produced the letter for RTGS as PX 3 and a letter from Soita and Saende Advocates to the bank lawyer Mr Kimondo as PEX 34.

PW 19 said that the law firm of Ahmednasir Abdikadir and Company Advocates had two bank accounts namely 0095301005 and 0095301004 both at First Community Bank. PW 19 also testified that he complied with a court order to supply the bank documents.

PW 20 Mr Peterson Wachira a civil servant working at the company registry give evidence on the ownership and directorship of the 3rd accused and that shareholding at incorporation there were three directors with the following shareholding:

- i. Grace Wakhungu-1000 shares
- ii. John Waluke- 500 shares
- iii. Jacob Juma- 500 shares

Making a total of 2000 shares.

That on the 8/03/2006 Mr Jacob Juma Resigned and by form 203A filed on 15/03/2006 on the company's annual returns filed on 31/12/2012 the directorship/ownership of the 3rd accused was:

- i. First accused- 1250 shares
- ii. 2nd accused - 750 shares

making award of shareholding at 2000.

PW 24 a Ms Jemima Mungai a Senior Clerical Officer at the Attorney General's office at the Company Registry gave evidence which was in material similar to that of PW 20. She produced the CR13 for the 3rd accused as PEX 61 and confirmed that at the time of incorporation the 3rd accused had three directors with ownership as:

- i. 1st accused with 1000 shares
- ii. 2nd accused with 500 shares
- iii. Jacob Juma with 500 shares

That Jacob Juma resigned as a director on 8/03/2006 vide form 203A dated 8/03/2006 and filed on 15/03/2006 and as per the last return to the Company Registry dated 6/02/2012 their directors and ownership of the 3rd accused stood at:

- i. 1st accused with 1250 shares and
- ii. 2nd accused with 750 shares

She produced the form 203A and the CR13 as PEX 60 and PEX 61, respectively.

PW 21 Mr Omar Dambi an employee of National Bank who issued the bank statement which confirmed the money being paid out of NCPB bank account number 01003003071600. He produced the bank statement as an exhibit. His evidence is that he supplied the document pursuant to a court order to investigate the account.

PW 22 Mr Freddy Chetty, a native of Durban, South Africa, testified that he was a director of Chelsea Freight with two other co-directors Thilogan Pillay and Leon Alfred Maynard. He availed the registration documents of Chelsea Freight. His evidence is that the invoice touching on this matter, PEX 43 did not emanate from Chelsea Freight. His evidence is that issuance of all invoices at Chelsea was under his docket and mandate, that he was not aware of PEX 43 and denied being involved in any storage businesses.

In this matter, his evidence is that PEX 43 had their address and details but bore the Rand bank account details which they could not use for any transaction involving USD and that they had a USD account for such businesses. He denied ever dealing in maize as Chelsea Freight. He also denied knowledge of the accused persons or the company called Ropack and denied PEX 64. He was categorical that they (Chelsea Freights) had never dealt with Ropack or Mr Ferenc Lago. PW 22's evidence is none of the members from Chelsea Freight dealt with PEX 43.

On cross examination by Mr Okubasu Advocate, PW22 was further categorical that Chelsea Freight Company existed, he further maintained that no employee of Chelsea Freight could generate PEX43 without his knowledge. He also said that no money relating to the transaction herein was paid to their bank account. He said that he had no interest in this case.

PW 22 told this honourable court that his company's details were falsely used by the 3rd accused. On further cross examination by Mr Saende Advocates PW 22 admitted having been contracted by KPLC to transport poles to Kenya and that he could not tell if his partner Mr Leon had business contacts in Kenya. PW 22 also said that it was him and one co-director Mr Thilogan Pillay who recorded their witness statements with the Investigating Officer in this matter and that Alfred Leon Maynard was not asked to record his statement.

PW 23 Mr Andries Christoffel a police officer from South Africa testified that his force number was 0477362-4 and that he is based at Eloff Street in Johannesburg CBD. That he received a Mutual Legal Assistance request. He gave evidence in detail on the effort he made to trace the suspects and investigations touching on the individual suspects and the companies that were involved namely:

- i. John Wald
- ii. Louis Dreyfus Commodities Limited
- iii. Thomas Courlaudia
- iv. Ferenc Lango
- v. David Kuper
- vi. Chelsea freight
- vii. Ropack

His evidence is that he got a court order to investigate the MLA request from a magistrate at Germiston, that he got information about the companies from the land registry and physically looked for the individuals also through telephone calls.

That on Messrs Louis Dreyfus Limited he spoke to a Mr Thomas who denied knowledge of the accused persons and specifically the 3rd accused. That Thomas said that Mr James Wald was their employee but had relocated to Dubai. That Thomas denied having any dealings with the 3rd accused.

His evidence is on how he carried out his investigations both physically and digitally on the status of the companies and the whereabouts of the individuals. PW 23's evidence is that most of the people in question could not be found in South Africa. Most of them were said to have relocated. Mr Ferenc Lago to Hungary, James Wald to Dubai. That he only spoke to Mr Thomas on telephone and found the directors of Chelsea freight who were within his jurisdiction.

PW 25 Mr David Changkwony Terer testified that he is an investigator with EACC. That he was among the investigating team, that he investigated alongside and later took over the investigation of the case from the original investigator Mr Kipsang Sambai (PW27).

PW 25's evidence is that he got the details of ownership and directorship of the 3rd accused from the company registry. His evidence is in line with what PW 20 and PW 24 said that at incorporation the 3rd accused was owned by three directors namely the 1st and 2nd accused as well as the late Jacob Juma. That Jacob Juma resigned and left both accused as co-directors of the 3rd accused.

PW 25 also testified that he also investigated the transactions in the NCPB's bank accounts held at the three banks that is; NBK, KCB and Cooperative Bank. That he also obtained warrants to investigate a bank account belonging to the law firm of Messrs Soita and Saende Advocates at Barclays Bank as well as the two bank accounts held by the law firm of Messrs Ahmednasir Abdikadir and Company Advocates held at First Community Bank.

His (PW 25) evidence is that there was a debit transaction for NCPB's NBK account no 01003003071600 of Ksh 13,364,671.40 on 27/06/2013 and that the amount was credited to the First Community Bank account belonging to Ahmednasir and Abdikadir Advocates. Further that USD 24,032.50 was also debited from NCPB Cooperative Bank account number 021200076116000 and the same amount was transferred through RTGS to account number 0095301005 at First Community Bank belonging to Messrs Ahmednasir Abdikadir and Company Advocates.

His evidence is that he also obtained bank statements to show that Ksh 297,386,505.00 was transferred from account number 110716567 belonging to NCPB and the same was transferred to bank account number 0948421941 Barclays Bank, market branch which is in the name of Soita and Saende Advocates client account, afterwards there were various transactions and money transferred from Messrs Soita and Saende client account as follows;

1. that on 20/03/2013 there was a debit of Ksh 5 million (5M) which was credited to Nancy Baraza Advocate indicating it to be legal fees.

2. That on 20/03/2013 there was another debit of the Ksh 35,000,000 which was credited to Ahmednasir Abdikadir and Company Advocates indicating the sum as legal fees.

3. That there was another sum of Ksh 5,000,000 paid to Ahmednasir Abdikadir and Company Advocates indicated again as legal fees.

4. That on 21/03/2013 there was another debit of Ksh 110,690,210 which was credited to Soita and Saende Advocates office account stated as legal fees.

5. That on the same day 21/03/2013 there was a debit transaction of Ksh 40,000,000.

The beneficiary was indicated as the 1st accused (Grace Sarapay Wakhungu) the payment detailed as funds for client.

6. On the same day 21/03/2013 there was a debit of Ksh 50,000,000 which was paid to the 2nd accused (John Waluke Koyi) the transaction indicated as funds transfer to client.

PW 25 testified that he also got a warrant to investigate the Ksh and USD bank accounts belonging to Messrs Ahmednasir Abdikadir and Company Advocates at First Community Bank namely account number 0095301004 for Kenyan shillings and account number 00953010005 for US dollar account. That in the US dollar account confirmed a credit of US dollar 24,032.50 effected on 2/07/2013 through an RTGS from NCPB's bank account at Cooperative Bank. And that in the Kenyan shillings account number 0095301004 there was a credit of Kenyan shillings 13,364,671 from NCPB's National Bank account.

PW 25 collected the letters and bank statements which he produced as exhibits. PEX 5 is the KCB bank statement and PEX 26 the swift transfer on the 19/03/2013 of which Ksh 297,386,505 (two hundred and ninety-seven million, three hundred and eighty-six thousand, five hundred and five) was transferred to the law firm of Soita and Saende Advocates. PEX 38 and PEX 6 (a) and (b) are the bank statements from NBK and the transaction of 27/06/2013 where Ksh 13,364,671.40 was transferred from the NCPB bank account at NBK to that of Messrs Ahmednasir Abdikadir and Company Advocates.

That PEX 9 is the Cooperative Bank statement and PEX 33 is the transaction of US dollar 24,035.50 which was transferred to Ahmednasir and Abdikadir and Company Advocates and the correspondent statement of Cooperative Bank PEX 39 For account number 02120007611600 reflecting the debit of USD 24,035.40. He also produced PEX 53, 54, 55 and 56 showing the dealings of account number 0948421941 belonging to Soita and Saende Advocates at Barclays Bank.

On cross examination by Mr Katwa Kigen Advocates holding watching brief for NCPB (upon being granted leave by this court) PW 25 told this honourable court that the payments were made out through a Garnishee orders. That NCPB was not willing to pay and that they appealed against the proceedings. PW25 also said that the recipients of the money were; the 1st accused, the 2nd accused, Nancy Baraza, Ahmednasir Abdikadir and Company Advocates and Soita and Saende Advocates.

His evidence is that he did not see any payment to Jacob Juma. He stated that there were some cash withdrawals which the prosecution could not tell how the money was being utilised. He further said that NCPB was not a party to the agreement entered between the 1st accused and Mr Sundip Patel (PW18).

PW 25 On being cross examined by Mr Okubasu for the first accused, he said that he did not make a search at the company registry to ascertain the identity of the directors of the directors of the 3rd accused. PW 25 Could not tell the findings of the parliamentary proceedings. Further that all the money was paid pursuant to a court order. According to PW 25 the decree holder had a decree for USD 6,140,859.80 which was to be paid by NCPB. Further that the order by Justice Mabeya dated or issued on 27/02/2013 was for Ksh 297,386,505. It did not mention any storage charges. PW 25 told this court the payments are as a result of the claim in the invoice PEX 43.

PW 25 could not tell whether or not the Garnishee order was lawful, his evidence is that the whole process was based on a fraudulent invoice. On further cross examination PW25 said that he was aware that there was an appeal pending at the Court of Appeal involving the NCPB on the same issue.

PW 26 Mr Hassan Ahmed Zubedi testified that he was at the time working for Dubai Bank as the Managing Director between the years 2003-2004. That at the time the bank received an application for performance bond and that they required the 3rd accused to submit a certificate of bid bond and the ability to supply. PW 26 testified that on behalf of the 3rd accused the application for the performance bond was made by its three directors namely:

- i. Jacob Juma
- ii. Grace Wakhungu
- iii. John Waluke

That they had obtained a bid bond from I&M Bank and were seeking for a performance bond from Dubai Bank. That the accused persons availed a contract between them and NCPB.

PW 26 testified that the bank issued the requested performance bond which was valid for 90 days. The evidence by PW26 is that they entered into a profit-sharing agreement at the ratio of 50:50 with the accused persons. That in the performance bond Dubai Bank undertook to pay NCPB USD 932,000 in the event of default. PW 26 testified that Erad Supplies and General Contractors Limited (3rd accused) did not perform the contract and that Dubai Bank gave them a loan of Ksh 50,000,000. That the accused persons were to pay back the Ksh 50 million, that Dubai Bank was not paid the money.

Further that they had conversation with Mr Saende Advocate about the profit sharing. PW26 testified that the accused did not

repay the loan to Dubai Bank. PW 26 was aware that NCPB did not issue the letter of credit and the performance bond elapsed and had not been renewed.

On cross examination by Mr Katwa Kigen Advocate with leave of this court, PW26 testified that Dubai Bank did not deal with NCPB, that it dealt with three people namely both accused and Jacob Juma who sought for the performance bond. PW26 did not know PW18 from KAPU Kenya and was not aware of any other profit-sharing agreement of 50:50 between the accused persons and PW18.

On being cross examined by Mr Okubasu Advocate for the 1st accused, his (PW 26) testimony is that Dubai Bank issued a 90-day performance bond which had no error. That Dubai Bank was to be paid the 50% of the profit if the contract was performed, that to his knowledge the contract was not performed.

Upon being cross examined by Mr Havi Advocate for the 2nd accused, PW26 told this honourable court that Dubai Bank was to be paid profit at 50% if the contract was performed that even when the contract was not performed the two accused and Jacob Juma took a loan of Ksh 50,000,000 which they were yet to pay. PW26 said the 50% profit was to cushion Dubai Bank on the risk they undertook by issuing the performance bond.

The last witness PW 27 Mr Kipsang Sambai said that he was an employee of EACC said that he was based in the upper Eastern region, that he was assigned to investigate this case involving NCPB and the 3rd accused revolving around the importation of maize in August 2004. PW 27 testified that in the course of investigation, he visited NCPB and led a team of investigators and that they visited various bank.

He wrapped up the prosecution's case in summary that the 3rd accused won a tender in August 2004 to supply 40,000 metric tonnes of maize but did not receive the requisite letter of credit to facilitate the importation. That due to the failure to receive the letter of credit the accused persons filed an arbitration claim against NCPB and were awarded compensation. The arbitration proceedings were produced to this court as PEX 41.

PW27 testified that he wished to record the statement of the arbitrator Mr Evans Thiga Gaturu Senior Counsel, but he urged the Investigating Officer to rely on the arbitration proceedings (PEX 41). That the 1st accused testified on behalf of the 3rd accused in the arbitration. That she said that Chelsea Freight stored their maize and produced the invoice for the storage charges in question (PEX 43) claiming for USD 1,346,000. That the arbitrator awarded the 3rd accused USD 3,106,000 plus the cost of the suit and interest.

PW 27 testified that in the course of investigation he gathered correspondence between Ropack and the 1st accused, a letter signed by Mr Ferenc Lago and copied to Chiko Slanders. That he also collected another invoice PEX 65 from the 3rd accused referring to Mr James Wald a contact person from Louis Dreyfus Africa DTY.

PW 27 also got the arbitration award and decree PEX 42 and 44 bearing the decretal sum as USD 3,106,000 plus interest at 12% per annum from 27/10/2004. He also collected the Garnishee proceedings against NBK, KCB and Cooperative Bank duly signed by the Deputy Registrar which were produced as PEX 28.

That from PEX 41 the claimant alleged to have sourced the maize from Ethiopia through a supplier from South Africa, PW27 sought for MLA (Mutual Legal Assistance) from the Republic of South Africa to verify the existence of the companies and their involvement in the supply of maize to the 3rd accused. He said that he was interested in two companies namely Chelsea Freight and Ropack International. That through the MLA they managed to contact the directors of Chelsea Freight PW22 and Thilogan Pillay and recorded their statements. That the two directors denied having ever dealt with the 3rd accused. They denied that PEX 43 emanated from their company, that they denied ever dealing with maize or storage of maize. They also denied knowledge of Ropack or the alleged directors.

That the South African police officer who was involved in the MLA Mr Andries Christoffel (PW23) confirmed that David Kuper and Ferenc Lago were not in South Africa, that Mr Wald had also relocated to Dubai. That the alleged persons from South Africa could not be found by PW23 and that he only met PW22 and the co-director Thilogan Pillay whose statements were recorded. He confirmed to have travelled to South Africa during the investigations.

PW27 prepared a report to the effect that no maize was bought or stored in South Africa. He then recommended that the whole claim from the arbitration was based on fraud. According to PW27 he interviewed about 20 witnesses and that the other witnesses were added by his colleagues. PW27 also confirmed that he gathered all the exhibits namely PEX 1-PEX 66 which he produced in general to the exclusion of those which had been produced by other witnesses.

PW27 testified that the 1st and 2nd accused were the directors of the 3rd accused. That the other director the late Jacob Juma had passed away. PW27 concluded his evidence that he recommended the three accused persons herein be charged for the offences herein, they were arraigned before court.

On being cross examined by Mr Katwa Kigen Advocates PW 27 told this court that NCPB was involved in the award and that it protested the claim and the payment of the money which was made by attachment of NCPB bank accounts. PW27 further said that it was public knowledge that the 3rd director Mr Jacob Juma died. Since his death was highly publicised and that he did not find his role in the matter during investigations.

On being cross examined by Mr Okubasu Advocates PW 27 confirmed that he investigated the arbitration and that parliament also investigated the matter by summoning the lawyers who handled the matter. That they recommended that the lawyers who handled the matter namely Advocate Joshua Nyawara PW13 and Nancy Baraza to be charged. PW27 confirmed that he recommended that the accused persons be charged for fraud. According to him the 3rd accused did not deserve to win the tender as the documents it submitted were wanting.

That from PEX4 only two companies, Hala General Trading LLC, and Versatrade International CC or Euroworld met the qualifications. That the other 3 firms which were awarded the tender had adverse remarks from PEX 4 and other documents PW27 came across during investigations. He however did not find any evidence of undue influence in the award of tender. Further that even if the 3rd accused was not supplied with a letter of credit, that the 3rd accused had no capacity (financial capacity) to perform the contract. That the 3rd accused availed four (4) invoices which were not verifiable.

Upon being cross examined by Mr Havi Advocate PW 27 stated that no maize was stored and that PEX43 is false hence count 1 relates to the offence of uttering PEX43. Further that PEX43 has a logo of Chelsea Freight but it had no signature. That at page 14 of PEX 41 the 1st accused stated that the maize was at Ethiopia. His evidence is that he did not investigate Leon the third director of Chelsea as he was not readily available. He further said that he investigated the NCPB Managing Director PW9 and the Company Secretary PW1 and the other NCPB officials but did not find sufficient evidence to charge them.

PW27 confirmed that there is no charge in the charge sheet over the claim on loss of profits rather his (PW27) investigations were geared toward the storage claim. Further that although the 2nd accused did not testify in the arbitration he benefitted from the proceedings and the award. Also, that the 2nd accused did not testify in the arbitration proceedings as such he did not utter PEX43.

On being cross examined by Mr Saende Advocate for the 3rd accused. His testimony is that he considered the evidence of two directors PW22 and Thilogan Pillay sufficient and that is why he did not interrogate the 3rd director Leon Alfred Maynard.

When all the accused persons were placed on their defence after the ruling of this honourable court under Section 210 of the CPC, the 1st and 2nd accused opted to give oral evidence on oath. They did not call witnesses. The 3rd accused relied on the evidence adduced by the 1st accused in its defence.

The defence case in summary is that they lawfully won a tender and entered into an agreement for the supply of 40,000 metric tonnes of maize, that the complainant (NCPB) frustrated their performance of contract. They then proceeded to seek remedy through arbitration pursuant to Clause 12.0 of the contract, PEX 2 and relied on a genuine invoice, PEX 43 and were lawfully awarded damages which they recovered by execution through Garnishee proceedings. They therefore denied any wrongdoing as alleged by the prosecution.

DW1, the 1st accused, Grace Sarapay Wakhungu testified that she was 78 years old and gave a long introduction on her career in civil and public service starting as a teacher all through to the time of her retirement at the position of General Manager at Kenya Re Insurance and lastly as a banker at Consolidated Bank until her retirement 1997.

The long introduction covers her academic and professional achievements. That after retirement she engaged in business and incorporated the 3rd accused and another company namely Gastilo Construction Company, that the 3rd accused was incorporated in 1998 by the 1st accused, the 2nd accused and Mr Jacob Juma. She produced the certificate of incorporation as DEX 21 and the Memorandum and Articles of Association as PEX 22.

That the 3rd accused was to deal with cement, sand, and cereals, that they could buy and sell merchandise such as sand, cement to hardware shops, that they also sold sugar, maize, beans, and other commodities. Her evidence is that the 3rd accused, and its directors had not been charged in any criminal case except this one further that the 3rd accused is still in existence, it has not been wound up. That in Kenya, they were supplying maize to EPZ, that they used to buy maize from Western and that the maize used to be stored in NCPB.

Her testimony is that in this matter they had applied for a tender with NCPB for the supply 85,000 metric tonnes of white maize and that they filed all the bid documents, that she is the one who prepared and submitted the bid documents to NCPB. She produced a letter dated 4th/8/2004 which was the response to the tender which was produced as DEX 23.

She told this honourable court that they were awarded a tender to supply 40,000 metric tonnes of white maize and were required to avail the performance bond. She gave evidence in detail that they won the tender on merit, citing that they supplied a superior quality maize sample than the other bidders and were the only company which indicated that they would deliver the maize in three weeks after signing the contract for the reason that they were importing their maize from Ethiopia compared to other bidders who were sourcing the maize from far such as from South Africa and Brazil.

She said that they were ranked third in the tender award and were the first local company that won the tender. she also said that they availed a performance bond issued to them by Dubai Bank, Kenyatta Avenue branch which was valued at USD 932,000 an amount which was equivalent to the requisite 10% value of the tender. that the performance bond was valid for a period of 90 days.

That they signed the contract with NCPB on 26/08/04 (PEX2) and were to receive a Letter of Credit from NCPB. She gave evidence on the effort she made to pursue the Letter of Credit from NCPB in vain. That they were frustrated from performing their contractual obligation by the failure by NCPB to open a letter of in favour of the 3rd accused.

Being aggrieved, the 3rd accused eventually filed an arbitration claim against NCPB in which they won an award for loss of profit and storage charges. DW1 (1st accused) produced letters and fax which she wrote to the said supplier Mr Ferenc Lago of Ropack and to Chelsea Freight which was introduced to her by a Mr Chiko Slanders and that it was to ship the maize from Ethiopia to Mombasa via Djibouti and that 3rd accused was to cover the storage charges.

Her evidence is that Chelsea Freight had three directors, but she was dealing with Chiko Slanders who on the other hand was dealing with a Mr Alfred Leon Maynard of Chelsea Freight. She denied having dealt with Freddy Chetty (PW 22). Her evidence is that the invoice, which is a subject of this case, must have been exchanged between Chiko Slanders and one of their directors the

late Jacob Juma who has since died. That Jacob Juma was following up the tender and that he wrote a letter dated 8/10/2004 to the Managing Director NCPB informing them that they are being pursued on storage charges.

She told the court that she first saw the invoice PEX 43 during the arbitration proceedings. She produced a letter dated 25/01/2005 to Chelsea Freight acknowledging the receipt of the invoice as DEX 35. According to her, PW 22 lied when he denied that Chelsea Freights had dealt with the 3rd accused. She was categorical that the invoice PEX 43 was not a forgery and that it was a correct and accurate document. That the invoice provided the bank account number that they were to deposit the money and that PW 22 confirmed that PEX 43 had their actual address and correct bank account. She blamed NCPB for not issuing them with a letter of credit despite persistence and consistent follow-up on their part leading them to go to arbitration for a breach of contract where they were fairly awarded the damages.

That they could have not made the loss of profit if they sold the maize. That the money was paid to the company lawyers and part of the money is still outstanding. She could however not tell the outstanding amount. Her evidence is that there were futile attempts by NCPB to stop the payment of the award by filing Misc. Civil Application 639/2009 which was dismissed by Justice L. Njagi on 28/06/2011. She produced the ruling as DEX 37. That NCPB again filed another application before Justice Odunga which was equally dismissed. She also produced the ruling of Justice Odunga as DEX 38.

She testified that there was a time that she was called to parliament to explain this transaction and that she read malice as parliament was fighting with some of her colleague directors. Her evidence is that while testifying and answering questions and being interrogated at the Parliament, that she was treated harshly and asked offending questions. Her evidence is that Parliament refused to listen to her and failed to believe that they had imported the maize.

Her defence is that this criminal case was maliciously instituted against her as Parliament failed to consider that there was an element of breach of contract. That the case was instigated by those who were fighting her co-directors, that an appeal was lodged at the Court of Appeal and EACC was enjoined to the appeal as an interested party alleging that they had used an invalid bid bond and that the documents in support of the storage charges was a forgery. They also alleged that she lied on oath and that she gave false evidence. According to her, the investigator failed to interrogate Mr Lago, Mr Slanders ad Mr Leon Maynard and only chose to rely on PW 22 and failed to pursue the people she had dealt with.

She produced letters that she wrote pursuing the transaction including a letter to the Ministry of Agriculture and the Ministry of Finance to intervene and open a letter of credit which she produced as DEX 39, 41, 42 and 43, in support of her defence. She maintained that they were in pursuit of a genuine claim and bore no wrong doing.

On being led in evidence in chief by Mr Saende Advocate for the 3rd accused, she confirmed that she was the director of the 3rd accused and that at the time of incorporation there were three directors who are herself, the 2nd accused and Jacob Juma. That she was the Managing Director who was in charge of the day-to-day running of the company. That this case and the appeal that is pending at the Court of Appeal arose from the tender awarded to the 3rd accused by NCPB. That she was involved in the follow-up of the tender and was being assisted by Jacob Juma. And that they were properly awarded the tender after going through the full tendering process. She subsequently signed the contract.

Her testimony is that none of the witnesses from NCPB blamed the 3rd accused for flouting the tender requirements. The witnesses said that the 3rd accused provided all the requisite documents for the tender. That PW3 from I&M Bank did not have any issue with the bid bond that he issued to NCPB. She confirmed that the bid bond PEX 12 was a genuine document from the I&M bank. PEX 12, PEX 13 and PEX 14 are all documents from I&M Bank that addressed to the 3rd accused.

Further that when they were looking for a performance bond, they approached many banks, including I&M Bank, which declined to give them the performance bond. She produced she produced a FAX from Ropack addressed to the 3rd accused which was signed by Mr Ferenc Lago as DEX 14. She also identified a demand letter to NCPB in which they were demanding for damages for the loss caused by the storage of the maize which was imported for the purpose of selling it to NCPB. That NCPB asked them to withdraw the demand letter, which they did but they still did not receive the letter of credit.

That they eventually referred the matter to arbitration as per the contractual provision and went through the arbitration process with NCPB. That at the end of the arbitration process, they were awarded the damages as per PEX 42. NCPB's counterclaim for damages was dismissed. That the arbitration award was confirmed by the High Court. That NCPB challenged the award by two applications to the High Court which were both dismissed.

That they proceeded to execute the decree and she produced DEX 28, a Garnishee order issued by Justice Mabeya attaching NCPB's bank account at National Bank of Kenya. Her evidence is that the execution of the decree was through a court order and that the arbitration award is still in force and has not been set aside to date. The applications by NCPB challenging the award were dismissed in 2015. Her evidence is that the 3rd accused had no wrongdoing whatsoever.

On being cross examined by Mr Katwa Kigen Advocate, DW 1 stated that she made a bid to supply maize to NCPB through the 3rd accused and prepared the bid documents as the managing director with the assistance of their staff. That afterwards she encountered frustrations and was not able to supply the maize. That consequently, they filed arbitration proceedings seeking for compensation for loss of profit, cost of storage and cost of the suit. That she testified for the 3rd accused in the arbitration and as the only witness. That they were successful in the arbitration and got an award which was confirmed by the High Court. That the 3rd accused had three directors, who are herself, 2nd accused and Jacob Juma and that all the 3 directors managed the affairs of the 3rd accused.

Upon being cross examined by Ms Gateru for the State, the 1st accused reconfirmed the directorship of the 3rd accused. That the three of them as directors made a joint decision to bid for the supply of the maize to NCPB. And that each of the three directors was to source for the maize before they could look for the bid bond. That Jacob Juma was good at the legal work and the follow-up of the payments and that the 2nd accused used to be more involved when they were sourcing for the maize locally. And that the three of them decided to refer the matter to arbitration as a remedy for the loss they had suffered. Further that she testified in the arbitration and relied on a series of exhibits including PEX 43 which was the invoice. That neither of her co-directors accompanied her to the arbitration tribunal. That the Garnishee order and the subsequent orders were in favour of the 3rd accused.

Her evidence is that the tender was announced between April, May, or June 2004 and that the 3rd accused responded to the tender on the 4th of August 2004. Further that by the 4th of August 2004, they had the maize which was stored by their supplier Ropack International. That the maize was at Ethiopia. That at the time of tendering, one was required to have a sample of the maize and that the supply was to be made in July 2004. Her evidence is that their supplier Ropack was from South Africa, but the maize was being sourced from Ethiopia.

That at the time of tendering one was required to submit a sample of the maize which was intended to be supplied that on account of the delays to get the letter of credit Ropack changed the source of the maize but that Ropack assured them of the quality and that the maize was still being sourced from Ethiopia. Further that the supplier had to source the maize before they could issue the performance bond.

DW1 said that James Wald was the contact person of Messrs Louis Dreyfus Ltd and that they had maize in the High seas and they were not going to get any profit out of it, that the MD of NCPB advised her to go for Dreyfus maize and that she met with James Wald in Kenya. She said that Ropack was related with Chelsea freights but it (Ropack) had no relations with Dreyfus. Ropack was the supplier while Chelsea Freight was to avail the storage.

That by the time Ropack contacted the accused persons, they already had the maize which they had bought somewhere. That the cost of storage was incurred to a tune of USD 1.8 million and that the same was discussed between Chelsea, Ropack, Jacob Juma and Chiko Slanders who discussed and lowered the storage costs. That Ropack engaged Chelsea Freight for the purpose of the shipment of the maize to Ethiopia. The maize was supposed to be routed from Ethiopia via Djibouti to Mombasa.

That Mr Maynard was the director who was involved but later he relocated to India. He was the contact person in Chelsea, he was contacted by Chiko of Ropack and that on the part of the 3rd accused, he dealt with the late Jacob Juma. That Jacob Juma was the force behind the follow-up of the contract and the payments in this matter.

Her evidence is that PW22 lied in disowning PEX 43 and Ropack. She produced DEX 33, a letter from the accused offering to meet the storage cost. That Chiko moved to Hungary. She produced DEX 35, her letter to Chelsea Freight. According to her, the PIC was misled and that they did not understand the contract. According to her, during the contract period, she was planning to travel to South Africa to meet the supplier and that Ropack offered to pay for her ticket to go to South Africa to sign the contract to expedite the transaction. That they had planned to have many more businesses involving maize, beans, soybeans after the delivery of the first 40,000 metric tonnes of maize.

Her evidence is that the payment for the storage has not been paid to Erad Supplies and General Contractors Limited (3rd accused) to date. She denied that a large sum of the money had been consumed by the lawyers. She confirmed and identified PEX 53 and confirmed that Ksh 297,386,505 was transferred from NCPB account to Messrs Soita and Saende Advocates bank account and that Chelsea Freight was not paid any money from that payment. She conceded to have received some amount of money, Ksh 40 million to be precise from the lawyer and also that the 2nd accused was also paid some money on the 21/03/2013.

On being re-examined, she confirmed that by the time she signed the contract, they had the maize ready, their supplier had identified some maize in Ethiopia that the Louis Dreyfus maize was forced on them by the Managing Director NCPB, that a powerful person had imported the maize which was in high seas and were looking for any tenderers to buy the maize.

That PEX 43 was sent to her via DHL and that the storage costs were incurred as such it was not a forgery. She admitted that they only recovered Ksh 300 Million out of the Ksh 600 million. That she received Ksh 40 million out of which she paid some creditors namely:

- i. Sundip Ksh 6 Million
- ii. Brian Yongo Ksh 7.5 Million

That the 2nd accused was paid Ksh 50 Million and Jacob Juma took everything. That he paid himself over Ksh 100 million. That Jacob Juma was an integral part of the transaction and that he negotiated the payments. That the PIC was made up of members who were at variance in some ways with her Co directors, that is the 2nd accused and Jacob Juma and such PIC chose to misinterpret the arbitration clause the moment they saw the name Jacob Juma.

On being re-examined by Mr Saende Advocate of the 3rd accused, she said that although PW 22 said that the bank account in PEX43 was a Rand account, the bank could still receive the USD then call the customer to negotiate the conversion rate. She said that both PW 22 and PW 23 confirmed that Chelsea Freight existed. That PW 22 said that the third director did not record his statement nor called to testify, that in the year 2013, the 2nd accused and her were interrogated by EACC, however up to the time he passed away in 2016, Jacob Juma had not been interrogated. According to DW1, the 3rd accused and herself are victims of political fights.

The 2nd accused, DW 2, Hon. John Waluke Koyi testified that he is a member of Parliament, Sirisia constituency in Bungoma county. That he had previously served in the military, before joining the business community then thereafter ventured into politics. He admitted being a director of the 3rd accused and that in the year 2004, the 3rd accused won a tender to supply maize to NCPB. It was given a performance bond but NCPB did not open the letter of credit despite several attempts to pursue it.

That subsequently, the matter was referred their claim against NCPB for arbitration. His evidence is that he neither participate in the arbitration proceedings nor did he appear before the arbitrator and he could not tell if the invoice (PEX 43) was uttered during the arbitration proceedings. That it is only the 1st accused who testified during the arbitration on behalf of the 3rd accused which resulted to the award PEX 42 and the subsequent execution orders were the result of the arbitration proceedings.

He denied count 1 as false that he did not utter the invoice. That count 3,4 and 5 were also not true as the award was confirmed by the High Court. That the money was paid by the bank to the 3rd accused as per the Garnishee order (PEX 28) which attached moneys in NCPB bank accounts to a tune of Ksh 297,386,505 and out of which he was given Ksh 50 Million as a director of the company. That the money was legally paid to his bank account.

His defence is that he only received Ksh 50 million which was paid to him by Mr Soita and Saende and Company Advocates. That he was a stranger to the moneys that were paid to Messrs Ahmednasir Abdikadir and Company Advocates and it was that law firm which can answer where they took the money. That the prosecution ought to have charged them and that the prosecution missed the point and missed the person to be charged for those moneys paid to the said law firm (Ahmednasir Abdikadir and Company Advocates).

That he was also surprised to be charges on issues he was not involved in since he did not participate in the arbitration and that the money was lawfully paid to him through a Garnishee order of a court of law. He denied any wrongdoing on his part.

On cross examination by Mr Okubasu advocate for the 1st accused, the 2nd accused admitted that he knew Jacob Juma as his partner and that he was closer to Jacob Juma than to the 1st accused. He testified that he was not supervising the running of the 3rd accused rather it was being handled by the 1st accused. That he was more involved in supervising their construction company in Western and other upcountry projects.

According to him, Jacob Juma was more aggressive, and he knew much about PEX 43 and it is only him who could tell if the invoice was a forgery or not. That he only saw PEX 43 after the arbitration ended. That there were differences between Jacob Juma and Brian Yongo further that Jacob Juma had differences with big people, it is possible that his death had everything to do with this case and that this case possibly arose on account of the differences between Jacob Juma and Brian Yongo.

That the tenders were involving many people including many prominent people whom he named in his testimony and that the letter of credit was not issued to them on account that they decided to buy maize from a different source, instead of buying the maize from the alleged prominent persons.

On being cross examined by Mr Saende Advocate for the 3rd accused, the 2nd accused said that the 3rd accused was not fraudulently awarded the tender that all of the NCPB officials testified that the 3rd accused won the tender on merit. That they went through all the processes of tendering. That the 3rd accused was paid money from NCPB after the arbitration award was confirmed by the High Court.

That the 3rd accused was paid pursuant to the court orders and there was no fraud involved. That the 3rd accused was successfully awarded a claim for a breach of contract in which that the 3rd accused had complied with all contractual obligations by supplying the bid and performance bonds but the NCPB failed to open their letter of credit for them without a justification. Also, that if there is any cause of action at all, then it ought to be a civil action and not a criminal case. That the civil case is still pending

in the Court of Appeal.

Ms Njoka Advocate for NCPB with leave of the court cross examined him and he confirmed to be a director of the 3rd accused and that he was sent to the field for other assignments hence it is the 1st accused and Jacob Juma who played a key role in this matter. He confirmed that he was payed Ksh 50 Million and the 1st accused Ksh 40 Million and that Jacob Juma paid himself Ksh 113 Million. He could not tell why Jacob Juma paid them, that he was away when he received the money in his account, he said that the 1st accused equally saw the money in her account.

On being cross examined by Ms Gateru for the State, he confirmed being one of the directors of the 3rd accused. He admitted that his co-directors, the 1st accused, and Jacob Juma made most of the decisions for the 3rd accused. That the 1st accused was sourcing the maize from Ethiopia and he did not know from what part in Ethiopia the maize was being sourced from and that he came to know of the storage costs much later, at the time of the arbitration in October 2004. That he had given the 1st accused mandate on that tender.

He did not know about PEX 33 and that the 3rd accused was the author. And also, that he did not get to know about Chelsea Freight whom the 3rd accused was dealing with. That it was the three directors who resolved to refer the matter to arbitration, that the claim amount was arrived at by the 1st accused and he could not tell how she arrived at that figure. And that it was the 1st accused and Jacob Juma who were processing the maize tender and he was involved in the road construction works with their other company. That it was the 1st accused and Jacob Juma who were involved in the arbitration proceeding and that he had nothing to do with it.

He denied having gone to see the arbitrator at all and that he only saw Mr Evans Gaturu to seek for his legal representation in his election petition. On account that he was not satisfied with the services of his advocate at the time (Mr Orengo, Senior counsel) that he went to see Mr Katwa Kigen who said that his diary was full and that he referred him to Mr Evans Gaturu and that, that was the only occasion he met the arbitrator. He denied his description that PEX41 making reference to a Captain Waluke that he was not a captain. And said that Waluke was a common name and that the proceedings PEX 41 was referring to a different person. That it was the 1st accused who made the decision which was and did benefit all the three directors.

That he was also making decisions in the other company for the benefit of both the 1st accused and Mr Jacob Juma. He denied that Jacob Juma had resigned from the directorship as alleged in the year 2006, rather maintained that it was Jacob Juma and Mr Saende Advocate who distributed the money to them. He could not have instructed the payments to be made if he was not the director. That he gave the 1st accused 40 Million, the 2nd accused 50 Million and Jacob Juma Ksh 113 Million. The 2nd accused agreed that the situation would have been favourable if Jacob Juma left because he took advantage of them and never gave them a chance to decide how the money was to be shared by the lawyer. That it is Mr Saende Advocate who knew how the money was paid to Jacob Juma.

He equally admitted that they relied on the said invoice PEX43 to get the award. That the maize was stored in Ethiopia. That Jacob Juma could not have ceased to be a director as he also appeared before PIC as a director together with both the accused. He said that he was also a member of PIC and that this case was instigated due to differences between him and the then PIC chairman.

He further said that Ahmednasir was also their lawyer and that he was paid part of the money. That after Ahmednasir was paid the money, they never released any money to the 2nd accused. That Ahmednasir was paid legal fees of Ksh 45 Million from Mr Saende Advocates. However, he never got to know when these payments were being made. That it was Jacob Juma who gave instructions of the payment to Mr Ahmednasir Advocate. That they had not paid Chelsea Freight for the storage that they expected to pay them when the outstanding money was recovered.

That it was Jacob Juma who made the decisions on the payments. That some money ought to have been paid to Chelsea Freight

and that it was because they were to there to decide on the payment and that is why Chelsea Freight missed out on the payment from the first recovery. He could not tell who in Chelsea Freight issued PEX 43 or how it was received by the 3rd accused. That it as the 1st accused and Jacob Juma who supplied the invoices. That Jacob Juma informed him that they had been paid Ksh 260 Million out of which he was paid Ksh 50 Million.

On re-examination the 2nd accused denied having participated in the tender and arbitration processes. That Jacob Juma was bossy and that he took advantage of the 1st accused. That Mr Brian Yongo also testified that he is the one who lodged the complaint to PIC. That Ahmednasir ought to have been charged for the moneys he received. That they are still expecting the outstanding balance of Ksh 400 million which they expect to pay the supplier (Chelsea Freight) and that Jacob Juma messed out the distribution of the initial payment. That he learnt from Mr Saende Advocate that Mr Jacob Juma threatened him with a gun and directed the distribution of the money.

At the close of the defence case, the prosecution unsuccessfully made an application under Section 212 of the CPC for leave of the court to give rebuttal evidence. They sought to call a witness by the Mr Leon Alfred Maynard to give rebuttal evidence. However, this honourable court rejected this application on account that the same was not only reopening the prosecution's case but it was also to reopen the investigation of the case on account that the witness had not been interrogated nor recorded his statement. Equally the court found that the defence had raised the question during the prosecution case whether Mr Maynard was to be called as a witness during cross-examination of PW22, PW23 and PW27 hence the court found that no new matter had been introduced at the defence and rejected the application.

The accused persons having denied committing the offences and given their version of the defence the duty is now on the prosecution to avail sufficient evidence required to sustain a criminal conviction and only when the evidence proves them guilty beyond reasonable doubt, this honourable court has considered the authority of **Caroline Wanjiku Ngugi v Republic[2015] eKLR in the High Court at Nyeri Criminal Appeal No 11 of 2013:**

It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

This honourable court has keenly evaluated the evidence of the 27 prosecution witnesses and the 66 exhibits that were produced in support of their case on one side and the evidence given on oath by 1st and 2nd accused plus the exhibits they produced in support of their defence on the other side. This case surrounds the question of authenticity of the invoice PEX 43, which was relied upon by the defence in the arbitration proceedings. The prosecution alleged that the same was a forgery, which has been denied by the defence.

This honourable court has duly considered the closing submission that were filed by the State, the Advocate for the 1st, 2nd and 3rd accused persons as well as the advocates holding a watching brief for the complainant. This honourable court has been guided by the authorities that were cited by each party, that is by Ms Mercy Gateru, prosecuting counsel for the State, Mr Okubasu, Advocate for the 1st accused, Mr Havi Advocate for the 2nd accused, Mr Saende Advocate for the 3rd accused and Mr Katwa Kigen Advocate for the complainant.

From the evidence on record from both sides, this court finds that the following issues were not disputed or contested;

- i. That there was shortage of maize at the national grain reserve (NCPB) in the year 2004
- ii. That the national government authorised tenders to be floated for the urgent importation of maize.

iii. That NCPB commenced the procurement process and that a tender committee sat on 10/08/2004 whereby five (5) firms were awarded the tender to supply the 180,000 metric tonnes of maize, among them the 3rd accused.

iv. That the 1st and 2nd accused were directors of the third accused.

v. That out of the five, four firms were issued with the letters of credit and that it is only the 3rd accused whose letter of credit was not opened.

vi. That out of the four (4), it is only two (2) firms that supplied the maize, the other two did not supply.

vii. That there was a duly signed contract between the 3rd accused and NCPB signed on the 26/08/2004 which provided an arbitration clause in event of any dispute.

viii. That pursuant to that, the 3rd accused filed an arbitration cause against NCPB and was successfully awarded damages for loss of profit, cost of storage, suit and interests while the counterclaim by NCPB was dismissed.

ix. That the award was confirmed before the High Court as required by the law.

x. That NCPB unsuccessfully attempted to set aside the award and the execution of the decree.

xi. That pursuant to the decree, Garnishee orders were obtained by the 3rd accused against the NCPB attaching the money held the Judgment debtor's accounts in three banks: NBK, KCB and Cooperative Bank (Ksh.13,364,671.40, Ksh.297,086,505, USD.24,032)

xii. That the money was paid to the bank accounts belonging to the advocates who were representing the accused persons.

xiii. That out of the decretal amounts recovered, the 1st accused received Ksh. 40,000,000 while the 2nd accused received Ksh. 50,000,000.

The contention is that the 3rd accused relied on PEX43 to secure the arbitration award on storage charges. The prosecution now contends that it was a fraudulent document and as such the arbitration award for storage charges was based on fraud. The prosecution blamed the accused persons for uttering PEX43 before the arbitrator, fraudulently acquiring public property and also the 1st accused for perjury during her testimony before the arbitrator.

To determine whether the prosecution established each and every count herein to the required standard, this honourable court will consider the following seven (7) issues:

i) Whether the elements of uttering a false document have been satisfied

ii) Whether the elements of perjury have been satisfied

iii) Whether the accused persons fraudulently acquired public property

iv) Whether the defence raised reasonable doubt to the prosecution's case

v) Whether they were two or three directors of the 3rd accused

vi) Whether the accused are to be held liable to legal fees incurred by the advocates

vii) Whether the 3rd accused is criminally liable

viii) Finally, and most importantly, whether PEX 43 was a genuine document.

On the first issue, all the three accused were charged with the offence of uttering a false document, contrary to Section 53(a) read with section 59 of the Penal Code. Section 353 of the Penal Code provides that: -

“Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.”

Section 349 of the Penal Code also provides for the punishment of the offence by providing that: -

“Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.”

On count one I have considered the authority of Justice Mativo in Nyeri HC Cr appeal 11 of 2013 **Caroline Wanjiku Ngugi v Republic (2015) eKLR** in which His Lordship held that in an offence of this nature, the prosecution must prove the following ingredients, namely; *that the accused person knowingly and fraudulently uttered a false document, or writing or counterfeit seal.* Thus, the elements of uttering a forged document are: -

i. Uttering and publishing as true a false, forged, or altered instrument.

ii. knowing the instrument to be false, altered, forged, or counterfeited; and

iii. intending to injure or defraud.

From the three elements herein and the evidence on record indicate that it is only the 1st accused who testified I the arbitration proceedings, the 2nd accused denied having participated in the arbitration and denied the offence of uttering PEX43. The 2nd accused testified that the invoice was secured by the late Jacob Juma. He also pleaded alibi saying that he was not involved much in the processes herein and that Jacob Juma and the 1st accused were more involved. the evidence of the PW27 (the I.O.) on cross examination tended to exonerated the 2nd accused and gave evidence which was in line with the version adduced by the 2nd accused.

From the evidence of the investigating officer, PW 27 the court was told that the 2nd accused did not testify in the arbitration which is supported by PEX 41. The prosecution did not adduce any evidence to link the 2nd accused to the first charge, PW 27 on cross examination conceded that the 2nd accused did not utter PEX 43, even though there a possibility of common intention as directors of the 3rd accused, I do find that the evidence of PW 27 did exonerate the 2nd accused on count 1 and the 3rd accused being a juristic person, it is my considered view that it was not capable of committing count 1.

This honourable court has also looked at the second authority, which was cited by both the prosecution and the defence; the case of **Joseph Mukuha Kimani v Republic, Criminal Appeal No 76 of 1983 [1984] eKLR** which outlined the element of the offence of uttering a false document as follows: -

i. “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”*

The document in question is PEX 43, which was an invoice and there is no dispute that the defence relied on it during the arbitration and the evidence on record indicates that it was produced by the 1st accused during the arbitration. The defence maintained that it was a genuine invoice from Chelsea Freight.

In her evidence the 1st accused said that PEX 43 was genuine, she also said that it was sourced by Jacob Juma and that she first saw said invoice for the first time during the arbitration, at another instance her evidence is that she received it through DHL. Both accused appear to be shifting blame to the late Jacob Juma knowing very well that having passed away, he is not available to give his version of the story.

On the second issue of perjury, the court has looked at the law under Section 108 (1) (a) of the Penal Code provides: -

“Any person who, in judicial proceeding, or for the purpose of instituting judicial proceedings, knowingly gives false testimony touching on any matter which is material to any question then pending in that proceedings or intended to be raised in that proceeding is guilty of a misdemeanour termed perjury”

This is as read with Section 110 of the Penal Code CAP 63 of the Laws of Kenya which states that: -

“Any person who commits perjury or suborns perjury is liable to imprisonment for seven years.”

The 1st accused is said to have lied on oath during her testimony in the arbitration. When she introduced the claim for storage. The prosecution contends that claim on account that there was no storage and that PEX 43 was a forgery. This honourable court has looked at the authority of **David Omwenga Maobe Case in Kisii HC Petition 77/14** in which C.B Nangillah J considered the meaning of (the offence) perjury in Halsbury’s Laws of England Vol. 11(P.938) Fourth edition as follows: -

“Any person lawfully sworn as a witness or as an interpreter in a judicial proceeding who wilfully makes a statement, material in that proceedings, which he knows to be false or does not believe to be true is guilty of perjury, and is liable on conviction on indictment”

The 1st accused testified on oath before the arbitrator as shown in PEX 41, there is no doubt that that was a judicial proceedings, the only issue which this court shall determine at a later stage is whether she made a statement which she knew to be false or she did not believe to be true.

This honourable court has looked at the meaning of the offence of perjury as defined in Black’s Law Dictionary 10th Edition as:

“The act or an instance of a person’s deliberately making materially false or misleading statements while under oath.

The 1st accused testified in the arbitration, and I quote: -

“I explained the delay to Ropack. They were unhappy with us. I was referred to M/S Chelsea Freight. Chelsea invoiced for storing maize which was not being sold. They invoiced from 21/09/2004 to 4/10/2004 i.e. USD 56,000 US from 06/10/2004 to 22/01/2005 they invoiced us for USD 1,090,000 making it a total of USD 1,146,000. We explained our difficulties and told them to hold on. They said they would hold on, but they would charge us a lot of money since we did not know what we were doing. We told them we had now to go to arbitration.”

The prosecution submission is that in the arbitration claim the prayers were in line with what the 1st accused stated during the arbitration that the claim was the following: -

i. “Loss of profit of USD 49 per tonne = USD 960,000. Making costs of USD 1,146,000.00 waiting a total of USD 3,106,000.00 plus interest

ii. On both occasions from 27/10/2004 when I expected to have completed the C I claimed interest. Interest being claimed is at the Commercial Rates of 25% on USD 3,106,000.00. [sic, PEX 41]

iii. General damages for breach of contract. They breached the contract by not giving me the Letter of Credit which was the key document in the whole transaction. I also want cost of the proceedings because if they had not breached the contract, we would not be here today. That is all for the claimant and its only witness.”

This honourable court finds there is no dispute on the nature of evidence the 1st accused gave during the arbitration proceedings and the prayers made therein. What this honourable court will determine whether her testimony during the arbitration and the said invoice number 122215-CF-ERAD (PEX 43) was genuine or not.

The third issue is whether the accused persons fraudulently acquired public property as charged in count 3, 4 and 5 herein. The evidence on the record is that the money in NCPB Bank accounts at KCB, NBK and Cooperative Bank were attached by a court order, Garnishee order, the evidence produced by the prosecution witnesses from the three banks as well as the investigators is that by Garnishee orders, the money was paid out to the advocates of the accused persons follows: -

i. Ksh 297,086,505 from KCB Account to Soita and Saende Advocates bank account at Barclays Bank, Market Branch.

ii. Ksh 13,364,671.40 from National Bank of Kenya (NBM) to Ahmednasir Abdikadir and Company Advocates bank account at First Community Bank.

iii. USD 24,032 from Cooperative Bank to Ahmednasir Abdikadir and Company Advocates bank account at First Community Bank.

That undisputed evidence was also corroborated by the bank statements and by the bank advise slips from all the banks namely KCB, NBK, Cooperative Bank, Barclays Bank and First Community Bank. The statements from First Community Bank and Barclays Bank confirmed that the said money was received and that the bank accounts were in the names of the law firms of Ahmednasir Abdikadir and Company Advocates and Soita and Saende and Company Advocates, respectively.

There is further evidence that out of the Ksh 297,086,505 that was paid to the firm of Soita and Saende Advocates' client account, the following payments were made out: -

i. Ksh 40 Million was paid to the 1st accused

- ii. Ksh 50 million was paid out to the 2nd accused
- iii. Ksh 35 million was paid to the firm of Ahmednasir Abdikadir and Company Advocates
- iv. Ksh 5 million was paid out to Nancy Baraza Advocate
- v. Ksh 5 million Ahmednasir Abdikadir and Company Advocates
- vi. Ksh 110,690,210 to Soita and Saende Advocates office account.

The moneys that were paid to the 1st and 2nd accused was indicated as money to client and the transfers to the respective advocates was indicated as legal fees. The 1st and 2nd accused have in their evidence in chief as well as in the cross examination indicated that the law firms of Soita and Saende and that of Ahmednasir Abdikadir and Company Advocates were the advocates representing them. Their defence evidence is that the directors jointly resolved to refer the matter to arbitration.

The defence's evidence is that none of the money was paid out to the alleged suppliers.

That they anticipated to pay their suppliers when the balance of the decretal sum was recovered from NCPB. The beneficiaries of the amounts stated in the charge sheet were the 1st accused, 2nd

accused and their advocates. Although there was an allegation by the defence that a third director by the name Jacob Juma now said to be deceased was paid Ksh 113 million. The bank statements, the bank advise slips did not reflect such payment to the said Jacob Juma and there was no other evidence given in support of that allegation.

This honourable court has been guided by the authority in **Criminal Appeal No. 27 of 2017Stephe Mboguah vs Republic (2017)e KLR** in which **Lady Justice Hedwig Ongudi** held:

Having considered the prosecution evidence alongside the appellant's defence on Count 2 to Count 6, I find some gaping holes not sealed by the prosecution. A lot more needed to be covered on the actuals rather than relying on the allocations. I will give the appellant the benefit of doubt on Count 2 to Count 6. The result is that his appeal is allowed in respect of those Counts and the convictions thereon quashed and sentences set aside.

In the case the amount had not been specified which can be clearly be distinguished from The instant case the judge further held

He is not as lucky in terms of Count 1. It is glaringly clear that he used forged receipts/documents in the surrender of the imprest. He endorsed the receipts and documents as being genuine and for purposes of surrender. In so doing, he knowingly deceived as is stated in Count 1. It is clear from the receipts Exhibit 2a – g that no money was paid to Kisumu Polytechnic as alleged which means the money ended up in somebody's pocket.

The judge maintained the conviction in court1, and she was convinced that the appellant had forge the receipts for the surrender of the imprest.

The 4th issue the court will look at and determine whether the defence has raised the reasonable doubt on the prosecution case, I have looked at the definition in **Black's Law Dictionary, 10th Edition** defines the term "reasonable doubt" as:

The doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty.

"beyond reasonable doubt" is the standard used by a jury to determine whether a criminal defendant is guilty

His Lordship Justice Mativo further held in the supra Cr Appeal 11 of 2013

The key question that this court seeks to answer is whether or not the prosecution proved the ingredients of the offences and whether the appellant offered any other explanation that could exonerate her from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. This calls for close examination of the law, the evidence tendered, and the defence offered by the accused.

He further held;

*In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in **Re Winship**^[9], where the court stated, (which he quoted)*

"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction.....Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"

The issue of proof of the case is crucial for a court of law to determine the outcome of the case, this honourable court has considered the authority by Justice Kasango In **James Muriithi Njoroge v Republic [2016] eKLR**, Mary Kasango J, quoted the case of **Miller v Minister of Persons [1947]** where Denning J, stated as follows:

"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."

The law is settled that it is the duty of the prosecution to prove a criminal charge beyond reasonable doubt. It follows that the prosecution must prove to the said standard, the two offenses which the 2nd accused person has been charged with. In **Pius Arap Maina v Republic (2013) eKLR** the Court emphasised as follows in page 3 of the list and bundles of Authorities:

It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubt must be interrupted in favour of the accused.

The liquidated claim was the outcome of the arbitration which was filed by the 3rd accused through a decision made by its directors. The 2nd accused in his defence denied having been involved in the transaction, however in PEX 41 at page 7, the 1st accused while testifying at the arbitration said that the 2nd accused was following up the matter with NCPB when she was out of the country for treatment. Equally, the arbitrator at page 3 of PEX 41 has made reference to the 2nd accused, the evidence on record is that the directors of the 3rd accused jointly made decisions to tender for the maize and to refer the matter to arbitration.

Although the 2nd accused contested that he is not “a captain” and that Waluke is a common name. Having gone through the entire proceedings and documentary evidence herein there is no mention of any other person by the name “Captain Waluke”. The accused informed this court that he had previously served as an army officer the rank description is possibly a technical error. The 2nd accused also admitted having been paid Ksh 50 Million out of the award as a director of the 3rd accused, this honourable court is certain that the arbitrator was making reference to the 2nd accused and not to any other Waluke.

This honourable court has been guided by the decision by Justice Nyakundi in **Republic v Ismail Hussein Ibrahim [2018] eKLR** where his Lordship held and found as follows:

In Kenya the doctrine of Criminal Justice is that an accused person under Article 50(2)(a) of the Constitution has the presumption of innocence in his favour guaranteed in the bill of rights unless the contrary is proven by the State beyond reasonable doubt. That burden of proof is well settled that it's the state that bears the responsibility at all times.

What therefore the prosecution must discharge by the phrase beyond reasonable doubt as stated in the three decisions is evidence which satisfies the court on the truth of the facts in dispute exclusion of any reasonable suspicion

There is no doubt that the first accused testified before the arbitrator and that she produced PEX 43 which was relied in support of their claim for storage charges. The source of PEX 43 has been challenged and PW 22 vehemently denied that it was from his company.

The evidence the defence availed on the alleged communication with Chelsea Freight was one sided from the 3rd accused and there is no corresponding response from Chelsea Freight and the court finds that the documents were not put to PW22 particularly during the cross examination. This honourable court thus finds the letters between the 3rd accused and Chelsea Freight are unreliable, and or made up, PW 22 was categorical that he did not issue the invoice and this honourable court has no reason to doubt his evidence.

This court has observed that the prosecution intended to call the second director, however this was opposed by the defence and the court finds that the evidence that was availed by PW22 had already stated that they had no dealings with the accused persons and there is no other documentary evidence that was availed to link Chelsea Freight to the case other than PEX 43 which the witness PW 22 had disowned. The defence opposed the application to have Mr Leon Maynard to be called as a witness and this honourable cannot make any adverse reference, both parties were not keen to have Mr Maynard as a witness.

The letter of credit was a crucial document that was vital to initiate the process of importation of the maize and without that, the accused persons had no capacity to commence the process to the importation of maize, they jumped the gun on three evident instances;

1. Securing the maize on 4th August 2004 a day before the tender award on 5/8/04.
2. Acquiring the maize on 4/8/04 before signing the contract with NCPB on 26/8/04
3. Allegedly importing and storing the maize without the crucial letter of credit

The court finds that process flawed, they did not follow the right sequence of events their recourse was to pursue the contract and the failure by NCPB to issue the letter of credit rather than to resort to raise a false claim for storage charges. Clause 8 of the contract PEX2 gave the right to either party the option to terminate the contract, hence that contract had a way out, neither party took that route.

The conduct of the accused persons in the process of acquiring the requisite tender document reveals them signing two separate profit-sharing agreements, with PW 18 and PW 25 which they were to share the profits at the ratio of 50:50. If both contracts were to be reinforced, it means that the accused persons had given up to 100% of the profit out of the business, they were left with no profit to share. It is evident to this court that the accused would go to such extent to get money from these witnesses and have so far not kept part of the bargain, both the 1st and 2nd accused conceded that PEX43 was introduced during the arbitration to support the claim for storage charges. PW 9 was categorical that the accused person availed other invoices which were not verifiable

The prosecution evidence questioned the manner in which the money was distributed, a smaller percentage was paid to the claimants (1st and 2nd accused), than the amount of money was utilised as legal fees, further that no payments made to other alleged contractual partners, including the Chelsea Freight who were allegedly pressurising the accused persons on the storage charges, or to PW 18 and PW 25 who are said to have advanced to them money during the processing of the tender documents.

The 5th issue is whether there were two or three directors who were running the affairs of the 3rd accused, the prosecution evidence is that Jacob Juma resigned in the year 2006, hence at the time of the arbitration when PEX43 was allegedly uttered and subsequent attachment of the money, he was not in the picture. The evidence by the investigating officer is that he did to find evidence of receipt of the award money by Jacob Juma.

The defence version is that they were 3 directors, both accused and Jacob Juma further that Jacob Juma from the time of incorporation and continued to be a director that he did not resign, that he sourced for PEX43 and that he was involved in the tender and follow up, that he was equally summoned to PIC for questioning as a director, this evidence is supported by some prosecution witnesses such as PW26 from Dubai bank whose evidence that three directors applied for the performance bond.

The contest is whether Jacob Juma was a director at the material time or not, the court finds that on account that he has since passed away his case now rests with his maker. The prosecution and the accused persons have testified on this issue. This court has considered Section 107 and 109 of the Evidence Act states as follows:

107 "1. Whoever desires the Court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"

109 "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The honourable court is aware that in a case of this nature the burden of proof lies on the prosecution side, This honourable court is further aware that the onus of proof does not shift and that the law envisages an acquittal of the accused persons if the prosecution fails to furnish sufficient evidence to establish the case beyond any shadow of doubt.

The 1st and 2nd accused alleged that Jacob Juma said to be deceased was also paid some money as the director of the 3rd accused, the evidence of PW25 pointed that none of the bank document supported that argument, the recipients of the money have already been set out, the record from the company registry and the testimonies of PW20 and PW24 is that the said third director resigned in the year 2006 and his share capital was redistributed to both accused 1 and 2. The defence evidence is that the 3rd accused is still in existence while there was no other evidence of the position of the directorship from the records than that availed by the prosecution for the record as at the year 2012.

Although the accused persons are not expected to proof their innocence, there are certain facts which are well within their

knowledge that they ought to have brought forth, considering the fact that they are facing serious charges of defrauding huge amounts of public money, the 1st accused as the managing director was less candid and evasive. The 1st and 2nd accused are in the knowledge of the directorship of the 3rd accused, the defence evidence shelved the blame on Jacob Juma and the advocates on the utilisation of the money, that they were not consulted, this was not established.

From the submitted official position from the company registry which is the regulator of all companies and the honourable Court finds the actual position was as per the evidence of the officers from the company registry, it has no reason whatsoever to doubt the evidence of PW20 and PW24 and the availed official record of the CR 13 and form 203A which was filed at the company registry in the year 2006. This court is satisfied that the 1st and 2nd accused were the directors in charge of the operations of the 3rd accused and they were not helpless as they wish the court to believe.

The court has now been satisfied that the 1st and 2nd accused were the co-directors hence responsible on the utilisation of the money, otherwise they ought to have protested or instructed their lawyers to distribute the money as they deemed fit, they are answerable if they allowed a non-director in the name of Jacob Juma to meddle in the business of the 3rd accused. They did nothing which means that they were satisfied in the manner the attached money was utilised, the dissatisfaction expressed in the defence was brought forth too late as a cover up and is not believable.

On the 6th issue both the 1st and 2nd admitted that said law firms represented them in the arbitration and execution of the award, the advocates were merely agents for their clients, acting at the instance of the instructing client. The defence having conceded that the Law firms of Soita and Saende Advocates as well as Ahmednasil, Abdikadir and company Advocates were representing them. The money was transferred directly to the advocate, then to the 1st and 2nd accused.

The record also reveals the firm of Soita and Saende Advocates paid out the money to the other advocates as well as to the 1st and 2nd accused persons. The financial transfer between the advocates and the accused persons appears to have been mutual, as the claimants and directors of the 3rd accused, the 1st and 2nd accused were fully aware therefore found fully liable and responsible for their actions as the principal for the full action and conduct of the advocates as long as it is not a question on the professional conduct of the matter, it therefore follows that should PEX43 be found not genuine, the accused persons will be held liable for the full quantifiable money lost by NCPB.

On the 7th issue of criminal liability of the 3rd accused, since a company is an artificial person, it can only act through an agent. In **Quin and Axtens v Salmon [1909] AC 442**, it was established that the decisions of the directors are deemed to be the decision of the company. This was further cemented in **Shaw Sons Ltd v Shaw [1935] 2 UB 113** that declared that directors are empowered to manage the company's affairs.

In this respect, the company is bound by the actions of its agents the directors as seen in **Leonards Carrying Company Ltd v Asiatie Petroleum Co [1915] A.C 705 HL**. This agency relationship and company liability only ensues in the scope of the director's mandate. Anything aside from that, they will be personally liable. A corporation has the same criminal responsibility as a natural person (**Section 3(1), Interpretation and General Provisions Act CAP 2, the Laws of Kenya**). A corporation is considered to be a legal entity, separate and distinct from its members (**Salomon v Salomon [1897] AC 22**)

In **R v ICR Haulage Ltd [1944] 1 All ER 691**, a limited Liability Company was charged with the offence of conspiracy to defraud. It raised the objection that it was not a natural person, it did not have a mind and thus could not form a *mens rea*. The argument was rejected by the court which held that the acts and states of mind of a company's servant may be treated as that of the company itself.

The court set out the limits to criminal offences that can be committed by corporations. Some offences such a perjury, and bigamy by their very nature cannot be committed by companies, and for offences such as murder, the only available penalty is

corporal, which a corporation cannot be subjected to (**Majestic Theatre Co Ltd v Regina [1952] KLR 157**). However, where an alternate punishment is availed, a corporation may be convicted as seen in **R v Nassa Ginners Ltd [1955] EA 33** where a company was convicted of an offence under the Factories Act for failing in its duty to securely fence a cotton opener.

Under Section 23 of the Penal Code states that where an offence is committed by either a natural or juristic person (a corporation), every person who is in charge of the control of the management of the affairs or activities of the company is guilty of the offence and is liable to be punished for it (Also seen in **R v Ivan Arthur Campus [2002] 1 KLR 461**). This is the rule, which exempts liability from parties who either were not aware of the offence being intended or about to be committed, or that they did their due diligence and took all the necessary steps to avoid its commission.

Section 23 also only applies to corporate bodies as seen in **Stephen Obiero v R [1962] EA 61** where his Lordship held that an unincorporated body may only be theoretically, and not in practice and instead the persons legally recognised (the directors/partners/managers) are the ones culpable for the offence. This case can be clearly distinguished from the authority of **Uganda v Khimchand Kalidas Shah and two others [1966] EA 30** where the evidence that the stolen goods were found at the company's residence was not evidence enough to convict the private company.

The court is therefore certain that the 3rd accused can be held liable and culpable in counts 3,4 and 5, however on account of the nature of count 1 that the 3rd is exonerated and accorded the benefit of doubt I count one.

The 8th issue which is critical and final which forms the basis of the case entire case is whether PEX 43 is a genuine document or not, Section 111(1) of the Evidence Act sets out the burden on the accused in certain cases and it states that:

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 defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

The defence version is that PEX 43 is genuine invoice in support of the storage charges which was disputed by the prosecution. If PEX 43 is a genuine invoice then the defence version carries the day and will justify the claim for storage charges herein, this court will consider if the prosecution availed sufficient evidence in support of their case. The defence availed letters to Chelsea freights written by the 1st accused in the letterheads of the 3rd accused and said that they had a contact person with Ropack and another with Chelsea frieghts both (James Wild and Chiko Slanders) who had since relocated from South Africa and could not be found by the two investigators PW23 and PW27. DW1 confirmed in her defence that Alfred Maynard had relocated it India, Chiko slanders to Hungary.

PW 22, the director from Chelsea Freight alleged that he was in charge of the issuance of all invoices in Chelsea Freight and was categorical that PEX 43 did no emanate from his company and that none of his employees or directors would have issued it without his knowledge. He said that his company had never had any dealings with the accused persons and that they never dealt with maize storage in any country. He denied knowledge of PEX 43 and the accused persons. It is clear from the evidence on record that the letters to Chelsea that were produced by the defence were not put to him (pw22) during the cross examination.

On cross examination, PW 9 told this court that they had not issued a letter of credit to the 3rd accused. He further stated that it was upon the 3rd accused to provide documentary evidence of the importation and storage of the maize without the essential letter of credit and the defence version is that the 1st accused with the assistance of Chiko Slanders managed to get the invoices from Ropack and also from Chelsea Freight, there is no direct evidence how the defence obtained the questioned invoice, they have mentioned the involvement of third parties such as Chiko Slanders Ferenc Lago, Alfred Maynard and even Jacob Juma, all them were not available and did not testify.

PW 22 vehemently denied PEX 43 being issued by his company, this honourable court finds that this witness gave direct evidence and he did not know the accused persons he would have no reason to frame them, the court finds that he was a truthful witness he disclosed the only transaction relating to a Kenyan company was transporting poles for KPLC, the court is convinced that PEX 43 did not emanate from Chelsea Freights as such it was a fraudulent document made by the defence in support of a fictitious claim for storage charges.

This honourable court is of the considered view that PW9 pointed out the correct position that the accused persons could not have imported the maize without the critical letter of credit. The evidence by the 1st accused reveals an inconsistency that the accused person had secured the maize by 4th August 2004, a day before the tender was awarded 22 days before they executed the contract, PEX 2, on 26/08/2004.

This court is therefore convinced that in the instant case the 3rd accused was used to defraud NCPB a huge quantifiable amount of money and during the process two companies namey KAPU Kenya and Dubai bank paid out money which they are yet to recover, a striking coincidence is that both KAPU Kenya and Dubai Bank no longer exist while the 3rd accused is said to be still in existence, the company (3rd accused) is therefore found to have been directly involved in the offences.

There is corroborated evidence on record from the prosecution and conceded by the defence that the 1st accused testified before the arbitrator and produced PEX 43 and there is no doubt that the claim for storage charges was supported by PEX 43, the 1st accused contradicted herself in stating that PEX43 was sourced by Jacob Juma and on another breath that it was sent to her via DHL. The 2nd accused on his part could not tell how pex43 was sourced, there is no doubt that the defence was evasive on how they obtained PEX 43.

This honourable court had the benefit to observe the demeanour of all the witnesses and it is satisfied that the prosecution side gave true and credible evidence which was well corroborated. The defence did not challenge the fact that they relied on pex43 and that they received part of the money. This honourable court having found that PEX43, the invoice in question was a false document made in support of a false claim for storage charges means that the claim was based on fraud.

The court having determined that PEX 43 was not genuine the next question is whether the prosecution has proved beyond reasonable doubt that the 1st accused person knowingly gave false testimony on the matter with regards to PEX 43. The 1st accused being the managing director of the 3rd accused and in charge of the day to day running of its affairs and from her evidence, she did the follow up of the contract there is no doubt whatsoever that she knew that pex43 was tailored to support their claim and she produced it during the arbitration with full knowledge that it was false and lied on oath on the false claim on storage.

The failure by NCPB to open a letter of credit in favour of the 3rd accused no doubt infringed the contractual terms, the 3rd accused was probably entitled to some civil remedy, however this is an issue that can at best be addressed a civil court, the accused persons crossed the civil line by adducing a false document in support of their claim and out of the false document NCPB lost a huge amount of money to the accused persons and their advocates.

In summary the evidence on record has established that pex43 did not originate from Chelsea freights on that account it is found to be a false document. It was relied upon for the award of storage charges of USD 1,146,000, which was granted in the award and

decree PEX 42 and 44 for a total award of USD 3,106,000 plus interest at the rate of 12 % from 27/10/2009, the defence claim rose to over 6,000,000 US dollars, which is 2/3rds of the contractual amount of USD 9,000,000, yet no maize was supplied, the accused persons had recovered over ksh 300 million said that they were still pursuing ksh 400 million, the accused committed an offence in availing a false invoice which was relied upon in the award hence that award lacks credibility since it arose out of a fraudulent document.

From the evidence on record as stated above there is sufficient evidence adduced by the prosecution side in support of its case there is no doubt whatsoever that the accused persons committed the offences as found here below, the 2nd and 3rd accused are however accorded the benefit of doubt in respect of count 1 here in, the defence version is rejected and dismissed, this honourable court makes the following findings.

Count 1: The 1st accused is found guilty and accordingly convicted

The 2nd accused is found not guilty and acquitted under sec 215 of the CPC.

The 3rd accused found not guilty and acquitted under section 215 of the CPC

Count 2: The 1st accused is found guilty and accordingly convicted

Count 3: The 1st, 2nd and 3rd accused found guilty and accordingly convicted

Count 4: The 1st, 2nd and 3rd accused found guilty and accordingly convicted

Count 5: The 1st, 2nd and 3rd accused are found guilty and accordingly convicted.

Dated this 22nd day of June 2020

HON, ELIZABETH JUMA.

CHIEF MAGISTRATE

ANTI CORRUPTION COURT.

MILIMANI, NAIROBI.

Judgment dated, delivered and signed in open court this 22nd day of JUNE 2020.

in the presence of;

Cc. Brenda Biyogo

CP Ms Mercy Gateru for the state,

Mr Okubasu Advocate for the 1st accused,

Mr Saende Advocate holding brief for Mr Havi for the 2nd accused

Mr Saende Advocate for the 3rd accused;

1st accused - Present

2nd accused - Present

3rd accused (Company)

HON, ELIZABETH N. JUMA.

CHIEF MAGISTRATE

ANTI CORRUPTION COURT.

MILIMANI, NAIROBI.

22/ 06/2020

BEFORE Hon. E. N. Juma CM

CC. Brenda Biyogo

CP Ms Gateru for the state

Miss Gateru for the State: I do not have any previous conviction on either of the two accused. I urge the court to treat each of them as a first offender. However, I urge the court to apply Section 48(1) of ACECA 2003 on the quantifiable loss and the quantifiable benefits in counts 3, 4 and 5. It is our submissions that the accused persons received a quantifiable benefit.

Hon Elizabeth Juma,

Chief Magistrate.

Mr Okubasu, Advocate for the 1st accused: I pray for the court's indulgence to give us time to give our mitigation and I also urge the court to be guided by Section 329 of the CPC that the amount recovered is part of the decretal sum which is partly recovered. The other issue is on the quantifiable amount for the sentence. I pray that we be given the time to mitigate for our client. I pray for the sentence to be deferred for a period of seven (7) days to enable us get the documents for the purpose of mitigation.

Hon Elizabeth Juma,

Chief Magistrate.

Mr Saende Advocate for the 3rd accused and holding brief for Mr Havi, Advocate for the 2nd accused:

I associate myself with the sentiments of Mr Okubasu for the court to accord us time to avail mitigation. As pointed out, we shall avail evidence to assist the court to arrive at the sentence. I pray for seven (7) days to avail my mitigation.

Hon Elizabeth Juma,

Chief Magistrate.

Miss Gateru for the State: I do not object for the defence being given time to mitigate, it is within their rights, but the time they are seeking is too long. The defence team has all along known that the judgement has been ready and pending. They ought to have prepared their mitigation. In any event, the accused persons are already convicted and can only be remanded in custody pending mitigation and sentencing.

Hon Elizabeth Juma,

Chief Magistrate.

Mr Okubasu: My prayer is that my client should not be put in custody in the intervening period. We will have difficulty to access them on account of the COVID-19 pandemic, there is no access to any inmate currently. Secondly, the 1st accused is sick and hypertensive. I pray that ordinarily, we will pray for the authorities to attend to her but the option is not available now. The 1st accused is 79 years old, very vulnerable to COVID-19, I assure the court to allow the accuse to continue on her current bond terms, her surety has been following up the mater keenly and is in court. As such, we pray that she be allowed to continue on her current bond terms and we will avail her for sentencing.

Hon Elizabeth Juma,

Chief Magistrate.

Mr Saende Advocate for the 2nd accused: I also request that the 2nd accused be allowed to attend to the litigation hearing and not to be placed in custody. The accused persons have been on bail, which is still in force. The 2nd accused has a cash bail surety and has also executed personal bond. The surety of the 2nd accused is still in court and the 2nd accused has never failed to attend court. He is also a sitting member of Parliament, he is a public figure, he cannot disappear. The prosecution knows where he works and both residences and the travel documents are with the court. Even if he had them, with the COVID-19 pandemic, he cannot leave the country. The 2nd accused is suffering from diabetes and he underwent head surgery. This is geared for the court to give a non-custodial sentence. Putting them to prison will expose them to a higher risk of COVID-19.

Hon Elizabeth Juma,

Chief Magistrate.

RULING

This honourable court has duly considered by Mr Okubasu and Saende Advocates, seeking for seven (7) days to avail heir mitigation. The court has also considered the response by the prosecution. This judgement has been pending for a while now and adjourned twice on account of the absence of both and one accused respectively. It is now surprising that the defence advocates are not ready with the mitigation, knowing that the judgement can go either way. Nevertheless, the accused are entitled to be given ample time to avail their mitigation considering the serious nature of the offences and the fact that the prosecution has not raised any objection.

On the bond terms, the accused persons were admitted to bond pending the hearing and the determination of the suit that has now been overtaken as the matter is now determined and the presumption of their innocence removed. Their status has changed from suspect to convict and I do agree with the prosecution that the accused persons are now convicts. For the above reasons, the defence advocates are urged to take a near date, in a day or so, to tender their mitigation for sentencing. As for now, both accused will be remanded in custody.

Hon Elizabeth Juma,

Chief Magistrate.

Ms Gateru: I pray that both the 1st and 2nd accused be remanded at Kilimani Police Station, pending mitigation and sentencing.

Mr Okubasu: I pray that both the accused be remanded at Kileleshwa police station as it has good facilities for the ladies which will be favourable for the 1st accused.

Court Prosecutor: No objection, so long as it is a police station. Both accused can be remanded at Kileleshwa Police Station.

Mr Okubasu: We proposed that the matter be mentioned on 25/06/2020, which is convenient, for mitigation and sentencing at 2:00 pm.

Mr Sande: that is OK, 25th June for mitigation ad sentencing at 2:00 pm.

RULING

The matter is fixed for mitigation and sentence on 25th June at 2:00 pm. Both 1st and 2nd accused to be remanded at Kileleshwa Police Station until then.

Hon Elizabeth Juma,

Chief Magistrate.

Mr Saende: I pray for an order for the legal team and immediate relatives to access the accused persons for purposes of getting the documents and medication as both accused are ailing and need to be accorded medical treatment in any event that it is necessary.

Hon Elizabeth Juma,

Chief Magistrate.

RULING

The defence team as well as immediate family members to be accorded access to the 1st and 2nd accused for documents/medical reasons. The 1st and 2nd accused may be accorded medical treatment under supervision in any event. Mitigation and sentencing on 25th June 2020 at 2:00 pm.

Hon Elizabeth Juma,

Chief Magistrate.



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