REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CRIMINAL APPEAL NO. 001 OF 2022

FRANCIS ZURIELS MOTURI..APPELLANT

=VERSUS=

REPUBLIC..RESPONDENT

(Being an Appeal from the judgment and sentences delivered by the Hon L. Mugambi, Chief Magistrate (as he then was), on 28th January 2022 in Nairobi CM's Court Anti-Corruption Case No. 15 of 2010)

JUDGMENT

1. The Appellant **FRANCIS ZURIELS MOTURI** has filed this Appeal against the judgment delivered by the Hon L. Mugambi, Chief Magistrate (as he then was) on 28th January 2022. The same was delivered in Nairobi CM's Court Anti-Corruption Case No. 15 of 2010, in which the Appellant together with eight (8) others, were charged with various corruption offences. The Appellant was the 1st Accused.
2. The other eight (8) were: (1) JAMES AKOYA (2nd Accused); (2) WILLIAM GITHAIGA MURUNGU (now deceased) (3rd Accused); (3) DAVID GITHAIGA MURUNGU GITHAIGA (4th Accused); (4) WILFRED MUNYORO WERU (5th Accused), (5) ISAAC NYAKUNDI NYAMONGO (6th Accused); (6) DISCOUNT SECURITIES LTD (7th Accused); (7) ORCHARD ESTATES LTD (8th Accused); and (8) MARY NDIRANGU (9th Accused). The 3rd Accused, WILLIAM GITHAIGA MURUNGU, died

before the trial ended, hence the charges against him abated; thereby leaving the case with the remaining eight.

3. The Charge Sheet had the following seven (7) counts:

    (1) Count 1 (Against the 1st and the 2nd Accused)
    Fraudulent Disposal of Public Property contrary to Section 45(1) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2023, hereinafter also referred to as the ACECA)
    With an Alternative Charge of Fraudulently Making Payment from Public Revenue contrary to Section 45 (2) (a) as read with Section 48 of ACECA.

    (2) Count 2 (Against the 1st Accused)
    Willful Failure to Comply with the Applicable Procedures and Guidelines Relating to Procurement of Property contrary to Section 45 (2) (b) as read with Section 48 (1) (a) of ACECA.

    (3) Count 3 (Against the 4th, 5th, 6th, 7th and 8th Accused)
    Fraudulent Acquisition of Public Property contrary to Section 45 (1) (a) as read with Section 48 of ACECA.

    (4) Count 4 (Against All the Accused)
    Conspiracy to Defraud contrary to Section 317 of the Penal Code Cap 63 Laws of Kenya.

    (5) Count 5 (Against the 1st Accused)
    Deceiving Principal contrary to Section 41 (2) as read with Section 48 of ACECA.

    (6) Count 6 (Against the 4th Accused)

Stealing by Agent contrary to Section 283 of the Penal Code Cap 63 Laws of Kenya.

(7) Count 7 (Against the 9th Accused)
Neglect of Official Duty by a Public Officer contrary to Section 128 of the Penal Code Cap 63 Laws of Kenya.

4. In the judgment that was delivered on 28th January 2022, the 2nd, 8th and 9th Accused were acquitted for lack of evidence. JAMES AKOYA the 2nd Accused was NSSF's Manager for Finance and Investments, MARY NDIRANGU the 9th Accused, was the Internal Audit Manager.

5. The 1st, 4th, 5th, 6th, and 7th Accused were found guilty and convicted on the following counts:

   (a) The 1st Accused was convicted on Count 4 and Count 5.

   (b) The 4th, 5th, 6th and 7th Accused were convicted on Count 3 and Count 4.

6. Upon those convictions, they (the 1st, the 4th, the 5th, the 6th and the 7th Accused) were sentenced as follows:

   (a) The 1st Accused

   (i) On Count 4, he was sentenced to a fine of Ksh 1 Million, and in default, to serve two (2) years.

   (ii) On Count 5, he was sentenced to a fine of Ksh 1 Million, and in default, to serve three (3) years imprisonment; plus an additional mandatory fine of Ksh 2,402,286,744/80 (for occasioning the loss of Ksh 1,201,143,372/40 by NSSF), and in default of paying this additional mandatory fine, to serve a further nine (9) years imprisonment.

(b) The 4th, 5th and 6th Accused

(i) On Count 3, each was to pay a fine of Ksh 1 Million, and in default, to serve three (3) years imprisonment; plus an additional mandatory fine of Ksh 800,762,248/27, and in default, to serve a further nine (9) years imprisonment.

(ii) On Count 4, each was to pay a fine of Ksh 1 Million, and in default, to serve two (2) years imprisonment.

(c) The 7th Accused

(i) On Count 4, the 7th Accused a stock brokerage firm that has since collapsed was fined **Ksh 4,804,573,489/60**; being a sum twice the **Ksh 1,201,143,372/40** it acquired from NSSF and the **Ksh 1,201,143,372/40**, that NSSF lost. The said firm being under statutory management, the court ordered that this fine be satisfied by the Statutory Manager.

7. The Court further barred the convicts from being elected or appointed to public office, for a period of 10 years. This being in accordance with Section 64 of the ACECA.

8. Dissatisfied with the said judgment and aforesaid sentences, the Appellant filed this Appeal **(NAIROBI High Court Anti-Corruption Criminal Appeal No. 001 of 2022)**, challenging both the convictions and the sentences. It is this Appeal that is the subject of this judgment. The Appeal seeks to quash the said convictions and set

aside the said sentences. It is based on the grounds listed in his Petition of Appeal.

9. Which grounds can be summarized as follows:

    1) *That the charges as set out in the charge sheet, were fatally defective.*

    2) *That the learned trial magistrate was biased against the accused.*

    3) *That the Prosecution failed to discharge its burden of proof.*

    4) *That the charge of deceiving principal, and the one of conspiracy, were not proved to the standard of proof required in criminal cases; which is that of beyond reasonable doubt.*

    5) *That the learned trial magistrate anchored his judgment on presumptions and assumptions.*

    6) *That the trial court inferred guilt on the part of the Appellant on wholly circumstantial evidence.*

    7) *That "the judgement is for nothing but reversal, as the Appellant was and still is innocent."*

    8) *That the trial took more than 12 years, hence its findings and consequences are null and void.*

    9) *That the trial court's judgment did not comply with the requirements prescribed in Section 169 (1) of the Criminal Procedure Code (Cap 75 Laws of Kenya), as to the contents of a judgment.*

10) That the amount on which the Appellant was convicted was not the one that had been stated in the charge sheet.

11) That the trial court imposed improper sentences.

10. The Appeal proceeded by way of written submissions; with each party filing its submissions, and which were later highlighted by the parties. On the other hand, DAVID MURUNGU GITHAIGA the 4th Accused, WILFRED MUNYORO WERU the 5th Accused, and ISAAC NYAKUNDI NYAMONGO the 6th Accused, for their part, filed their own Appeal. The same is also in this Court and it is **NAIROBI High Court Anti-Corruption Criminal Appeal No. E001 of 2022**. It proceeded separately and is subject of a separate judgment, as the appeals were not consolidated.

Analysis and Determination

11. The duty of the court in a first appeal was reiterated in **Okeno v. Republic [1972] EA 32**, where it was stated that a first appellate court has a duty to analyze and re-evaluate evidence adduced in the trial court, and make its own finding thereon, as well as arrive at its own conclusion; without being bound by the finding of the trial court. But that in so doing, it has to all along caution itself that it never heard or saw the witnesses.

12. In a criminal appeal, an appellate court needs to carefully analyze not only the Petition of Appeal, but also the charge in the trial court, together with the evidence on record comprised in the rival prosecution and the defence testimonies in that court. It also needs to studiously distill the rival submissions of the parties, the Record of

Appeal, as well as the judgment of the trial magistrate. It also needs to apply the applicable law and settled legal principles, to the facts and evidence on the trial court's record.

13. Upon considering the Petition of Appeal, the rival submissions of the parties, as well as the provisions of law, I find that this Court is to determine the following:

    a) *Whether the Prosecution discharged its burden of proof.*
    b) *Whether the charges on which the Appellant was convicted, were proved to the required standard of beyond reasonable doubt.*
    c) *Whether there was sufficient evidence on record, to sustain the convictions on the two counts;*
    d) *Whether the sentences the trial court imposed on the Appellant were proper; and*
    e) *Whether this Court should in this Appeal interfere with the said convictions and sentences.*

14. From the above issues, the prime questions that need answers in this determination, and which should not be skirted or casually thrown by the roadside, are (a) *Whether NSSF paid DSL, a stock brokerage firm, money for the purchase of shares; (b) Whether DSL in receiving the payment assured NSSF that it had purchased the shares; (c) Who at NSSF was to ensure that the shares had been purchased and initiate payment; (d) Whether or not DSL actually purchased the shares as alleged by its officials, and the NSSF staff in charge of investments; (e) Whether these facts disclose any criminal offence(s); and (f) Who should bear this criminal responsibility?*

The Charge Sheet: Were the Charges Defective?

15. The Appellant has in this Appeal, asserted that the charges upon which him and his co-accused, were tried and convicted, were defective. In determining whether a charge is defective, as to warrant the setting aside of a conviction, a court has to consider whether the charge sheet contains sufficient details and particulars as would enable the accused to know the case against them.

16. Such details and particulars include: *the wrongful act they are alleged to have committed; the date and sometimes the exact or approximate time of such act; the complainant/victim where appropriate; as well as the provisions of law violated*.

17. Defects in a charge sheet need to be those that are manifest on the face of the record, and not those that arise from craft of interpretation, from sheer application of logic, philosophic rationalization, extravagant and pedantic examination, a tooth-comb analysis, or those of mere grammar or punctuation. The latter would bother a grammarian and not a court of law. In essence courts adopt a realistic and pragmatic approach rather than an abstract and academic approach.

18. I hold that it is not every minor or minute error or slip or goof in a charge would amount to actionable defect as to abort the charge. Such an approach would fly in the face of Article 159 of the Kenya Constitution. Which provisions enjoin courts to determine cases on merits and substantive justice, and not lofty procedural niceties and technicalities.

19. Upon scrutinizing the charge sheet, I do not find the charges therein to be defective at all. The charge sheet as drawn had enough

details and particulars as to who were charged, the acts and omissions they were accused of, the particulars of such acts, as well as the laws that the alleged conduct violated.

The Burden of Proof and the Standard of Proof

20. The Appellant has in this Appeal asserted that the prosecution neither discharged its burden of proof, nor proved the case to the required standard of proof. At the trial, the prosecution called a total of thirty-five (35) witnesses including the Fund's two successive Managing Trustees, NAFTALI OKONG'O MOGERE (PW11) and RACHAEL KHAVAYA LUMBASYO (PW16), and many other staff of the Fund.

21. Those witnesses testified on oath and were extensively and intensively cross examined by the Appellant's counsel. The defence also extensively presented its case and determinately endeavored to discount the charges. In putting forth its case, the prosecution has to discharge the burden of proof, as well prove the charges to the required standard of proof. Which in criminal cases is beyond reasonable doubt. On the burden of proof, it is clear that in a criminal case, the legal burden of proof rests with the prosecution, and not the accused.

22. The Appellant has maintained that the prosecution did not discharge its burden of proof; that the charges were not proved beyond reasonable doubt; that there wasn't sufficient evidence on record to sustain the convictions.

23. Corruption, and especially misappropriation and theft of public funds, is a very serious crime. Despite that grave nature of corruption

offences, those that are accused of committing them should like those accused of other crimes and offences, be subjected to due process of law, rather than lynching or crucifixion. To prosecution rather than persecution.

24. As with all criminal cases, the burden of proof in terms of Sections 107, 108 and 109 of the Evidence Act, is on the prosecution to prove that the offence was committed, and that it was committed by the accused. In Criminal cases, the burden is always generally on the prosecution and not the accused.

25. Further, corruption offences like all other Criminal charges, has to be proved to a standard that is higher than the civil cases' balance of probability. In criminal cases the standard of proof is that of beyond reasonable doubt. And where there is reasonable doubt, the benefit of that doubt is usually given to the accused, and not the prosecution, despite the gravity and seriousness of the offence.

26. The need for this higher standard is even higher in offences carrying heavier sentences, such as corruption offences on which Section 48 of the ACECA imposes additional mandatory sentence, over under above the sentence imposed. The additional mandatory sentence being twice the benefit earned or the loss incurred.

27. The Appellant has contended that there was variance between the amount on which he was convicted and the amount stated in the charge sheet. The amount stated in the charge sheet was **Ksh 1,601,576,461/65**, and he was convicted on **Ksh 1,201,143,372/40**. Hence that even the computation of the additional mandatory sentence at Ksh **2,402,286,744/80** was in error. On this I hold that conviction is based on the amount proved.

28. Similarly, the computation of the additional mandatory fine should be based on the amount proved. I do not see the problem with the charge sheet having stated **Ksh 1,601,576,461/65** and the evidence adduced having proved only **Ksh 1,201,143,372/40**. Logically that is even better for him, as the additional mandatory sentence would have been twice **Ksh 1,601,576,461/65**, had this figure been proved. I hold that there was no error and the learned magistrate applied his mind correctly on arriving, as he did, at a sum double the amount that was actually proved in evidence. Afterall, in litigation, proof is everything.

Was Conspiracy Proved?

29. The Appellant has in this Appeal contended although he was convicted on the charge of conspiracy to defraud, conspiracy was never proved. Further that neither was there evidence that a meeting was held to hatch conspiracy. That on a charge of conspiracy, evidence of the holding of such a meeting is necessary.
30. This is a clearly unfortunate misstatement of the law. Conversely, I hold that there doesn't have to be a formal meeting for conspiracy to exists or come into being. The *Black's Law Dictionary* has defined the term conspiracy as ***"An Agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and action or conduct that furthers the agreement."*** (11th Edition at Page 387)
31. It is the meeting minds rather than a physical meeting of persons or bodies; the being in consensus and in agreement with one another. Provided there is a common intention of the conspirators to act in a

particular manner or fashion, and to achieve a particular result. Which in this case was to defraud the NSSF. Such agreement is usually a "gentleman's" agreement that is informal and not reduced into writing; and neither does it require the convening of a formal or minute-taking meeting.

32. On this point, *Archibold's Criminal Pleadings, Evidence and Practice* (Sweet & Maxwell), observed as follows:

> ***"...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."*** (at page 3025-3026)

33. In ***Stephen Odiaga Kilombero & Another v. Republic (2019) eKLR***, the court, clarified the ingredients of conspiracy, and emphasized the requirement of agreement between two or more persons and a common criminal purpose. The scheme in the conspiracy the subject of this Appeal, was a pre-meditated, ingeniously conceived, and cunningly executed fraud on a public fund of pensioners. Who are a vulnerable segment of society. This was a cunning and systematically choreographed conspiracy by the Appellant together with the directors/officials of DISCOUNT SECUTRITIES LTD to defraud the NSSF; and which conspiracy was actually executed. I am therefore satisfied beyond guess work and peradventure, that the conspiracy was proved beyond reasonable doubt.

Culpability and the Shifting the of Blame

34. The Appellant has in his defence in the trial court, and in this Appeal, argued that the decision to invest was made by the Funds Board of Trustees and not him. Hence that he had nothing to do with the decision to buy shares and DSL's subsequent pretended purchase of shares. I can't disagree more; because conversely, his complicity and role in this whole scam is as clear as pikestaff.

35. He is the one who was NSSF's Investment Manager at the time the idea of investment in the alleged shares was floated and approved. He floated and followed up with the idea of those shares, and actually by his multiple memos convinced the Fund's Board of Trustees to find the proposal viable and endorse it. Given also that he was the Fund's Investment Manager and the one under whose docket the purported investment scheme was located. In that capacity and office, he was expected to act diligently, prudently, honestly, and protect as well as further the best interests of the Fund, his employer.

36. This he did not do. Instead, he in conspiracy with DSL's officials, hatched and then executed the said scheme that defrauded the Fund of such a monumental sum of money. More than a billion in Kenya currency. Thereby throwing not only Fund his employer under the bus, but also the Kenyan pensioners whose money was lost in this scam.

37. This was a mammoth fraud perpetrated on Kenyan pensioners. Public officials need to learn even painfully such as is the case here, to respect public funds and restrain themselves form expropriating, appropriating, misappropriating such funds. The magnitude of

victimology and the impact of this scam to the economy, were immense, and such as cannot just be past-tensed.

38. From the evidence on record, the Appellant wrote many memos (estimated to be not less than 45 in number) to the Fund's Managing Trustee containing information and statements to the effect that DSL had actually purchased for Fund, shares at the Nairobi Stock Exchange. Which information and statements he well knew to be false. Thereby willfully misleading the Fund's Board of Trustees; and as a result, he caused it to commit to paying, and actually paying DSL, supposedly for the shares as alleged and pretended by him and DSL's directors. Yet in fact no shares had been purchased or were ever purchased.

Agent- Principal Relationship and the Breach of Trust

39. His criminal responsibility, *inter alia,* arises both from his demonstrated and otherwise glaring complicity in the scheme, and from his fiduciary as well as agency relationship with the Fund his employer.

40. I find that in many circumstances, an agency relationship can in appropriate circumstances, arise or be inferred in an employee-employer relationship. Such as the circumstances that obtained in this case. As an agent of his employer, he had a duty to act in good faith and for the interest of his employer the Fund. Further to refrain from conduct or decisions that could occasion harm or loss to the employer.

41. Besides, his office as that of any public servant or state officer, was one of public trust. This he through that dishonest scheme and

resultant scam, betrayed. By his fraudulent actions and conduct of deceiving his employer, and acting in concert with others to defraud it, and plunder the pensioners' hard-earned funds. By these, he occasioned loss of such a monumental and almost unprecedented loss of such public funds.

42. It is as disgusting as it is perturbing, that with his complicity non-action and willfulness, NSSF continued to periodically make payments for shares that never were; and with those payments not begetting the intended shares. DSL and its officials, claimed to have purchased shares for NSSF, yet they had not purchased any shares.
43. This was discovered upon cross-checking the Nairobi Stock Exchange reference numbers with the information from the Central Depository Settlement Corporation which confirmed that no purchase at all was ever made. This was with the assistance of a consultant the Fund deployed on forensic audit and fact-finding.

Whether the Delay in Concluding the Trial, Rendered it a Mistrial

44. The Appellant has in his Petition of Appeal stated that the trial in the trial court took more than 12 years to conclude, hence that his rights were violated, the trial was a mistrial, hence that the trial court's final judgment and consequential orders are a nullity. As to this, it is a sigh of relief that the long and winding trial was finally concluded, and the trial court finally arrived at a verdict. It ended afterall.
45. As to the prolonged trial, I have perused the original record of the trial court. I have deciphered that neither the trial court nor the learned magistrate are to blame for the delay. The delay was occasioned partly by a multiplicity of adjournments sought by the

parties including the Appellant's own counsel, as well as other circumstances such as: (a) The number of the charges, (b) The number and voluminous nature of exhibits, (c) The large number of witnesses that testified including experts, (d) The number of defence counsel, and (e) The complex nature of the case as well as the convoluted character of the scam and fraud.

46. Noting also that for each witness, there had to be examination-in-chief, multiple cross-examination, as well as re-examination. Besides judicial time and resources had to be shared between this case and other cases. I am not in any way supporting the delay of cases. The prolonged delay in concluding this case, was obviously unfortunate and should be called out. I however do not agree with the assertion that it engendered a miscarriage of justice, or rendered the trial a mistrial.

Did the Judgment Comply with Section 169 (1) of the Criminal Procedure Code?

47. Another ground of this Appeal, is that the trial court's judgment did not comply with the requirements prescribed in Section 169 (1) of the Criminal Procedure Code (Cap 75 Laws of Kenya), as to the contents of a judgment. As to whether the judgment is compliant with the said provision, as to the essential contents of a judgment, I hold that it is compliant. In fact both as to form, and as to substance. In any case minor non-compliance as to the form and even substance is curable under Section 159 of the Kenya Constitution as to focusing on substantive justice rather than technicalities. It is not every technicality or minor slip that will warrant the setting aside of

a judgment, and Appellants are encouraged to base their Appeals on solid and grave enough grounds.

Final Determination and Orders

On the Appeal on Conviction

48. From the totality of the aforegoing analysis, I have arrived at the conclusion, that the prosecution discharged its burden of proof, and proved its case beyond reasonable doubt. There was sufficient evidence on record to sustain the convictions on the two counts (Count 4 and Count 5, respectively). I therefore uphold the Appellant's conviction on those counts, hence his Appeal against conviction fails accordingly.
49. As to his Appeal against the sentences, I need to first clarify that shying away from assigning blame for the Appellant's aforesaid conduct and actions, or from penalizing this larcenous and fraudulent scheme, is in my view, not only an abdication of judicial function, but also a condoning of impunity and the lack of accountability.
50. On the other hand, cracking the whip on it, is a fulfillment of patriotic duty under Article 10 and 73 of the Kenya Constitution 2010, as well as the legal provisions under which the Appellant was convicted. Further, by the fact that he was the Fund's Manager in charge of Investment and the one who promoted the said scheme, he was the fulcrum of the scam, hence the one to bear the highest responsibility for it.

The Appeal on Sentence

51. The Appellant has faulted the sentences imposed on him, and described them as improper. I find that the principal sentences imposed on the Appellant, including the principal fine and the additional mandatory sentence, to be neither unreasonable, harsh, excessive nor illegal. The additional mandatory fine for its part, was in accordance with Section of the ACECA. Which states that as follows:

Section 48 (1)

"A person convicted of an offence under this Part shall be liable to:

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss."

Section 48 (2)

"The mandatory fine referred to in subsection (1) (b) shall be determined as follows:

(a) The mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1) (b):

(b) If the conduct that constituted the Offence resulted in both a benefit and loss described in subsection (1) (b), the mandatory fine shall be equal to two

times the sum of the amount of the benefit and the amount of the loss.

52. I am satisfied that the scam occasioned not only loss to NSSF and the pensioners' funds, but also conferred benefit and gain on the conspirator perpetrators. In my view, where there is common intention and conspiracy, the benefit or gain does not have to accrue or be conferred to each one of the conspirators.

53. Indeed, a benefit or gain to any one or more of them, is a benefit or gain to all of them. Afterall the glue that holds co-conspirators together is their common intention and the scheme they have set out to execute. Such that each one of them is liable for the acts of his co-conspirators in furtherance of the common intention and devised scheme; and he will be jointly liable with those that eventually execute the scheme as planned. Non-eventual participation notwithstanding; as co-conspirator are like conjoined twins joined at the hip.

54. In corruption cases, there is that which will have motivated the perpetrator into the corrupt conduct. The motivation or incentive for the conduct being the potential gain or benefit likely to accrue or be derived from it. No one will be involved in a corrupt scheme, if he is certain that he will not derive any gain or benefit from it at all, and that it is all for nothing.

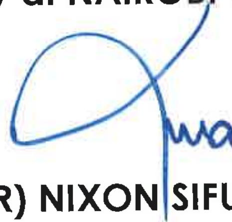
55. Whether you describe it as a gain, benefit or other, it is what in anti-corruption jurisprudence falls under the definition of a benefit. This was present in this particular case. To put this in perspective more aptly, it can be said that crime is attractive and seductive; and corruption offences and economic crimes, are even more attractive

and more seductive. It is that motivation that makes the latter more attractive and more seductive. For that reason, resilient efforts have to be made to tame that thirst and appetite, as well as severely punish corruption.

56. Having found the sentences to be neither unreasonable, harsh, excessive nor illegal. I hereby uphold those sentences, including the principal fines as well as the additional mandatory fine of **Ksh 2,404,286,744/80**, and see no need of interfering with them. Except that, considering the Appellant's advanced age, he shall in default of paying the said additional mandatory fine, serve 5 (five) years imprisonment instead of the nine (9) years decreed by the trial court.

57. I also uphold the sentence barring the Appellant from being elected or appointed to public office, for a period of 10 years. The upshot on sentence therefore, is that except for this substitution of the imprisonment in default of payment of the additional mandatory, the Appeal on sentence fails.

DATED and DELIVERED Virtually at NAIROBI on this 3rd July 2024.



PROF (DR) NIXON SIFUNA

JUDGE