REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 232 OF 2012

REBECCA MWIKALI NABUTOLA……1ST APPELLANT

DUNCAN MURIUKI KAAGURU……2ND APPELLANT

ONGONG'A ACHIENG …….. 3RD APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being an appeal from the conviction and sentence in the Chief Magistrates Court, Milimani Anti-corruption Criminal Case No. 17 of 2009 of the Hon. Lucy Nyambura (SPM) delivered on 10th September 2012).

JUDGMENT.

Background

The Appellants were charged with various counts of offences as follows:

Count I: Conspiracy to defraud contrary to Section 327 of the Penal Code the particulars of which alleged that the three appellants and Maniago Safaris Limited between 18th June, 2007 and 24th September, 2007 in the City of Nairobi, within Nairobi Area of the Republic of Kenya, by deceit conspired together with intent to defraud the Kenya Tourist Board of Kenya Ksh. 8,925,444/- that was the disbursement to it for tourism marketing and promotion activities during the financial year 2007/2008.

Count II: conspiracy to defraud contrary to section 327 of the Penal Code: against the 2nd appellant, the 3rd appellant and Maniago Safaris Limited. The particulars were that on or about the 21st December 2009 and 24th September 2007 in the City of Nairobi, within Nairobi area of the Republic of Kenya, by deceit conspired together to defraud the Ministry of Tourism towards the expenses incurred towards the trip by the Permanent Secretaries of the Government of Kenya to Maasai Mara in October 2007.

Count III: Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 where it was alleged that the 1st appellant, on or about 24th

September 2007 at Utalii House in the City of Nairobi within the Nairobi area of the Republic of Kenya, being the Permanent Secretary for the Ministry of Tourism and Wildlife and the Accounting Officer for the said Ministry, used her office to improperly confer a benefit on M/S Maniago Safaris Limited by directly appointing the said firm Maniago Safaris Limited to coordinate the trip by the Permanent Secretaries of the Government of Kenya to the Maasai Mara in October 2007 and communicating such appointment to the Catering and Tourism Development Levy Trustees for purposes of payment.

Count IV: Wilful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, where the particulars alleged that the 1st appellant on or about 21st December 2007 at Utalii House in the City of Nairobi within the Nairobi area of the Republic of Kenya, being the Permanent Secretary for the Ministry of Tourism and Wildlife and the Accounting Officer for the said Ministry, a person whose functions concerned the management of public revenue, willfully failed to comply with the law relating to procurement by issuing instructions for the payment of Ksh. 400,000/- to M/S Maniago Safaris Limited notwithstanding that the services of the said Maniago Safaris Limited had not been procured in accordance with Sections 88 and 89 of the Public Procurement and Disposal Act, 2005.

Count V: Abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 against the 1st appellant, the particulars of which were that on or about 21st December 2007 at Utalii House in the City of Nairobi within the Nairobi area of the Republic of Kenya, being the Permanent Secretary for the Ministry of Tourism and Wildlife and the Accounting Officer for the said Ministry, used her office to improperly confer a benefit on M/S Maniago Safaris Limited by issuing instructions for the payment of Ksh. 400,000/- to the said Maniago Safaris Limited in respect to the trip by the Permanent Secretaries of the Government of Kenya to the Maasai Mara in October 2007 whereas the said Maniago Safaris Limited had not accounted for the sum of Ksh. 8,925,444/- that had been paid to it by the Catering and Tourism Development Levy Trustees for the said trip.

Count VI: Wilful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003., against the 3rd appellant, alleging that on or about 24th September 2007 at the offices of Kenya Tourist Board in Upper Hill in the City of Nairobi within the Nairobi area of the Republic of Kenya, being the Managing Director of the Kenya Tourist Board, a person whose functions concerned the management of public revenue, willfully failed to comply with the law relating to procurement by directly sourcing for the services of M/S Maniago Safaris Limited in disregard to the provisions of Section 74(3) as read with Section 29(3) of the Public Procurement and Disposal Act, 2005. There was an alternative charge of **Abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.**

Count VII: Fraudulently making payments from public revenues for services not rendered contrary to Section 45(2)(a)(iii) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 against the 3rd appellant**,** with the particulars alleging that on or about 24th September 2007 at the offices of Kenya Tourist Board in Upper Hill in the City of Nairobi within the Nairobi area of the Republic of Kenya, being the Managing Director of the Kenya Tourist Board, a person whose functions concerned the management of public revenue fraudulently made payment from public revenue for services not rendered by instructing Catering and Tourism Development Levy Trustees (CTDLT) to pay the said Maniago Safaris Limited sum of Ksh. 8,925,444/- on account of Kenya Tourist Board before the services were rendered to the Kenya Tourist Board.

Count VIII: Willful failure to comply with the law relating to procurement contrary to Section

45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 also against the 3rd appellant whose particulars alleged that on or about 24th September 2007 at the offices of Kenya Tourist Board in Upper Hill in the City of Nairobi within the Nairobi area of the Republic of Kenya, being the Managing Director of the Kenya Tourist Board, a person whose functions concerned the management of public revenue, willfully failed to comply with the law relating to procurement by causing the Kenya Tourist Board to enter into a contract for the provision of services with M/s Maniago Safaris Limited, an entity that was related to a member of the Board of Directors, namely, Duncan Muriuki, in disregard to the provisions of Section 33(1)(a) as read with Sction 33(1)(c) of the Public Procurement and Disposal Act, 2005.

Count IX: Conflict of interest contrary to Section 42(3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 where the 2nd appellant was charged, with allegations that on 24th September 2007 in the City of Nairobi within the Nairobi area of the Republic of Kenya, being an agent of the Kenya Tourist Board, knowingly acquired a private interest in the contract between the said Kenya Tourist Board and M/s Maniago Safaris Limited of which he is a director, for the coordination of a trip by the Permanent Secretaries of the Government of Kenya to Maasai Mara in October 2007for which M/s Maniango Safaris Limited was paid Ksh. 8,925,444.00

Count X: Fraudulent acquisition of public property contrary to Section 45(1)(a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, against the 2nd appellant and Maniago Safaris Limited whose particulars alleged that on 24th September, 2007 in the City of Nairobi within the Nairobi area of the Republic of Kenya, jointly and fraudulently acquired public property to wit Ksh. 8,925,444.00 from Catering and Tourism Development Levy Trustees (CTDLT) that was due to the Kenya Tourist Board for tourism marketing and promotion activities

Count XI: Fraudulent acquisition of public property contrary to Section 45(1)(a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 whose particulars alleged that the 2nd appellant and Maniago Safaris Limited on 24th September 2007 in the City of Nairobi within the Nairobi are of the Republic of Kenya, jointly and fraudulently acquired public property to wit Ksh. 400,000/- from the Ministry of Tourism on the pretext that that the funds were in respect of activities for the promotion of tourism activities s by the Kenya Tourist Board.

The prosecution called 18 witnesses, following which the appellants were placed on their defence. The appellants denied committing the offences as charged. Each gave a sworn testimony. The 2nd appellant also called two witnesses in support of his defence. At the conclusion of the trial, the court acquitted the 1st appellant on count III of the offence of abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act, while the 3rd appellant was acquitted on count VII of the offence of fraudulently making payments from public revenues for services not rendered contrary to Section 45(2)(iii) as read with Section 48 of the Anti-Corruption and Economic Crimes Act. The 2nd appellant was also acquitted of the offence of conflict of interest contrary to Section 42(3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act charged under count IX.

The court convicted and sentenced the appellants on the rest of the offences as follows:

a. On count 1: each of the appellant was convicted and sentenced to 3 years imprisonment
b. Count II: The 1st and 2nd appellants were convicted and sentenced to one year imprisonment.
c. Count IV: the 1st appellant was convicted and sentenced to a fine of Ksh. 500,000/- in default to serve one year imprisonment.
d. Count V: the 1st appellant was convicted and sentenced to a fine of Ksh. 500,000/- in default to serve one year imprisonment.

e. Count VI: the 3rd appellant was convicted and sentenced to a fine of Ksh. 500,000/- in default to serve one year imprisonment.
f. Count VII: the 3rd appellant was convicted and sentenced to a fine of Ksh.1,000,000/- in default to serve one year imprisonment.
g. Count IX: the 2nd appellant was convicted and sentenced to 3 years' imprisonment and an additional mandatory fine of Ksh. 17,850,888/- and /- in default to serve three years imprisonment.
h. Count X: the 2nd appellant was convicted and sentenced to a fine of Ksh. 500,000/- in default to serve one year imprisonment and an additional mandatory fine of Ksh. 800,000/- and /- in default to serve one year imprisonment.

The court ordered the sentences to run concurrently and where the fines are not paid, the default sentences to run consecutively. Aggrieved by the trial court's decision, the appellants filed their appeals separately, but which were later consolidated.

The 1st appellant raised various grounds as contained in the Petition and the Amended Petition. I summarize them as follows: that the evidence adduced was insufficient; that the magistrate shifted the burden of proof to the appellant; the magistrate heavily relied on the uncorroborated evidence of PW5 in disregard of other evidence by the prosecution and defence; that the trial court erred in failing to appreciate that the appellant was not the procurement entity and further that the magistrate misinterpreted the offences of conspiracy, effectively shifting the burden of proof to the appellant and that the sentence imposed failed to consider that the appellant was a first offender. The 1st appellant also faulted the magistrate for failing to recuse herself and disclose knowledge of materials and circumstances which could demonstrate actual or perceived bias. She also faulted the court for not complying with Sections 199, 211 and 200(3) of the Criminal Procedure Code and for not recording the demeanor of the prosecution witnesses. The 1st appellant cited the charges as bad for duplicity, and that the court failed to address the issue of joinder of the accused persons in her judgment. Finally, that the evidence adduced did not prove the case beyond a reasonable doubt.

The 2nd appellant cited several grounds in support of his appeal summarized as follows: that the trial court shifted the burden of proof and erred in holding that the appellant ought to explain how the money was spent; the trial court relied on evidence of a telephone conversation that was not proved; the trial court failed to appreciate and consider the evidence that was in favour of the appellant, the court ignored evidence showing the two events that were held in respect of which the subject money was spent and further that the projects were fully implemented and in respect of which he incurred costs. The 2nd appellant also faulted the court's failure to consider the capacity in which he was charged, which amounted to a fatal error which rendered the charge sheet and entire proceedings null and void and further that the sentence imposed was wrong in principle, manifestly excessive and harsh and irregular. He also faulted the magistrate for applying the wrong facts on the charges and consequently finding a conviction and passing the sentence on the basis of such facts.

The 3rd appellant relied on the grounds that: the prosecution evidence was contradictory, that the evidence was not sufficient to support a conviction, thus the prosecution had not proved its case beyond reasonable doubt, and further that the trial court relied on inadmissible evidence and that the findings were not based on actual evidence; and finally, that the sentence imposed was manifestly excessive and wrong in law.

Appellants' submissions

All parties filed their respective written submissions. The 1st appellant submitted that the elements of the

charge of conspiracy were not proved since no evidence was produced to show a secret plan to defraud the Kenya Tourist Board, nor was the element of common intention established. The trial court was faulted for placing heavy reliance on the uncorroborated testimony of PW5, which was challenged during cross-examination, and was hearsay thus not a sufficient basis for conviction. It was further submitted that the court erred in shifting the burden of proof by finding that the 1st appellant failed to question the payments adding that since she was not party to procurement matters at the Board, she ought not to have been convicted on matters she was not involved with. Further, that the Ksh. 400,000/- paid to Maniago Safaris was the ministry's contribution for the trip, which was a sufficient explanation on the expenditure which had not required competitive bidding or procurement. The 1st appellant submitted further that the magistrate was biased *ab initio* and she was therefore not afforded a fair trial. It was also submitted that Section 200(3) of the CPC was not complied with and further that the court failed to record remarks regarding the demeanor of the witnesses contrary to Section 199 of the Criminal Procedure Code. Further, that that the evidence adduced did not show that the 1st appellant committed the alleged offences since no amount of money was traced to her account. On sentencing, the 1st appellant submitted that the magistrate failed to take into account that she was a first offender and disregarded other alternative forms of punishment, and principles of sentencing.

The 2nd appellant submitted that the court shifted the burden of proof and cited several instances when the magistrate misdirected herself in this regard. He also submitted that the prosecution failed to call material and relevant witnesses as seen in the evidence of PW18 who did not investigate several aspects. Thus, it was erroneous for the court to make a finding that the money was fraudulently acquired despite the substantial loopholes in the prosecution case. On the charges of conspiracy to defraud, the 2nd appellant submitted that the element of common intention among the three appellants was not proved, in that there was no direct evidence to show that the appellants met to plan about the payment of the subject monies and no reference to any evidence of joint intention. On the charges of fraudulent acquisition of Ksh. 8,925,444/- and Ksh. 400,000/-, the 2nd appellant submitted that the budget was explained by PW7 as comprising of several items and the prosecution had failed to lead evidence on the other activities highlighted which had been budgeted for and funded. Further, that Hon. L. Nyambura did not comply with section 200 of the Criminal Procedure Code when she took over the case from Hon. C. Githua and that the court failed to inform him of his right under the provision and instead conferred with his advocate. Several cases were cited. It was also submitted that the charges were bad for duplicity since the charges did not give reasonable information on the extent and nature of offences against the 2nd appellant and those against the 4th accused person being a separate legal entity. He also challenged that the sentences for being disproportionate and excessive since he was punished twice on account of the liability of the company. Finally, the 2nd appellant submitted that the court failed to consider his defence which exonerated him from the charges.

The 3rd appellant challenged the conviction and sentence as being improper for misjoinder and duplicity, adding that he was charged and convicted of the offence of conspiracy to defraud as well as the substantive offence of fraudulently making payment from public revenue, which led to double penalty. He further submitted that there is a substantive provision on the offence of conspiracy in relation to corruption and economic crimes under Section 47(a) of the Anti-Corruption and Economic Crimes Act while Section 48 does not provide for an imprisonment term of 3 years unlike Section 317 of the Penal Code. He added that the offence for conspiracy ought therefore, to have been brought under Section 47 and as an alternative charge. Further, that he was given a noncustodial sentence for the substantive offence and a custodial sentence for the conspiracy offence arising out of the same set of facts and thereby suffered double punishment. The 3rd appellant also stated that the sentence imposed was too high and unjustifiable. It was further submitted that the evidence was not sufficient evidence to support a conviction on conspiracy. Further, the court misdirected itself in finding count VII was proved if payment was made before the services were rendered which standard is not imposed by Section 45(2)(b).

Determination.

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

a. ***Whether Ssection 200(3) of the Criminal Procedure Code was complied with.***
b. ***Whether Section 199 of the Criminal Procedure Code was complied with.***
c. ***Whether Section 211 of the Criminal Procedure Code was complied with.***
d. ***Whether the charge sheet was defective for mis-joinder and duplicity.***
e. ***Whether the charges against the appellants were proved to the required standard***
f. ***Whether there was consideration of the appellants' defences.***
g. **Whether the sentences imposed were legal.**

Non-compliance with section 200(3) of the Criminal Procedure Code

Both the 1st and 2nd appellants faulted the trial magistrate for failing to abide by the provisions of section 200(3) of the Criminal Procedure Code. Several cases were relied on.. It was submitted that Hon. L. Nyambura did not comply with section 200 when she took over the case from Hon. C. Githua.

Section 200(3) requires that:

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

The record of proceedings shows that Hon. C. W. Githua (as she then was) presided over the case until the end of the prosecution's case, and wrote the ruling on a case to answer which was delivered by Hon. L. Nyambura (as she then was) who succeeded her. On 6th October, 2010, the appellants were informed that the trial magistrate has been appointed as a judge of the High Court. Thereafter the record shows that the court proceeded to inform the appellants of their right under Section 200(3). The relevant part of the record reads as follows:

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C.W. Githua (Mrs.) has been elevated to the position of the High Court Judge. Section 200 of the Criminal Procedure Code has been explained to the accused persons and their counsels and they responded as follows:

Wagara – on behalf of the 2nd and 4th accused persons we will proceed with the matter form where it has reached. We will put in sworn statements and call four witnesses. We can take a hearing date. We do not wish to start the matter afresh.

Okundi – on behalf of the 3rd accused person, we wish to proceed with the matter from where it has reached. 3rd accused person will give sworn statement. No witness. We can take a hearing date.

1st accused: I will also proceed with the matter form where it had reached.

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Court – on 6.10.2011 parties elected to proceed with the matter from where it had reached. Section 200 of the Criminal Procedure Code having been explained to them today its defence hearing and parties are ready to proceed. Section 211 of the Criminal Procedure Code complied with.

Having considered the above record, I am satisfied that the succeeding trial magistrate complied with section 200(3) of the Criminal Procedure Code. The court went ahead to indicate that the provision was explained to both the appellants and their respective counsels. Thus, any assertion that the court failed to explain to the accused fails.

Non - compliance with section 199 of the Criminal Procedure Code

It was also alleged on behalf of the 1st Appellant that the trial court failed to record remarks regarding the demeanor of the witnesses contrary to section 199 of the Criminal Procedure Code, which is worded in mandatory terms. Thus, the court should not have proceeded to convict and sentence the appellant without caution, having not ascertained the credibility of the witnesses and that this failure was fatal to the prosecution case.

Section 199 of the Criminal Procedure Code provides that:

*'**When a magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of the witness whilst under examination.**'*

This provision, as worded, particularly the use of (if any), means it is not mandatory, and gives the presiding magistrate discretion to record such remarks, if he sees fit, on witnesses' demeanor. It was well within the law for the succeeding magistrate to proceed on the basis of the recorded evidence even in the absence of remarks as to the demeanor of the witnesses. The 1st appellant's argument in this respect fails and this ground of appeal similarly fails.

Non -compliance with section 211 of the Criminal Procedure Code

The other ground of appeal on the law relates to the assertion by the 1st appellant that section 211 was not complied with since the record of proceedings did not show what was explained to the appellant and the responses from the appellants despite the magistrate alluding to have explained provisions of section 211 to the appellant..

Section 211 sets down the procedure to be followed upon the close of the prosecution's case. It requires that where the court finds that a case has been made out against the accused, sufficiently to justify placing the accused on his defence, '***the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)***.'

At page 253 of the proceedings, Hon. Nyambura upon taking up the matter, indicated that section 211 of the Criminal Procedure Code had been complied with. While the court did not set out in verbatim what was explained in detail, the responses by the respective counsels for the appellants point to the fact that the provision was explained. Each of the counsels for the accused responded indicating that each of the appellants would give a sworn statement in defence and would not call any witnesses. There is no

requirement under that provision that the entire Section should be duplicated in the proceedings. The fact that the counsel for the various parties responded appropriately after the explanation in the provision is a demonstration that the parties understood what was required of them. After all, counsel were the mouth pieces for the appellants and they told the court how they (appellant) wished to proceed. I therefore, find no error by the trial magistrate, and I dismiss this ground.

Whether the charge sheet was defective for mis-joinder and duplicity

The 1st appellant relied on the ground that the charges were bad in law for duplicity although this was not elaborated in in her submissions. It was also submitted on behalf of the 1st and 3rd appellants that there was misjoinder of causes of action since they were charged and convicted of the offence of conspiracy to defraud as well as the substantive offence of fraudulently making payment from public revenue, leading to double penalty. The appellants argued that the prosecution should have proceeded on a single count, since both counts emanated from the same set of facts. Furthermore, that there is a substantive provision on the offence of conspiracy in relation to corruption and economic crimes under Section 47A of the Anti-Corruption and Economic Crimes Act under which the appellants ought to have been charged with considering the nature of the alleged offences. The Respondent maintained that the offence of conspiracy to defraud is a substantive offence unlike other conspiracies, adding that both were substantive offences.

It was also submitted for the 2nd appellant that there was duplicity of charges in respect of counts 2, 10 and 11 since there was no indication regarding the extent to which the 3rd appellant should answer charges and further that it was wrongly presumed that he had answered to charges both in his private capacity and as a director of the 4th accused. Further, the charges were not clear as to the extent and nature of offences against the 2nd and 4th accused persons, who were charged independently and jointly for the same offence, yet the 2nd appellant answered charges against him and the 4th accused company.

The question of duplicity of charges has its basis in **Section 134** of the Criminal Procedure Code which provides that:

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

Further on joinder of counts **Section 135** provides:

'(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.'

Section 136(1) recognizes the categories of persons who may be joined in one charge or information and tried together as including:

(a) persons accused of the same offence committed in the course of the same transaction;

(c) persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code or of any other Act or law) committed by them jointly within a period of twelve months

(d) persons accused of different offences committed in the course of the same transaction;...'

The question for determination is whether any of the above provisions have been violated in the manner the charge sheet is drafted. The Black's Law Dictionary, 9th Edition at page 578, defines *duplicity as: ''**the charging of the same offence in more than one count of an indictment or, the pleading of two or more distinct grounds of complaint or defence for the same issue.'***

In the case of ***Omboga vs Republic*** **[1983] KLR 340,** it was held that;

"injustice will be occasioned where evidence is called relating to many separate counts all contained in one count because the accused cannot possibly know what offence exactly he is charged with.'

Looking at the charge sheet there are 11 counts of specific offences each with particulars describing the alleged contravention of the law. None of the counts as drafted contain more than one offence as to make it difficult for the appellants to understand the nature of charges against them.

The charges against the appellant arose from the same set of facts concerning expenditure of public funds for an event in which all the appellants were in some way allegedly involved. On the face of it, I find that the charges as drafted are not bad in law for either duplicity or joinder of counts.

On the question of the charge of conspiracy not being a substantive charge, courts have on various occasions dealt with instances where a person is charged with substantive counts of offences and their related charges of conspiracy. In the case of ***Kinyanjui v Republic*** **[1988] KLR 76,** the Court of Appeal expressed the view that the trial court should call upon the prosecution to elect which charges to proceed with. The court reasoned thus:

'We can therefore agree with the Courts below that it is not illegal per se to join an alternative charge of conspiracy; indeed it is not necessarily illegal to frame a substantive charge of conspiracy together with substantive charges for specific offences, as Musinga's case above shows, and more especially R v Cooper & Compton [1947] 2 All ER 701. The problem is deeper than simply changing substantive counts of conspiracy to alternative counts. Dealing with counts of conspiracy raises problems which require discretion and complete understanding of the case in hand. It seems to us that the principles summarised in Archbold Criminal Pleading Evidence and Practice, 40th Ed para 4073 as to the desirability of including a count of conspiracy in an indictment or charge, offers a useful approach. But the question cannot be determined by the application of any rigid rules. Each case must be considered according to its facts. The following points should be considered:-

1. As a general rule where there is an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy is undesirable. It is not desirable to include a charge of

conspiracy which adds nothing to an effective charge of a substantive offence. The conspiracy indeed may merge with the offence.

2.To this general rule there are exceptions, as for instance:-a)Where it is in the interest of justice to present an overall picture, which a series of relatively small substantive offences cannot do; sometimes a charge of conspiracy may be the simpler way of presenting the case;

b)Where there is clear evidence of conspiracy but little evidence that the conspirators committed any of the overt acts; or where some of the conspirators but not all, committed a few but not all, of the overt acts, a count for conspiracy is justified;

c)Where charges of substantive offences do not adequately represent the overall criminality disclosed by the evidence, it may be right and proper to include a charge of conspiracy.

3.But a count for conspiracy should not be included if the result will be unfair to the defence, and this has always to be weighed with other considerations.

4.It may be necessary to try a count for conspiracy separately from substantive counts which are only examples of carrying out the conspiracy.

5.Where the evidence discloses more than one conspiracy, it is undesirable to charge all the conspiracies in one count, but it may not be bad in law as Musinga's case shows.

6.Other factors concern the number and type of conspirators, for instance, the possibility of two being husband and wife, or of two conspirators the possibility that one may be acquitted, may need to be safeguarded as Mulama v Rep [1976] KLR, 24 indicates.

The question which one must then ask is why or in what circumstances it is undesirable to join a count of conspiracy with counts for substantive offences" The main ground is unfairness to the accused, which is a general consideration. That may arise because the accused may not know with what he is charged precisely, or may be embarrassing to be obliged to defend in the alternative…'

The court also cited with approval, the practice direction set out in the **English case of [1977] 2 All E.R 540**, as follows:

In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.

2. A joinder is justified if the judge considers that the interests of justice demand it."

The court proceeded to add:

'We may add that election or severance follows from the Court's inherent powers to see that its process is not abused, in the sense that the accused is guarded against oppression or prejudice. It is for this purpose that the rule is that the objection must be taken at the earliest opportunity; and here we congratulate counsel for trying to safeguard their clients at the right time, a chance missed in Musinga's case, whether or not their clients are ultimately proved right.'

The result of that appeal was that the court remitted the record to the Principal Magistrate to take up the objection and cause the prosecution to justify his charge sheet or elect which offences he will rely upon.

I havr relooked at the charges which are the basis of the contention that it was wrong to include in the charge both the offence of conspiracy, and the offence of fraudulent payment or acquisition of the money that was the subject of the conspiracy charges. Considering the above reasoning in the cited case law, I support the view that the inclusion of the charges of conspiracy together with substantive offences did not render the charges as drafted defective or undesirable.

Further, in agreement with the above-cited reasoning, it is important to make the determination on the propriety or otherwise of including the charges with the full appreciation of the facts of the particular case. And it is for this reason that I decline to summarily find the charges defective purely on the ground of inclusion of the counts of conspiracy along other counts of substantive offences. I shall revert to this issue and make a determination thereof, upon analysis of the facts in the relation to the charges in question. As the court stated above, each case must be considered on its facts and solely not as a matter of law only.

However, the question regarding the legal standing of Maniago Safaris Ltd, the 4th accused in the lower court proceedings must be looked at separately outside the concerns of duplicity or misjoinder. The 2nd appellant (the 2nd accused) was said to be a board member of the Kenya Tourism Board and director of the 4th accused.

The 2nd appellant maintained that the magistrate ought to have inquired whether the appellant was mandated to take plea on behalf of 4th accused, and whether he was the right person to carry out the sentences imposed on the 4th appellant.

Section 23 of the Penal Code recognizes offences by corporations in the following terms:

*'**Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.**'*

The 2nd appellant and the company were charged in counts 1, 2, 10, 11 while the 3rd appellant faced an additional charge under count 9. The offences as drafted are against both the 2nd appellant and the company in the applicable instances. While the charges are also drawn against the company, the implications of Section 23 above are that, upon determination of its liability, the directors shall bear the responsibility. In my view therefore, the charges as drafted were proper, and no question of mis-joinder arises. The question of liability will only be determined upon consideration of evidence, and a further determination on whether the 2nd appellant bears liability as a director of the company.

Whether the charges against the appellants were proved to the required standard

I shall consider all the grounds surrounding the sufficiency of evidence under this broad issue.

The 1st appellant challenged the evidence relied on and averred that it was insufficient to prove counts 1, 2, 4 and 5 of the charges. She also challenged the trial court for placing heavy reliance on the evidence

of PW5 in the absence of other evidence to warrant a conviction, which amounted to reliance on hearsay evidence. The 1st appellant also blamed the trial court for failing to find, on the basis of evidence adduced, that the 1st appellant was not the procurement entity. Further, the trial court misinterpreted the elements of the offence of conspiracy to defraud. Finally, she stated that the evidence adduced in fact exonerated her from the charges of abuse of office.

The 2nd appellant argued that the prosecution evidence was riddled with contradictions and discrepancies and was insufficient to support a conviction, thus the prosecution failed to prove its case beyond reasonable doubt. The court was also faulted for imposing a theory in her findings that was not based on actual evidence.

The 3rd appellant on his part stated that the court failed in finding that the appellant appropriated public funds despite abundant evidence to the contrary. Further, that the trial magistrate relied on heavily discredited evidence of PW5 to find that a conspiracy between the accused had been proved. Furthermore, the court had failed to consider evidence that was led in his favour including the testimonies of PW 2, PW5, PW6, PW7, PW18, DW 2, DW 4, and DW5 and the accounts of PW10, 13 and 18 which exonerated him from the charges of conspiracy to defraud and appropriate Ksh. 8,925,444/-. He also faulted the court for failing to appreciate the full extent of the purpose to which the money was used.

On the charge of conspiracy to defraud, the appellants argued that the charges could not stand without any evidence of the essential ingredient of common intention. The appellants were charged under **Section 317** of the Penal Code which provides for the offence of conspiracy to defraud in the following terms:

'Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.'

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

"An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement's motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose."

In ***Archibold's Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell)*****, at pages 3025 and 3026,** it is observed as follows:

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

The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it….Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."

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

The first issue to consider is whether or not there was an agreement to execute an unlawful act. An agreement may either be express or implied from the circumstances of the case. As expressed in the **Halsbury's Laws of England Vol. 25 Criminal Law at para. 73:**

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

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

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

'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

In the present case, it was alleged in count one that all the appellants conspired together with intent to defraud the Kenya Tourist Board of Kenya Ksh. 8,925,444/- that was the disbursement to it for tourism marketing and promotion activities during the financial year 2007/2008. In count 2, also on conspiracy to defraud, it was alleged that the 1st and 2nd appellants together with Maniago Safaris Limited conspired to defraud the Ministry of Tourism over expenses incurred for a trip by the Permanent Secretaries of the Government of Kenya to Maasai Mara in October 2007.

From the facts set out in this case, there is no evidence of an express agreement among the appellants to defraud. The conspiracy can only be proved or disproved from the facts revealed. The trail leading to the allocation and payment of the monies in question is borne from the evidence of **PW5, Allan Wagula Chenane**, who testified that on 27th Dec. 2006, he received a request from the 1st appellant by a letter dated same date, for Ksh. 30 million as additional marketing funds. PW5 placed the request before the Board of Trustees and it was approved but subject to further approval by the Treasury. The 1st appellant sought the approval which was given by the then Permanent Secretary of Treasury. Consequently, the 1st appellant communicated to PW5 the Treasury's approval by a letter dated 18th June, 2007. With this approval, Ksh. 15 million of the approved monies, was disbursed by a cheque to the Permanent Secretary Treasury. He also informed the 1st Appellant of the same via a letter in which he copied the 3rd Appellant. The 1st appellant acknowledged receipt of the cheque in a letter dated 24th July 2007 in which she also copied the 3rd Appellant. He testified that in August 2007, the 1st appellant requested him to release the remaining Ksh. 15 million since there were planned tourism activities by senior government officials in the Mara, which were meant to be funded by the money in question. He testified that he could not recall if the request was over the telephone or in writing. Thereafter, the 3rd appellant called him inquiring as to whether the 1st appellant had contacted him in respect of the trip by Permanent Secretaries to the Mara. A day later, the 2nd appellant also called informing him that he had been directed to organise for the trip to which he replied that he was awaiting for written instructions. By a letter dated 24th September, 2007, under the subject of the balance of Ksh. 15 million, the 3rd appellant informed PW5 that the Tourism Ministry and the Kenya Tourism Board were coordinating the visit to the

Mara together with other stakeholders. He was therefore requesting the CTDLT to contribute money on its behalf. The letter also directed him to get in touch with the 2nd appellant who was coordinating the trip which was estimated to cost Ksh. 8,925,444/- for the period 5th to 6th October, 2007. The letter gave a breakdown of costs as per an attached budget. The items in the budget were; accommodation, park fees, special bush meals, & cocktail – Ksh. 5,680,208/-, flights, gifts, & Maasai village – Ksh. 1,942,130/- and media, PR related costs & consultancy – Ksh. 304, 545/-. In response, PW5 forwarded two cheques and a forwarding letter dated 24th September, 2007, one cheque for the Ksh. 8,925,444/- to Maniago Safaris and Ksh. 6,074,556 to the Kenya Tourism Board as the balance of the remaining Ksh. 15 million. The letter forwarding the cheques was copied to the 1st appellant.

From the above, it is clear that the request of funds, the expenditure of which gave rise to the above allegations was made by the 1st appellant. From the testimonies available, the procedure followed when requesting for the Ksh 30 million, and the eventual allocation was properly conducted. The dispatch of the first tranche of Ksh. 15 million was similarly in order. Later, PW5 was requested by the 1st appellant to release the remaining Ksh. 15 million to fund tourism promotional activities in the Mara entailing the visit by senior government officers. At this stage, no offence can be said to have been committed. The problem arose from the payment of Ksh. 8.9 million to Maniago Safaris, through a cheque in the second disbursement of Ksh. 15 million while the remainder was paid to Kenya Tourism Board.

It is not disputed that Ksh. 8.9 million was paid to Maniago Safaris. The 1st appellant directed for the release of the remaining Ksh. 15 million to the Kenya Tourism Board. Even though she challenged the telephone conversation on the basis of which the remainder was released, I find that even though no proof of the telephone conversation was presented, the actions of PW5 give credence to PW5's testimony in this respect. When PW5 was disbursing the balance of the money to the Kenya Tourism Board, PW5 copied the forwarding letter to the 1st appellant. Therefore, the 1st appellant by this letter, had notice of the fact that the Ksh. 15 million was disbursed to the Kenya Tourism Board, and in particular the Ksh. 8,925,000/- of this money was paid to Maniago Safaris directly. Even though, from PW5's account the 1st appellant directed the release of the money on account of the planned activities, it cannot be deduced, purely from this forwarding letter alone, that the 1st appellant had formed a consensus, with the 2nd and 3rd Appellant, to defraud the Kenya Tourism Board.

The fact that the 1st appellant had notice of the payment to Maniago Safaris does not in my view prove that she shared 'a meeting of minds' with her co-accused. This is because, once the money was disbursed to Kenya Tourism Board, it was the responsibility of the Board to appropriate and account for its expenditure. In addition, the letter to PW5 from the 3rd appellant seeking disbursement of Ksh. 15 million to the Kenya Tourism Board, with a clear indication that the cost of the trip would be Ksh. 8,925,444/- with the budget from Maniago Safaris attached was not copied to the 1st appellant. This, without any other evidence to the contrary, removes the 1st appellant from the chain of events that led to the requisition and payment of the money to Maniago Safaris.

Further, in the call to PW5, it was not shown that the 1st appellant specifically mentioned payments to Maniago Safaris, or specific details in respect of the budget or payments for the said trip. On that basis alone, I find that the prosecution did not show that the 1st appellant conspired with her co-accused to defraud the public of the Ksh. 8,925,444/-. Furthermore, there is clear evidence that the 3rd appellant wrote to the 1st appellant on 23.8.2007 enumerating the cost of the PSs' trip as Ksh. 1,819,000/- which costs included a 2-days' excursion and accommodation. In response, the 1st appellant by a letter dated 24.8.2007, suggested to 1st accused(now 3rd appellant) to have costs reduced by using a KWS caravan and getting other complimentaries from industry players. The 1st appellant went ahead to request the Kenya Wildlife Service to provide transport, which was used as evidenced by PW6. This conduct on her part is not consistent with the mind of a person conspiring to defraud public funds.

PW18 also connected the 1st appellant to the offence of conspiracy in count I on account of her letter of 19.09.2008 to the Treasury Permanent Secretary seeking authority for the trip which indicated that she coordinated the trip and that all the arrangements were complete yet Maniago Safaris was appointed on 24.09.2007. In my view this did not positively establish a criminal intent on the part of the 1st appellant. Authority to undertake the trip was a procedural action, the appellant being the Permanent Secretary in the Ministry of Tourism. It was also not shown that by indicating that the arrangements were complete, she had knowledge of the intricacies involved including procurement of service providers as a result of which the charges arose.

The prosecution also advanced the theory that the fact that the 1st appellant approved the disbursement of the money initially meant for promotional activities in Europe, to another use i.e. the trip to the Mara, pointed to the conduct of conspiracy to defraud. This was also part of the reasoning applied by the court in finding the appellants guilty of the offences of conspiracy to defraud as charged. While the use of the money for a different activity other than the use it was initially budgeted or allocated for may be irregular and possibly attract other independent charges, I share a different view. This is because, the 1st appellant initially asked for Ksh. 30 million additional funding for Kenya Tourism Board, from CTDLT on 27th December, 2006. This request was approved by the Treasury on 18th June, 2007 way before the trip to the Mara was planned. The communication about the trip came in August 2007. Therefore, there is no discernible nexus between the request of the additional funding for the Kenya Tourism Board by the 1st appellant, which was approved in full and the alleged conspiracy arising from the payment to Maniago Safaris. With the above in mind, I find that the evidence is not sufficient to prove a meeting of minds between the 1st appellant and the others to defraud.

With respect to the 3rd appellant, PW5 testified that he received a call from the 3rd appellant for the release of the money to the Kenya Tourism Board. Again proof of this conversation was disputed by the 3rd appellant. However, the written communication by the 3rd appellant gives more weight to PW5's account. In August 2007 the 1st appellant directed PW5 to release the remaining disbursement of Ksh. 15 million to the Kenya Tourism Board, and further that the trip would cost Ksh. 8,925,444/-. Enclosed with this letter was a letter from Maniago Safaris giving a breakdown of the cost of the trip, totaling Ksh. 8,925,444/-. From this communication, it is clear that the 3rd appellant was aware of the details of the proposed trip to the Mara, as he cited it in his communication and enclosed a budget breakdown in a letter by Maniago Safaris.

At this stage, I must make two observations. First of all, that Maniago Safaris first comes into the picture in the entire chain of events through the request by the 3rd appellant. The prosecution produced a letter dated 19.09.2007 addressed by the 2nd appellant to the 3rd appellant (Exh. 23c) which was not copied to the 1st appellant. Secondly, assuming that the Ksh. 8,925,444/- was legitimately meant to fund the Mara trip as pleaded by the appellants, a question arises as to why in the first instance, the 3rd appellant wrote to the 1st appellant on 23.8.2007, enumerating the cost of the trip as Ksh. 1.819,000/- which costs included a 2-days' excursion and accommodation. This communication was followed by a suggestion by the 1st appellant to the 3rd appellant on cost reduction in a letter dated 24.8.2007, through alternative transport and use of complimentaries from players in the industry. Yet, a month later, on 24th Sep. 2007, the 3rd appellant wrote to PW5 on the issue of the remaining Ksh. 15 million. In that letter, he indicated that the Kenya Tourism Board and the Ministry were coordinating the trip, and the 1st appellant was not copied into this letter, where the 3rd appellant went ahead to indicate a different cost of Ksh. 8,925,444/- which was higher than he had indicated to the 1st appellant. The 3rd appellant authorised PW5 to fund the trip directly on its behalf and to get in touch with the 2nd appellant. Another observation is that the appellants were consistent in their testimonies that the trip was a joint effort of stakeholders in the tourism industry who were expected to make a contribution to the cost of the trip. The 3rd appellant indicated that the total cost of the trip was Ksh. 8,925,444/- yet asked PW5 to make full payment, even

though this was a joint-effort by stakeholders. Further, despite the claim that this was a cost-shared project, it was the obligation of the Tourism Ministry and the Kenya Tourism Board, if they were contributors, to indicate, or inquire from the onset, on a their required contribution. This was not done, and the 3rd appellant simply authorised the release of the money to fund the trip.

The question at this point is whether then the 2nd and 3rd appellants conspired to steal the sum of Ksh. 8,925,444/-. I t is clear that the money was put in a fixed deposit account and was advanced before the trip, which raises eye brows. However must look at the circumstances independently. Maniago Limited, a profit- making company, was not mandated to use money specifically sourced from KTB and could have, as it saw fit, utilized its other sources of money as long as it offered the services it was tasked to provide. This is evidenced by the fact that a payment was made out to Fairmont Hotels and Resorts on 5th October 2007 via a Barclays Bank of Kenya cheque number 002043 which means this court can not conclusively tie the fact that money from cheque number 000831 was not directed to the PS trip as proof of any wrong doing on the part of the company. The services were adequately rendered by the company as evidenced by PW5 and PW6 who attended the event in question. That the company made a profit off its dealing does not constitute an illegality.

Further this court has considered the monies that were contributed for the activity in question. Recalling that the Mara trip was what triggered the request for the release of money, further communication made reference to the trip i.e. communication by the 3rd appellant to the 1st appellant that the cost of the trip would be Ksh. 1,819,000/-. Further, communication by the 1st appellant and 2nd appellant to PW5 indicated that the trip would cost Ksh. 8,925,444/-. At this stage I cannot comment on the issue as to whether the money was spent for the intended purposes as advanced by the appellants. Despite having received the payment for coordinating the activity, the 2nd appellant had the money deposited in a fixed deposit account. In the same intervening period, the 2nd accused continued soliciting for funds from other stakeholders.

PW8, Fred Kaigwa, then a CEO at KATO, a private sector association comprised of individual licensed tour firms testified that the 2nd accused relayed the intended trip to the Board of KATO. The board approved Ksh. 500,000/- to go towards the trip. This was proved in the minutes of the Board of 16th October 2007. This was after the trip had taken place, and after the 2nd accused had received payment for the trip. On 29th Jan. 2008, the 2nd accused again approached KATO to clear the outstanding bill of Ksh. 258,580/- in respect of accommodation. Again, this was after the event, and even after the 2nd accused had received payment, deposited it and had it cashed and released to him. All previous communication indicated that the money was to take into account of accommodation and other costs. The KATO board approved the second request and made a direct payment to Fairmont Hotel of Ksh. Ksh. 298,579.74/-.. At the board meeting, the 2nd accused requested the board to consider funding the trip and the KATO board approved Ksh. 500,000/- (see minutes of Board meeting 16.10.2007). Subsequently, the 2nd accused requested the Board to clear an outstanding amount of Ksh. 258,580/- (see minutes 29.01.2008) to Fairmont Hotels in respect of accommodation for the PSs and the board gave its approval to clear the amount as requested (and paid Ksh. 298,579.74 as indicated in the invoice) directly paid to Fairmont. **PW4, Ibrahim Rashid Ali**: a credit manager at Fairmont Hotels and Resort, confirmed that He produced an invoice dated 5th Oct. 2007 addressed to Maniago Safaris showing that Ksh. 652,616/- had been paid while Ksh. 298,579/- was due, but eventually paid on 20th July 2008.. He added that the full amount of Ksh. 951000/- took care of full board accommodation, meals, drinks and taxes.

Having made the above observation, I think what ought to have followed was a requirement of the 2nd appellant to account for the actual expenditure of the allocated funds, which does not appear to have happened.

In the circumstances, that the event was conducted, I am unable to find and hold that 2nd appellant worked in cohort with the 1st and 2nd appellants with an intention to defraud Kenya Tourist Board. Being an offence of conspiracy, it cannot stand against one person. The entire charge must therefore fail.

The **2nd charge of conspiracy is with respect to count II: against the 1st appellant, the 2nd appellant and Maniago Safaris, regarding the Ksh. 400,000/-** paid by the Ministry of Tourism to the company, after the trip to the Mara. **PW12, Mrs. Rosemary Murimi,** then an employee of the Tourism Ministry testified that in December, 2007, she came across an invoice from Maniago Safaris claiming for Ksh. 400,000/- in respect of a trip made by the Permanent Secretaries to Maasai Mara between 5th and 7th Oct. 2007. The invoice was dated 7th October, 2007 and attached to the invoice was a yellow sticker marked to the H/Accounts(Head of Accounts) DCFO(Deputy Chief Financial Officer). The handwritten note, attached to the invoice, dated 21.12.2007 stated *'this is the Ministry's contribution towards this trip that was organised by the Ministry+ other stakeholders. Please arrange to pay.'* The invoice and the note came from the 1st Appellant. PW12 proceeded to raise a requisition order explaining that she raised a direct LSO since no quotations had been invited for the services which had been rendered. The procurement committee was not involved in the trip. She could not explain since the invoice came with instructions to pay for services rendered. **PW13, Joseph Ndungu Kiarie,** then a senior accountant and head of accounting units at the Ministry of Tourism explained that in cases where quotations were not raised if services were procured directly, an LPO would be raised by the procurement department which must be accompanied by an invoice of the service provider for the payment to be processed. He testified that he received payment voucher no. 2533 on 25.06.2006 for his approval and signature in respect of services rendered for the Mara trip, at a cost of Ksh. 400,000/- payable to Maniago Safaris. He stated that the note accompanying the invoice was addressed to him by the 1st appellant, explaining reasons for payment, and asking them to pay. It was also accompanied by an LSO. He completed the authorization part of the voucher and released it for payment to be raised. A cheque was raised for Ksh. 400,000/- payable to Maniago Safaris, dated 27.6.2008 and PW13 signed as one of the signatories.

From the facts set out, it is not in doubt that the 1st appellant directed the finance office to pay the invoiced amount to Maniago Safaris. The handwritten note was proved to be hers, and she admitted this fact. She, however, denied that her note was an authorization for payment, even though it was the basis, according to PW12 that she relied upon to raise a DLSO. Furthermore, the handwritten note was addressed to PW12 to process payment. The reason for the expenditure was only in the knowledge of the 1st appellant and she could not on the same line, distance herself to authorizing its payment. There is agreement that Maniago Safaris was not procured in the normal process for this expenditure. As PW12 testified, there were no quotations for the services said to have been rendered, and it is on this basis that direct LSO was raised, more so since services had been rendered.

The 1st appellant in her defence stated that the Ksh. 400,000/- was the contribution by the Tourism Ministry after the trip being a member of the Kenya Tourism Initiative. She stated that she had made a commitment to pay for the extras incurred in the trip. The 3rd appellant maintained that the costs of the trip were to be met by all players in the industry, this being a public/private partnership. She stated during cross-examination that no specific sum was given to Ministry as its required contribution, and further that no specific budget was shared with stakeholders. She added that she had no knowledge of how much each stakeholder contributed including the Kenya Tourism Board.

PW18, the investigating officer expressed his opinion in cross-examination that the tourism ministry did not have any role in contributing financially to the trip and that the money was paid on the sole instructions of the 1st appellant. During re-examination he reiterated that the 1st appellant did not carry out due diligence to find out how the Ksh. 8.9 million had been spent before authorizing extra payment of Ksh. 400,000/-.

Having considered the above, for the 1st appellant to be guilty of conspiracy in respect of the Ksh. 400,000/- a nexus has to be shown that there was a covert action between her and the 2nd appellant and the 4th accused's company. The reason for the conspiracy from the prosecution's case is that the 2nd appellant invoiced the Tourism Ministry for expenses that had already been taken care of. If that were the case, it was upon the prosecution to show that the 1st appellant was aware of the other alleged payments made directly to the company by the Kenya Tourism Board on the one hand and that made by KATO. This was not expressly proved nor could it be proved by inference. Even though there may be concerns in the manner the payment was authorized, that in my view does not support the charge of conspiracy to defraud. All the ingredients of the offence of conspiracy as set out above must be proved. In this regard, I find that the 1st appellant is not guilty of the offence of conspiracy to defraud under count II. At all material times, the 2nd appellant was acting, in respect of monies paid and received as the director of Maniago Safaris. Thus, having discharged the 1st appellant of the offence of conspiracy under count II, it follows that the 2nd appellant could not have conspired with the company in which he is the director to defraud the public of the monies in question. The offence of conspiracy entails overt acts by two or more persons and cannot therefore be sustained against one person. While Maniago Safaris Limited is a separate legal entity, all the acts in question in this case were executed by its director, the 2nd appellant. In accordance with **section 23** of the Penal Code, the directors of the company bear the responsibility of a company's criminal actions. The 2nd appellant is therefore similarly acquitted of the offence under count II.

On **Count IV the 1st appellant was charged with willful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act.** The charges arose in relation to the 3rd appellant's authorization for payment of Ksh. 400,000/- to Maniago Safaris Limited notwithstanding that the services of the said company had not been procured in accordance with Sections 88 and 89 of the Public Procurement and Disposal Act, 2005.

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

Section 45(2)(b) provides that:

"An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—

(b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures*."*

The prosecution alleged that the 1st appellant failed to follow procurement laws and procedures in ordering for the payment of the Ksh. 400,000/-. The undisputed facts set out earlier are that an invoice for payment of Ksh. 400,000 was presented by Maniago Safaris. This request, when received by the 1st appellant was passed on for payment with a handwritten note. PW12 testified that there were no quotations to this invoice, an indication that the normal procurement procedure was not followed. She explained that she raised a direct LSO to facilitate payments since there were no quotations yet it was clear the services had been rendered. In her defence, the 1st appellant severally claimed that she had not been involved in the procurement of Maniago Safaris. Nevertheless, she went ahead to explain the reasons for the invoice and ask the finance office to make arrangements for payments. The 3rd appellant also stated that there was no budget shared to stakeholders on how much they were required to

contribute to the Mara trip. By this admission, it would appear that the 1st appellant would comply with whatever figure was presented to her as the contribution by the Tourism Ministry. Moreover, the invoice submitted was not supported by evidence of the expenditure for which payment was being sought. **PW13** admitted that even though due process had not been followed, she had to raise payment since services had already been rendered. During cross-examination, **PW12** testified that he did not find any receipts attached to the invoice. It was upon his inquiries that Maniago Safaris forwarded receipts in a letter dated 14.12.2008. The costs in question were referenced as costs of extras for the Permanent Secretaries' trip signed by its managing director at Ksh. 400,040/- and were evidenced in D Exh 5.

Even though the 1st appellant indicated that no queries were raised in respect of the said request, it is clear from the evidence of PW12 and 13 that PW12, and thereafter PW13 simply regularized what was initially an irregular procedure. PW12 reasoned that services had been rendered and thus payment had to be made.

The question therefore, is whether the 1st appellant's actions amounted to willful or careless failure envisaged under Section 45(2)(b). I find that her defence that she was not concerned with procurement untenable. She took responsibility when she received the invoice and gave direction for its payment. Maniago Safaris was not procured by the ministry. The justification for the payment was that it was a contribution for the trip. However, even that claim is not supported by any prior process of procurement or outlined budget on the basis of which such a contribution would have been justified. While it was the duty of the prosecution to proof the charges, it is not lost to this court that it is the 1st appellant who introduced the claim that the payment was contribution of a larger expenditure shared among stakeholders. She admitted that the Ministry was not presented with any specific budget as a stakeholder, and added that she had no idea how much each stakeholder was required to pay, including the Kenya Tourism Board. It appears to me that in this context, the 1st appellant incurred an expense without reference to any applicable law and procedure. In my view, the actions and omissions of the 1st appellant amount to careless failure in this regard. As the accounting officer in the ministry, she was enjoined to ensure that public funds under her charge were incurred prudently and in accordance with the law and procedures. I find that this charge has been proved. The 1st appellant was an accounting officer within the meaning of **section 3** of the Public Procurement and Disposal Act. **Section 3(a)** defines an accounting officer as: '***for a public entity other than a local authority, the person appointed by the Permanent Secretary to the Treasury as the accounting officer or, if there is no such person, the chief executive of the public entity***;…'**Section 27** provides that an accounting officer shall be responsible for ensuring that the public entity charged under him complies with the regulations and any directions with respect to each of its procurements. The Act also requires that a procuring entity should have a procurement plan in line with its budgeting process.

The 1st appellant faced an additional charge in **count V of abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act for conferring a benefit to Maniago Safaris** by issuing instructions for the payment of Ksh. 400,000/-.

The offence under **Section 46** is couched in the following terms:

'A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.'

From the analysis already set out above, it is not disputed that a sum of Ksh. 400,000/- was paid to Maniago Safaris. This followed a presentation of an invoice for the payment of this amount. The 1st appellant proceeded to request PW13 to make arrangements for its payment.

Under **Section 2** a benefit means ***'any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage.***' The prosecution was under a duty, in proving the offence to show that the appellant improperly used her public office to confer a benefit. It was also crucial as part of the ingredients to show the nature of benefit conferred. The 3rd appellant, being the permanent secretary in the Ministry of Tourism was a public officer within the meaning of the law. Having found above that the 3rd appellant was guilty of disregarding laws and procedures before incurring public expenditure, the next issue to determine under this charge is whether that failure amounted to an abuse of office on her part and further that the amount alleged the Ksh. 400,000/- as having been irregularly paid amounts to a benefit in the context of section 2.

As I have reasoned earlier, the 1st appellant's action in my view amounted to willful or careless failure to comply with applicable laws and procedure in incurring the expenditure.

However, from the facts revealed, I also find that charging the 1st appellant with two different offences arising from the same set of facts amounts to duplication of charges. Both of these offences (counts IV and V) arise from the same set of facts, the act of the 1st appellant issuing instructions for the payment of Ksh. 400,000/-. This in my view, amounts to improper splitting of charges which could result in double convictions on the same facts. While the two offences are essentially different in their elements, the evidence relied on by the prosecution to prove the charges are the same. The most appropriate approach that ought to have been adopted by the prosecution was to provide for the offence of abuse of office in the alternative. I find that the circumstances in this case better suit the 5th count and I proceed to acquit the 1st appellant on this charge.

Under **count VI**, the 3rd appellant was charged with **wilful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act.** He also faced an **alternative count of abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Ac**t. The 3rd appellant was accused in this respect for allegedly directly sourcing for the services of Maniago Safaris Limited in disregard to the provisions of Section 74(3) as read with Section 29(3) of the Public Procurement and Disposal Act.

The facts in relation to these charges have been set out above. The engagement of Maniago Safaris to provide services for the coordination of the trip to Mara raised queries with the auditors. The direct payment by CTDLT to the company was one of the questions raised. **PW7, Julius Masivo Sindani,** testified that during the subject financial year, the CTDLT disbursed Ksh. 182 million to Kenya Tourism Board which only acknowledged Ksh. 144 million, the difference being monies that were paid directly to 3rd parties, one of whom was Maniago Safaris which received Ksh. 8,925,444/-. When **PW3, James Mwithia Kilonzo** sought explanation as to discrepancies in reported revenues between the CTDLT and the Kenya Tourism Board, it was explained that some of the monies were paid directly to third parties without going through the accounts of Kenya Tourism Board; this included payment to Maniago Safaris. Upon enquiring from the 3rd appellant, the 3rd appellant informed that the payments were in order and directed PW3 to include them in the book of accounts.

It was established that Maniago Safaris was not procured in accordance with the laws and procedures governing the Kenya Tourism Board. **PW1, Julie Torian Njeru** who was then in charge of procurement and was the chairperson of the tender committee testified that the payment to Maniago Safaris, an expenditure that ought to have gone through the tender committee was not considered by the tender committee at the material period. She also explained that any contribution by the Board to the trip needed to be deliberated and approved by the Board.

PW2, Jake Jonathan Robert Greeues Cooke: chairman of the Kenya Tourism Board testified that the 1st appellant was directed to give a response as to how payments were made directly to third parties, which included the payment that was made to Maniago Safaris by the CTDL. The 3rd appellant's response then was that at the time the payments were made, there was no Board of Directors had been constituted at the time, and that the payments were made as a matter of urgency. He further responded that there was no anomaly in the payment of Ksh. 8.9 million since the services were required urgently and instructions to pay the money had been given by the parent ministry.

This is not supported by the evidence. Firstly, there was no evidence to show that the Tourism Ministry authorised the payment of Ksh. 8.9 million to Maniago Safaris. From the evidence, the ministry sought the approval of Ksh. 30 million as additional budget to the Kenya Tourism Board, and thereafter directed that the money be released. It was not shown that the ministry had involvement in the specific authorization of payment to the company. On the contrary, as PW5, the 3rd appellant enclosed a letter from Maniago Safaris showing the budgeted amount for the trip and directed PW5 to make the payment on its behalf.

Furthermore, as explained by **PW2** the payment to Maniago was made in October 2007, when the Board was in existence till 30th November 2007. **PW2** stated during cross-examination by Mr. Oyatta, that Kenya Tourism Board did not have a board in place between November, 2007 and August, 2008. Even then, activities were organized and supervised by the management; with procurement processes in place ran by the tender committee. The engagement of Maniago Safaris happened before then, and furthermore, the absence of a board was not an excuse for flouting procurement procedures.

The attempt to explain that the subject payment was made by the CTDLT and further that the Kenya Tourism Board was not involved in the planning and financing the trip also fails. The communication by the 3rd appellant to PW5 gives a clear indication. The funds paid, as directed by the 3rd appellant were drawn from the additional budget of Ksh. 30 million approved by the Treasury. This could not therefore have been said to be the CTDL's funds having been allocated to the Tourism Board. The 3rd appellant's response to PW3 also shows that he owned the payments in question by justifying them as proper and directing PW3 to include them in the book of accounts. Were it otherwise, the 3rd appellant ought not to have received and forwarded the payment to Maniago Safaris. It is also peculiar on the 3rd appellant's part to argue that he did not engage Maniago Safaris, yet went ahead to accept a budget presented to him and to authorize payment on the same. The said budget was presented by the same company that alleged to have been appointed to coordinate the trip. As a prudent office, he ought to have questioned the process, and subjected this engagement through the procurement process. Instead, the 3rd appellant unilaterally took it up and asked PW5 to make the payment and delivered the cheque himself, against the requirement of **Section 26(3)(c)** which requires that all procurement procedures should be '***handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services'.*** The obvious objective behind this requirement is to among others ensure transparency and accountability in public processes and related expenditure.

The evidence shows that the 3rd appellant took responsibility when he authorised payment to Maniago Safaris. It is not enough therefore for him to say that he did not participate in the company's procurement. He ought to have subjected the presentation by Maniago Safaris through the procurement process. As PW1 and PW2 confirmed, no such procurement was presented. This manifests a deliberate disregard of the procurement laws and procedures, yet the Board was incurring an expenditure. The explanation of urgency of the payment is not an excuse for flouting procurement procedures.

The 3rd appellant tried to justify that the payment was sought for in the manner used because it was urgent. The law provides for instances when direct procurement may be allowed, under **Section**

74(3) which must meet the following conditions:

‘(a) there is an urgent need for the goods, works or services being procured;

b) because of the urgency the other available methods of procurement are impractical; and

(c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.’

Where urgent need under **section 3** means ***‘the need for goods, works or services in circumstances where there is an imminent or actual threat to public health, welfare, safety, or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable.’***

Where direct procurement is done, Section 75 requires that

‘(a) the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;

(b) the procuring entity shall not use direct procurement in a discriminatory manner; and

(c) the resulting contract must be in writing and signed by both parties.’

If Maniago Safaris’ engagement was a result of direct procurement, it ought to have been in accordance with **Section 29(3)** of the Public Procurement and Disposal Act, which requires approval by the tender committee. I find that the prosecution has sufficiently shown that the proper procurement procedure was not followed. None of the documentation presented was in relation to the subject matter. **Section 27(1)** of the Public Procurement and Disposal Act provides that:

Subject to the Act, all approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.

The 3rd appellant sought to justify payment to Maniago as shown in the evidence but distanced himself on how Maniago Safaris was procured. The two must go hand in hand and he ought to have provided a reasonable explanation as the accounting officer of Kenya Tourism Board. As long as public funds were to be expended whether by contribution or otherwise, the expenditure ought to have undergone the requisite procurement procedure. In line with **Section 27,** the 3rd appellant being the managing Director bore the responsibility of ensuring the Kenya Tourism Board complied with the procurement laws. The 3rd appellant failed in this respect, and I therefore, confirm the 3rd appellant’s guilt on Count VI as charged.

The 3rd appellant was charged also under **count VII** with the offence of f**raudulently making payments from public revenues for services not rendered contrary to Section 45(2)(iii) as read with Section 48 of the Anti-Corruption and Economic Crimes Act.**

Section 45(2)(a)(iii) of the Anti-Corruption and Economic Crimes Act provides that:

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

rendered or not adequately rendered. (Emphasis mine)

The subject payment was Ksh. 8,925,000 made to Maniago Safaris. The 3rd appellant informed **PW5** that the Ministry and the Tourism Board were coordinating a visit by Permanent Secretaries to the Mara together with other stakeholders and was requesting the CTDLT to contribute money on its behalf. The letter also directed that PW5 gets in touch with the director of Maniago Safaris who was coordinating the trip which was estimated to cost Ksh. 8,925,444/- for the period 5th to 6th Oct. 2007. The letter gave a breakdown of costs: accommodation, park fees, special bush meals, & cocktail – Ksh. 5,680,208/-, flights, gifts, & Maasai village – Ksh. 1,942,130/- and media, PR related cross & consultancy – Ksh. 304, 545/-. It is apparent from this Act alone that payment was made on the basis of a budget, which is merely a proposal on expenditure and not a representation of the actual expenditure. The payment was not supported by any documents such as quotations, invoices, or bills in support of expenditure. Furthermore, there is no indication that the said budget went through any approval process, whether by the Board or the internal procurement units.

The Public Procurement and Disposal Act provides for a procedure for requisition and authorization for provision of goods and services. Procurement according to the Act involves all processes needed to certify the provision of goods and services. No procurement procedure was followed as require under the Act.

It is not in dispute that a trip was planned for a delegation of Permanent Secretaries and senior government officials with the aim of highlighting issues facing the tourism industry. This, according to the 1st,2nd and 3rd appellants was done under the banner of the Kenya Tourism Initiatives, thus, stakeholders were required to make a contribution. The expectation under such an initiative was that a budget estimate would be drawn and stakeholders informed of their contribution proportion. This was apparently not done. The only budget it seems is that contained in the letter from Maniago Safaris, at Ksh. 8,925,444/- and the initial budget given by the 3rd appellant to the 1st appellant at Ksh. 1,819,000/-. Instead of acting on the 1st appellant's proposal to seek other alternatives for cost reductions, the 3rd appellant went ahead to approved an even higher budget and authorize payment to be made in advance.

Even as the 2nd appellant justified that certain commitments had to be made in order to secure bookings for the trip, he did not attach such commitments to the letter sent to the 3rd appellant, who in turn did not seek to ensure there was documentation to support any payment in the first place. Indeed, **PW4, Ibrahim Rashid Ali** then a credit manager at the Fairmont Hotel testified that the booking for accommodation of Permanent Secretaries was made on 5th October, 2007 way after the payment was made, and an invoice was issued. This is the date when the participants travelled to the Mara. This just demonstrates the irregular manner in which the 3rd appellant acted in making payments without justification. There was no information on how the budget was arrived at. The 1st appellant admitted that no budget was presented to stakeholders including information on share of contributions by stakeholders.

Moreover, at this stage of issuing the payment in advance, the process of planning was still in progress, and there were no confirmations on the exact number of participants which would have a bearing on the total expenditure. According to **PW17,** the investigating officer, the budget shared by the 2nd accused from Maniago Safaris indicated that it was in respect of 60 people. It also included costs of flights among others. From the evidence advanced, it turned out 27 out of the 30 expected participants turned up for the trip to the Mara. It is also clear from the evidence of the 1st appellant, and **PW6, Julius Kipngetich,** that the Kenya Wildlife Service provided for chopper and caravan to ferry participants throughout the planned trip. Thus, such costs of the intended flights were not therefore spent. It is

therefore, apparent, without making mathematical accuracies that payments were made without full disclosure of the purpose for the said payments and without accounting on the actual expenditures incurred.

With this explanation, it is therefore, clear the services were rendered, in that, if the money was released for facilitating the trip, and the said trip took place, as evidenced by PW5 and PW6. The provision of the Public Procurement and Disposal Act under which this charge was brought criminialises payment for services that were not rendered or adequately rendered. In this case, the charges were brought for the reason that the payment was made before the services were rendered. That is not the intent of the provision. The provision seeks to ensure that public expenditure is not incurred where services are not rendered or are not adequately rendered.

It would have been expected that after the trip had taken place, that accounting of expenditure would be provided to determine if the services were spent according to the expenditure. When **PW3** addressed the 3rd appellant, on the queries raised by Kenya National Audit Office, regarding the discrepancies in revenue as raised in their management letter, the 3rd appellant responded that all the payments were in order and directed **PW3** to include them in the book of accounts. The auditors raised the issue in their management letter dated 21st October 2008 and PW3 addressed the issues to the 3rd appellant in a memo dated 4th November 2008. This was over one year since the subject payments were made and the trip undertaken. The Kenya Tourism Board did not declare or account for the direct payments from CTDLT, part of which was paid to Maniago. It is also puzzling that despite the same not being declared, the 3rd appellant would go ahead to certify them as proper and direct their inclusion in the accounts. Thus, besides the budget breakdown contained in the letter from Maniago Safaris, there was no documentation to attest to the delivery of services in accordance with the payments.

Taking the above cumulatively, I find that the 3rd appellant, being the Managing Director of the Kenya Tourism Board, made payments for services that had not yet been delivered. However, since the services were subsequently delivered, the failure on the 3rd appellant's part was to account for the expenditure incurred. Without such accounting, it is difficult to determine that the services were not adequately provided. Furthermore, the witnesses who attended the event including the appellants attested to the fact that the services were provided for and the trip proceeded according to plan. This would not fall under the cited section. The proper provision would have been Section 45(2) (c) of engaging in a project without prior planning or Section 45(2)(b) on willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to management of funds or incurring of expenditures. For this reason, unfortunately for the prosecution, Count VII could not stand and I find that the prosecution did not prove it beyond a reasonable doubt.

The 2nd appellant and 4th accused (Maniago Safaris) were charged in **Count X and XI** with **fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48 of the Anti-Corruption and Economic Crimes Act.** The charges were in respect of payments of Ksh. 8,925,444/- and Ksh. 400,000/- made to Maniago Safaris by Kenya Tourism Board and the Ministry of Tourism respectively.

Section 45(1)(a) of the Anti-Corruption and Economic Crimes Act creates the offence of fraudulent or otherwise unlawful acquisition of public property or a public service or benefit. The subject in question was the Ksh. 8,925,444/- and Ksh. 400,000/- paid from the Kenya Tourism Board through CTDLT and the Tourism Ministry respectively. This monies fall within the category of public property being monies drawn from public bodies. It is also not in dispute that the monies were paid to Maniago Safaris in which the 2nd appellant is a director. The issues for determination is whether the acquisition of the monies was fraudulent or otherwise unlawful. Fraudulent actions introduce the element of deception purposed at

gaining a benefit.

The prosecution advanced the argument that the 2nd appellant together with the 4th accused acquired Ksh. 8,925,444/- under the guise of expenditure for the Permanent Secretaries' trip yet the money was no spent on the stated purpose. The 2nd appellant denied the charges, stating that the monies disbursed to the 4th accused company were spent on the planned activities. He testified that a series of activities were held by the Kenya Tourism Initiative including: Two media breakfast held in September 2007- 26th and 27th, Nairobi Safari Club as evidenced by the letter of 26.9.2006); and photos; and the visit to the Mara. He stated that as an organiser, he secured bookings at the hotel, and flight for participants. He added that Maniago Safaris also paid for park entrance fees and lunch at Serena Lodge, cocktail at Saruhi Game Lodge, entertainment during the trip. These expenses, he claimed, were part of the expenditure for Kshs. 8.9 million. He explained the Kshs. 400,000/- as monies for extras which were not part of the booking of the accommodation, that is, Kshs. 951,100/-. In re-examination the 2nd appellant maintained that **KATO** paid to Fairmont as it was easy to account by receipt, while media was paid out of 8.9M, Afroline media was the consultant company.

It is not in doubt that the Kshs. 8,925,444/- was paid out to Maniago Safaris. The 2nd appellant received the cheque payment on behalf of the company and went ahead to open a fixed deposit account at Imperial Bank. The 2nd appellant maintains that the money was to be spent on the trip and other activities such as media breakfast meetings, which he faulted the prosecution for failing to investigate. In particular, he faulted PW18's failure to investigate the Kenya Tourism Initiatives activities which were funded by the Ksh. 8,925,444 alleged to have been defrauded; notably, a meeting at Nairobi Safari Club but admitted that he did not cover this aspect and expenditure incurred which was paid from the amount of Kshs. 8,925,44/- alleged to have been defrauded; bookings, reservations and expenditure at Air Kenya and Safari Link Services; 4th accused other bank accounts yet cheques including cheque number 002043 were drawn in these other accounts; witnesses from Mara Serena, Ole Serumi Lodge, several game drives and other establishments visited in the Mara where expenditure was incurred further there were invoices raised by Fairmont Hotel requiring payment of Kshs. 400,000/-.

PW5 testified that the 2nd appellant called informing PW5 that he had been directed to organise for the trip but PW5 indicated that he was waiting for instructions in writing. The discussions around this time revolved around the visit to the Mara which took place from 5th to 6th October 2007. This was also the content of the 3rd appellant's letter dated 24th September 2007. There was also the letter from the 4th accused company that gave a breakdown of the budget for the trip as follows:

a. accommodation, park fees, special bush meals, & cocktail – Ksh. 5,680,208/-,
b. flights, gifts, & Maasai village - Ksh. 1,942,130/-
c. media, PR related costs & consultancy - Ksh. 304, 545/-
d. 2 media breakfast meetings - Ksh. 955,055/-

For purposes of raising the cheque, this letter was not denied in its content by the 2nd appellant, a director at the company. The cheque of Ksh. 8,925,444/- was advanced on the instructions of the 3rd appellant who forwarded the letter for purposes of raising the exact needed amount. The 2nd appellant indicated that there were additional activities including the media breakfast. Yet, those were not included in the budget breakdown. The 2nd accused called DW1 and DW2 in his defence to support his testimony that the media breakfast meeting happened. He relied on photos of the said events and also produced a letter to support his claims. Even though the media event may have taken place, I find that it did not form the subject of the budget breakdown.

A general appreciation of the circumstances under which the monies in question show that even though

there was a general agreement to have a trip for Permanent Secretaries, and further that this was a joint effort to be borne by the stakeholders, there was however, no concrete advance budget agreed upon by the players to be involved. The 1st appellant admitted in her defence that no budget was shared among stakeholders, and she did not have information on contribution by each stakeholder including the Kenya Tourism Board. The 2nd appellant also admitted that the budget or itinerary was not discussed. This would explain why there were variations in the budget i.e. the Ksh. 1,819,000/- that the 3rd appellant communicated to the 1st appellant and the Ksh. 8,925,444/- that seems to have only emanated from the 2nd accused and the company and shared in the first instance with the 3rd appellant. In his re-examination, PW18 referred to Exh. 23(c) which provided Ksh. 7,970,390 for the trip while and twice of Ksh. 348,052/- would go into the media breakfasts. PW18 stated that the 3rd appellant indicated that the media breakfast did not take place.

Maniago Safaris came on board, from the evidence herein, from the letter to the 3rd appellant. It is not clear who appointed it to provide the services although logic would dictate that the 2nd Appellant, who had been asked to facilitate the events by Kenya Tourism Initiative, so an opportunity to gain his company some business. What is clear is that there was no formal procedure for setting out the various parties roles in the events. In the letter to the Kenya Tourism Board, the 2nd appellant indicates that he had already made the necessary arrangements for the trip. The 2nd appellant maintains that services were provided as procured. This fact is not in dispute regarding the trip to the Mara. What was in dispute were the media breakfast which PW18 states, were not carried out. Also disputed were the transport arrangements since the Kenya Wildlife Services provided transport without charging, yet this had been included in the budget of Ksh. 8.9 million. From the above, it is clear that the subject monies were not accounted for. However, it is also clear that the Ksh. 8.9 million was paid to Maniago on the strength of the budget attached to its letter. It has also been established that the 3rd appellant gave instructions for the money to be paid to the company and a budget was attached. The money was to be paid to facilitate the trip. The trip to the Mara took place. And this fact has been admitted by several of the prosecution witnesses as well as the appellants. Thus, on this alone, the charges under count X are at variance with the facts. The particulars allege that the 2nd appellant and Maniago Safaris Limited jointly and fraudulently acquired public property to wit Ksh. 8,925,444.00 from Catering and Tourism Development Levy Trustees (CTDLT) that was due to the Kenya Tourist Board for tourism marketing and promotion activities. The issuance of this money has been admitted by the Kenya Tourism Board. PW5 issued the money on the instructions of the 3rd appellant, who personally received the payment. The payment of 8.9 million was made out of the remaining Kshs. 15 million allocations to Kenya Tourism Board from the CTDLT after approval for the additional funding. The allegations under the count X cannot therefore, stand. If the monies as paid out were not properly accounted for, it was the responsibility of the Kenya Tourism Board to ensure that their service providers conformed to their agreement. In this case there was no contractual basis setting out what services were to be offered and the only basis of what should have been carried out was in the budget annexed to the letter of 19th September, 2007. The parties seemed satisfied by the services offered and no issues arose until the audit. The duty to evaluate falls with the procuring entity and this was not done.

With regard to the last count, appellant and Maniago Safaris Limited were accused of fraudulently acquiring Ksh. 400,000/- from the Ministry of Tourism on the pretext that that the funds were in respect of activities for the promotion of tourism activities by the Kenya Tourist Board. This request was made to the Ministry and the 1st appellant acknowledged the cost and went ahead to authorize payment. The money was paid out eventually and PW13 requested for the receipts to ascertain the expenditure. That alone removes the allegation of fraud on the part of the appellants as charged. It was also confirmed that the trip took place. If the Ministry did not receive value for the money paid out, that would arise in a different context. I therefore, also find that the charge under count XI was not proved to the required standard.

In the end, I find that the prosecution did not prove their case against eh Appellants in respect of counts I, II, V, VII, X and XI beyond all reasonable doubt. The Appeal succeeds respectively. I quash the conviction and set aside the respective sentences. I order that the appellants be and are hereby forthwith set free unless otherwise lawfully held. However, I find that the prosecution proved their case against the 3rd Appellant in respect of count IV and against the 1st Appellant in respect of Count VII. The conviction in respect of the 1st and 3rd Appellants in those two counts is upheld.

On sentence in the respect of the 1st and 3rd Appellants, the same is upheld. For the bonds deposited, the sureties are hereby discharged and if any cash bails were paid the same shall be forthwith refunded to the respective Appellants. For avoidance of doubt, bonds in respect of the 1st and 3rd Appellants are hereby cancelled.

DATED and **SIGNED** this **19TH** day of **MAY, 2016**.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. M/s Betty Mwenesi and Mr. Were for the 1st Appellant.
2. F.N Njanja for the 2nd Appellant.
3. Mr. Saende for the 3rd Appellant.
4. Mr. Warui for the Respondent.