REPUBLIC OF KENYA

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IN THE CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT AT MILIMANI

ANTI-CORRUPTION CASE NUMBER 1 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

KIOKO MIKE SONKO MBUVI GIDION *alias* MBUVI GIDION KIOKO MIKE SONKO *alias* MBUVI GIDION KIOKO *alias* MIKE SONKO MBUVI GIDION KIOKO *alias* MBUVI GIDION KIOKO SONKO.....1ST ACCUSED

ROG SECURITY LIMITED.....2ND ACCUSED

ANTONY OTIENO OMBOK *alias* JAMAL.....3RD ACCUSED

RULING OF THE COURT

PART I: INTRODUCTION AND BACKGROUND

(1) Like gold dust, this seldom occurs in criminal trials. For a second time, upon remittal by the High for reasons to become apparent hereinafter, a decision is being rendered pursuant to sections 210 and/or 211 of the Criminal Procedure Code (hereinafter "the CPC"), whether the evidence presented by the prosecution warrants a Defence. Lest we forget, the test of a *prima facie* case – which was enunciated by the Court of Appeal of East Africa (hereinafter "EACA")[1] in **Ramanlal Trambaklal Bhatt vs. R [1957] 1 EA 332** – was catalyzed by a remittal by the High Court, which provided EACA with fodder to weave the test along the grain of the infirmities which characterized directions of the High Court to the then trial Magistrate.

(2) On 27th January 2020, the Accused persons were arraigned in Court and charged with 8 Counts of diverse offences. However, the charges were later substituted with 13 Counts of offences, for which all the Accused persons took fresh plea on 14th September 2020.

(3) In his Ruling dated 21st December 2022, rendered under section 210 of the CPC, my learned brother, Hon. Dr. D. Ogoti, found the charges defective in substance on account of vagueness, and proceeded to acquit all the Accused persons from all the 8 Counts of offences under section 210 of the CPC.

(4) However, upon an appeal to the High Court by the Director of Public Prosecutions (hereinafter "the DPP"), the findings and conclusion of my learned brother were set aside by the High Court (by **Prof. Dr. Nixon Sifuna, J.**) on 11th December 2024, on the premise that the decision was erroneously anchored on the charges set out in the charge sheet dated 27th January 2020, instead of the correct charges set out in the amended charge sheet dated 7th September 2020 and stated to the Accused persons on 14th September 2020. In the Judgment, the High Court ordered and directed as follows, at paragraph 31: **"... (c) This case shall be retried by a Magistrate other than**

[1] A bench constituting **Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA,** as they then were, sitting in Dar-Es-Salaam Tanzania.

Hon. D.N. Ogoti. Who shall start by making a fresh ruling under section 210 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya), on whether on basis of evidence so far on record, the Accused persons have a Case to Answer. (d) The said ruling be made within 30 days from the date of this judgment."

PART II: CHARGES SET OUT IN THE AMENDED CHARGE SHEET DATED 7TH SEPTEMBER 2020, AS STATED AND EXPLAINED TO THE ACCUSED PERSONS ON 14TH SEPTEMBER 2020

(5) On 14th September 2020, five clusters of offences namely conspiracy to commit an offence of corruption, abuse of office, conflict of interest, money laundering, and acquisition of proceeds of crime, packaged into thirteen Counts, as set out in the Charge Sheet dated 7th September 2020, were stated and explained to the Accused persons as follows:

(i) **Under Count 1, the three Accused persons were charged with the offence of conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. The particulars of the offence were that on or about 10th January 2019 and 19th January 2019, in Nairobi City County, within the Republic of Kenya, being the Governor of Nairobi City County Government, a private limited liability company and its director, the Accused persons jointly and knowingly conspired to commit an offence of corruption, namely abuse of office by extorting the payment of Kshs. 10,000,000/= as an inducement to facilitate payments to Web Tribe Limited by Nairobi City County Government, and thereby improperly conferred a benefit on the Governor of Nairobi City County Government and Antony Ombok through ROG Security Limited.**

(ii) **Under Count 2, the 1st Accused was charged with the offence 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. The particulars of the offence were that on or about 10th January 2019 and 19th January 2019, in Nairobi City County, within the Republic of Kenya, being the Governor of Nairobi City County Government, in abuse of his office, the 1st Accused improperly conferred upon himself a benefit of Kshs. 10,000,000/= from Web Tribe Limited through ROG Security Limited as an inducement to facilitate payments to Web Tribe Limited by Nairobi City County Government.**

(iii) **Under Count 3, the 1st Accused was charged with the offence of 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. The particulars of the offence were that between 10th January 2019 and 19th January 2019, within the Republic of Kenya, being an agent of a public body, to wit the Governor of Nairobi City County Government, the 1st Accused knowingly acquired an indirect private interest in a contract connected with a public body, to wit Contract for Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, issued by Nairobi City County Government to Web Tribe Limited by Nairobi City County Government, by receiving a sum of Kshs. 10,000,000/= from Web Tribe Limited, through ROG Security Limited.**

(iv) Under Count 4, the three Accused persons were charged with the offence of money laundering contrary to section 3(b)(i) as read with section 16 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009. The particulars of the offence were that between 14th January 2019 and 19th January 2019, within the Republic of Kenya, being the Governor of Nairobi City County Government, a private limited liability company and its director, with intent to unlawfully dispose of monies received from Web Tribe Limited, the Accused persons jointly engaged in transaction to conceal an amount of Kshs. 10,000,000/= whilst having reason to believe that the said monies were proceeds of crime.

(v) Under Count 5, the 2nd and 3rd Accused persons were charged with the offence of acquisition of proceeds of crime contrary to section 4 as read with section 16 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009. The particulars of the offence were that on or about 14th January 2019, at Equity Bank Limited within the Republic of Kenya, being a private limited liability company and its director, the 2nd and 3rd Accused persons received property namely a sum of Kshs. 5,000,000/= from Web Tribe Limited through Equity Bank Limited account number 0950xxxxx6136, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime.

(vi) Under Count 6, the 2nd and 3rd Accused persons were charged with the offence of acquisition of proceeds of crime contrary to section 4 as read with section 16 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009. The particulars of the offence were that on or about 16th January 2019, at Equity Bank Limited within the Republic of Kenya, being a private limited liability company and its director, the 2nd and 3rd Accused persons received property namely a sum of Kshs. 5,000,000/= from Web Tribe Limited through Equity Bank Limited account number 0950xxxxx6136, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime.

(vii) Under Count 7, the 1st Accused was charged with the offence of acquisition of proceeds of crime contrary to section 4 as read with section 16 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009. The particulars of the offence were that on or about 19th January 2019, at Equity Bank Limited within the Republic of Kenya, being an agent of a public body to wit the Governor of Nairobi City County, the 1st Accused received property namely a sum of Kshs. 3,000,000/= from ROG Security Limited through Equity Bank Limited account numbers 1380xxxxx3608; 0350xxxxx5757; and 1620xxxxx9567, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime.

(viii) Under Count 8, the three Accused persons were charged with the offence of conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. The particulars of the offence were that on or about 13th April 2019 and 30th April 2019, in Nairobi City County, within the Republic of Kenya, being the Governor of Nairobi City County Government, a private limited liability company and its director, the Accused persons jointly and knowingly conspired to commit an offence of corruption, namely abuse of office by extorting the payment of Kshs. 10,000,000/= as an inducement to facilitate payments to Web Tribe Limited by Nairobi City County Government, and thereby improperly conferred a benefit on the Governor of Nairobi City County Government and Antony Ombok through ROG Security Limited.

(ix) Under Count 9, the 1st Accused was charged with the offence 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. The particulars of the offence were that on or about 13th April 2019 and 30th April 2019, in Nairobi City County, within the Republic of Kenya, being the Governor of Nairobi City County Government, in abuse of his office, the 1st Accused improperly conferred upon himself a benefit of Kshs. 10,000,000/= from Web Tribe Limited through ROG Security Limited as an inducement to facilitate payments to Web Tribe Limited by Nairobi City County Government.

(x) Under Count 10, the 1st Accused was charged with the offence of 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. The particulars of the offence were that between 13th April 2019 and 30th April 2019, within the Republic of Kenya, being an agent of a public body, to wit the Governor of Nairobi City County Government, the 1st Accused knowingly acquired an indirect private interest in a contract connected with a public body, to wit Contract for Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, issued by Nairobi City County Government to Web Tribe Limited by Nairobi City County Government, by receiving a sum of Kshs. 10,000,000/= from Web Tribe Limited, through ROG Security Limited.

(xi) Under Count 11, the three Accused persons were charged with the offence of money laundering contrary to section 3(b)(i) as read with section 16 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009. The particulars of the offence were that between 25th April 2019 and 30th April 2019, within the Republic of Kenya, being the Governor of Nairobi City County Government, a private limited liability company and its director, with intent to unlawfully dispose of monies received from Web Tribe Limited, the Accused persons jointly engaged in transaction to conceal an amount of Kshs. 10,000,000/= whilst having reason to believe that the said monies were proceeds of crime.

(xii) Under Count 12, the 2nd and 3rd Accused persons were charged with the offence of

acquisition of proceeds of crime contrary to section 4 as read with section 16 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009. The particulars of the offence were that on or about 25th April 2019, at Equity Bank Limited within the Republic of Kenya, being a private limited liability company and its director, the 2nd and 3rd Accused persons received property namely a sum of Kshs. 5,000,000/= from Web Tribe Limited through Equity Bank Limited account number 0950xxxxx6136, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime.

(xiii) **Under Count 13, the 2nd and 3rd Accused persons were charged with the offence of acquisition of proceeds of crime contrary to section 4 as read with section 16 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009. The particulars of the offence were that on or about 30th April 2019, at Equity Bank Limited within the Republic of Kenya, being a private limited liability company and its director, the 2nd and 3rd Accused persons received property namely a sum of Kshs. 5,000,000/= from Web Tribe Limited through Equity Bank Limited account number 0950xxxxx6136, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime.**

(6) Each Accused denied the truth of each charge. The prosecution called nineteen (19) witnesses and produced one hundred and thirteen (113) documentary exhibits in support of the prosecution case.

PART III: THE DPP'S SUBMISSIONS

(7) In their written submissions dated 24th December 2024 and filed on even date, learned Prosecution Counsel Mr. W. Nyamache and Mr. Akula instructed by the DPP, submitted that the three (3) Accused persons were charged on 27th January 2020 but the prosecution filed a substituted charge sheet dated 7th September 2020 which was duly admitted by the trial Court. It is submitted that the prosecution called nineteen (19) witnesses and produced one hundred and thirteen (113) documentary exhibits in support of its case and that the prosecution closed its case on 27th July 2022.

(8) Regarding the standard of evidence required at this stage, the said learned prosecution counsel submit that the standard of establishing a *prima facie* case is neither beyond reasonable doubt nor to a level that determines the guilt or innocence of the Accused persons, but sufficient enough to place the Accused persons to answer to the charges, citing the ***Oxford Companion of Law, page 907,*** which defines a *prima facie case* as **"A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive."** Further reliance is placed upon ***Mozley and Whiteley's Law Dictionary, 11th Edition,*** which defines a *prima facie* case as follows: **"A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case then is one which is established by sufficient**

evidence, and can be overthrown only by rebutting evidence adduced by the other side." Besides, the said learned prosecution counsel have fortified this proposition with the holding in **Republic vs. Charles Kimani Mbugua [2017] eKLR,** where the Court stated as follows: **"However, at this stage of the trial it is enough that the evidence adduced affirms that the allegation is made out to the reasonable satisfaction of the Court ... My understanding of a prima facie case is not one where this Court has to decide the Accused innocence or guilt, but to review the evidence and consider whether the prosecution has put up a case and materials to the extent to fairly call the Accused to defend himself."** For a similar proposition, further reliance is placed upon **Ronald Nyaga Kiura vs. Republic [2018] eKLR.**

(9) Regarding the question of designation and identity of the 1st, 2nd and 3rd Accused persons, the said learned prosecution counsel submit that through the investigating officer, **PW19/D19**, the prosecution vide the letter dated 23/09/2019 to the Government Printer produced the response thereto dated 27/09/2019 **[Exhibit 112]**, provided Gazette Notice Vol 117 dated 16/08/2017, Gazette Notice No. 118 dated 18/08/2017, and Gazette Notice No. 11 dated 10/02/2012 produced as **Exhibit 113** and that these Exhibits confirmed the designation of the 1st Accused as the Governor of Nairobi City County (hereinafter "the NCCG") and change of his names. Further, it is submitted that through **PW12/D11,** an officer from the Registrar of Companies, the prosecution produced a letter from EACC dated 2/12/2019 **[Exhibits 40]**, another letter from EACC dated 20/06/2019 **[Exhibit 42]**, a CR13 Report dated 2/07/2019 **[Exhibit 43]**, and incorporation documents of ROG Securities Limited **[Exhibit 44 (a – g)]**, through which the prosecution confirmed the 3rd Accused person as the Director of the 2nd Accused, a private liability company.

(10) Concerning the relationship between Web Tribe Limited and NCCG, it is submitted that **PW12/D11,** an officer from the Registrar of Companies, produced the following documents in respect of Web Tribe Limited: a letter from EACC dated 11/07/2019 **[Exhibits 38]**, a CR13 Report dated 24/07/2019 **[Exhibit 39]**; another letter from EACC dated 2/12/2019 **[Exhibit 40]**; and the incorporation documents of Web Tribe Limited **[Exhibit 41 (a – i)]**. It is thus urged that the prosecution proved that **PW2/D1** and **Pw 8/D3,** were the directors of Web Tribe Limited.

(11) Pertaining the relationship between the 1st and 2nd Accused persons, it is submitted that in their testimonies, **PW1/D6,** an officer in the ICT Department ***(the user Department),*** at Nairobi City County between 2012 – 2020, **PW5/D5,** the NCCG Secretary between 2013 - 2015, **PW3/D7** the *Ag.* County Secretary, NCCG in 2019 and **PW4/D8,** the County Attorney in 2019, confirmed that NCCG and Web Tribe Limited had a contractual relation as demonstrated by the Contract dated 08/04/2014 **[Exhibit 2]**, the Addendum dated 05/04/2019 **[Exhibit 3]**, and another Addendum dated 07/05/2019 **[Exhibit 4]**. It is submitted that the above evidence corroborates the testimony and evidence of **PW2/D1, PW8/D3** and **PW9/D2,** who were directors and employee, respectively, of Web Tribe Limited on the existing contractual relationship between Web Tribe Limited and NCCG, and that from **Exhibit 2,** Web Tribe Limited was to establish an electronic revenue collection and payment solution to NCCG, and that the duration of the contract was five (5) years. It is submitted that upon expiry, on or about 04/04/2019, the contract was extended twice vide the two addenda **[Exhibits 3** and **4]**, for a further period of 60 days expiring on or about 06/06/2019.

(12) For the DPP, it is submitted that from the proceeds collected through the Jambopay system which was the system developed by Web Tribe Limited as per the contract [**Exhibit 2**] NCCG was to pay Web Tribe Limited a commission.

(13) In relation to the question of the pending payments owing and due to Web Tribe Limited by NCCG, the said prosecution counsel submit that in their testimonies, **PW2/D1, PW8/D3** and **PW9/D2,** stated that Web Tribe Limited had challenges receiving their payments from NCCG since most of their payments were unjustly delayed. Further, it is submitted that **PW2/D1** stated that he formally and informally raised complaints with the NCCG and the 1st Accused person on the unjust delay in receiving payments and that the 1st Accused held meetings with **PW2/D1** at the 1st Accused's residence in Nyari (in Kiambu County) and later, in Kikambala and Kanamai homes (both located Kilifi County) sometime in January 2019. It is submited that this testimony was corroborated in cross-examination of **PW2/D1,** by the counsel of the 1st Accused, where a reference was made on **PW2/D1**'s statement dated 24/01/2020 prodcued as **DExhibit 7,** and the audio recordings marked as **DMFI 12 – DMFI 33.** It is submited further that **DMFI 17** being an audio recording of **PW2/D1** and 1st Accused at Kanamai recorded on 10/01/2019 as per the cross-examination of **PW2/D1,** placed PW2/D1 at the residence of the 1st Accused in Kanamai, within Kilifi County. It is submitted that the audio recording was admitted by the 1st Accused, who presented the same during cross-exmination. Further, it is submitted that **PW14/D17** confirmed vide **Exhibits 60** and **61,** that indeed on 10th January 2019, there was a message from **PW2/D1,** to the 1st Accused, stating that **"am here"** and a reply **"okay",** signifying the arrival of **PW2/D1** in Kikambala, for the meeting. Besides, it is submitetd that **PW2/D1** further stated that after the said meetings, they communicated via SMS and WhatsApp texts and calls and that the 1st Accused demanded for bribes to facilitate payment of the pending payments to Web Tribe Limited. In addition, it is submitted that **PW2/D1** testified that the WhatsApp conversation refered to a term **"transfer of file"** which he understood to mean the bribe demanded by the 1st Accused during the said meetings. It is argued the assertion of PW2/D1, were corrobrated by the tetimony of **PW19/D19,** the Investigating Officer, and **PW14/D17,** a Digital Forensic Examiner who prepared two forensic reports produced as **Exhibit 60 and 61** following his forensic examination of the **PW2/D1's** sumsung mobile SM – 6960F Galaxy S9. It is further argued that **PW2/D1** testified that while at Nairobi, a person who introduced himself as **"Shaw wa Governor",** a person he did not know, and whose telephone number was +254724xxx333, reached him on phone and directed him to pay the 1st Accused vide the 2nd and 3rd Accused persons.

(14) Concerning the question of unjustified delay of payments of the commmsions due and owing to Web Tribe Limited, it is submitted that **PW2/D1, PW8/D3,** and **PW9/D2,** while referreing to Web Tribe Limited's bank account statement for account number 0114xxxxx8601, produced as **Exhibit 5,** confirmed that NCCG had not paid Web Tribe Limited for some of the services rendered and that the last payment was on 25/05/2018 and the testimony was corroborated by **PW10/D12,** a manager in charge of banking services at Central Bank of Kenya (hereinafter "the CBK"), who produced **Exhibit 25 (a), Exhibit 26 (a) – (b)** and **Exhibit 13,** being the account opening documents, mandate cards and bank statements of the NCCG Recurrent Account No. 100xxxx502 domiciled at the CBK, which confirmed the last transaction paid by NCCG to Web

Tribe Limited before the transactions in question was on 25/05/2018. It further submitted in this regard that **PW11/D14,** a security officer at Cooperative Bank, produced **Exhibit 31 (a) –(h), Exhibit 32, Exhibit 33, Exhibit 34 (a) –(b), Exhibit 35 (a)-(b)** and **Exhibit 6** being account opening documents, account statements and account transaction documents for Web Tribe Limited account, confirming **PW2/D1** and **PW8/D3,** as signatories to the said account. It is further argued that from the testimony of **PW10/D12,** the payments after the alleged faciloiattion are captured in the bank statements produced as **Exhibit 13** on 9th January 2019, 16th April 2019 and 17th April 2019.

(15) In relation to payments made in January 2019 from the said NCCG recurrent account number 100xxxx502 domiciled at the CBK - **Exhibit 13-** to Web Tribe Limited, **PW7/D10,** the Head of County Treasury at NCCG, corroborated the following payment vouchers which were used to pay Web Tribe Limited as follows:

(i) Payment Voucher No. 06846 approved on 21/11/2018 {Exhibit 20 (a - k)} for Kshs. 15,986,119.00, being payments for services rendered in March, April, May, and June 2018;

(ii) Payment Voucher No. 18759 approved on 21/11/2018 {Exhibit 21 (a - e)} for Kshs. 4,942,611.00, being payments for services rendered in March, April, May, and June 2018;

(iii) Payment Voucher No. 18763 approved on 21/11/2018 {Exhibit 23 (a - e)} for Kshs. 4,358,539.00, being payments for services rendered in August and October 2018; and

(iv) Payment Voucher No. 18759 approved on 21/11/2018 {Exhibit 21 (a - e)} for Kshs. 4,942,611.00, being payments for services rendered in March, April, May, June 2018.

(16) In relation to the payments which were made in April 2019 from the said NCCG recurrent account number 100xxxx502 domiciled, at the CBK - **Exhibit 13 -** to Web Tribe Limited, it is submiotetd that **PW6/D9,** the Chief Officer Finance and Economic Planning and the Accounting Officer, confirmed that Web Tribe was paid as follows:

(i) Payment Voucher No. 23065 dated 12/04/2019 {Exhibit 12 (a - c)} Kshs. 4,874,704.18, being payments for services in Septemer 2018 as per Exhibit 12c;

(ii) Payment Voucher No. 23067 dated 12/04/2019 {Exhibit 15 (a - c)} Kshs. 5,472,476.66 .being payments for services in November 2018 as per Exhibit 15c;

(iii) Payment Voucher No. 23064 dated 12/04/2019 {Exhibit 14 (a - c)} Kshs. 4,412,531.00, being payments for services in October 2018 as per Exhibit 14c;

(iv) Payment Voucher No. 23074 dated 12/04/2019 {Exhibit 17 (a - c)} Kshs. 15,825,122.00, being payments for services in January 2019 as per Exhibit 17c;

(v) Payment Voucher No. 23066 dated 12/04/2019 {Exhibit 16 (a - c)} Kshs. 7,269,879.47, being payments for services in December 2018 as per Exhibit 16c;

(vi) Payment Voucher No. 23072 dated 12/04/2019 {Exhibit 18 (a - c)} Kshs. 10,656,346.00, being payments for services in February 2019 as per Exhibit 18c; and

(vii) Payment Voucher No. 23073 dated 12/04/2019 {Exhibit 19 (a - b)} Kshs. 13,438,649.00, being payments for services in March 2019 as per Exhibit 19a.

(17) It is thus urged that from the foregoing, it is clear that the testimonies of **PW2/D1, PW8/D3** and **PW9/D2,** were corroborated by the testimonies of **PW6/D9, PW10/D12** and **PW7/D10,** on the issue of delayed payments and challenges faced by Web Tribe Limited. It is further submitted that **PW16/D15,** a Senior Digital Forensics Investigator, produced **Exhibit 64,** with appendices 2, 3 and 4, which confirmed that the aCount number 0110xxxxx8601 belonged to Web Tribe Limited, and produced as **Exhibit 6** which was found in the IFMIS system, between 1st August 2015 and 12th April 2019, Web Tribe Limited had been paid about 36 transactions. It is urgued that from the evidence, the payments which were due to Web Tribe Limited included were as follows:

(i) **Payments for 2018 services**: Ksh 15,986,119 (March-June 2018); Ksh 4,942,611 (March-June 2018); Ksh 4,358,539 (August-October 2018); and Ksh 4,942,611 (March-June 2018); and

(ii) **Payments for 2019 services**: Ksh 4,874,704 (September 2018); Ksh 5,472,476 (November 2018); Ksh 4,412,531 (October 2018); Ksh 15,825,122 (January 2019); Ksh 7,269,879 (December 2018); Ksh 10,656,346 (February 2019); and Ksh 13,438,649 (March 2019).

(18) Concerning the alleged bribe of Kshs. 20,000,000/= which was allegedly demanded by and paid to the 1st Accused, through the 2nd and 3rd Accused persons, it submitted that bribery is defined in section 6 of the Bribery Act, 2016 and that in **Paul Mwangi vs. Republic C.A (210)** (sic), the Court set out the ingredients for soliciting and receiving a bribe a follows: **"in order to constitute an offence, three things are essential; in the first place, there must have been solicitation or offer or receipt of a gratification. Such gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means, and secondly, that someone should be acting in the public or private or employed or act for and on behalf of another person, or confer a favour or ask for a favour to render some service."** In this connection, it is submitted that the testimony of **PW2/D1** that the last payment received by Web Tribe Limited from NCCG was approximately Kshs. 26,000,000/-, which were paid on 25/05/2018, which was about nine (9) months before the **'intervention by the 1st Accused person'** and the transaction in question. It is urged that the prosecution has demonstrated that the 1st Accused demanded from **PW2 /D1** a bribe in order to facilitate the pending payments and that the prosecution has further demonstrated that the 1st Accused received a total of Kshs. 20,000,000/-, through the 2nd and 3rd Accused persons. It is submited that upon receiving the payments by the NCCG on 9th January 2019, **PW2/D1** testified that the 1st Accused demanded a bribe of Kshs. 10 million, for facilitating the payments which were effected on 09/01/2019. It is submited that this is corroborated by **Exhibit 60,** which at page 7, demostrates a WhatsApp conversation of 10/01/2019, which is further corroborated by **DMFI-17,** placing **PW2/D1** at Kikambala. For the DPP, it is submitted that from the said payment of 9/01/2019, and on instructions of the 1st Accused, PW2/D2 paid the

1st Accused a bribe of Kshs. 10 million, through a proxy, ROG security Limited at Equity Bank Limited account number 0950xxxxx6136, as per **Exhibit 84** (account opening documents) and **Exhibit 95** (bank statement) as follows:

(i) Kshs. 5,000,000/- on 14/01/2019; and

(ii) Kshs. 5,000,000/- on 16/01/2019.

(iii) Kshs. 5,000,000/- on 25/04/2019; and

(iv) Kshs. 5,000,000/- on 30/04/2019.

(19) It is submitted that through **PW2/D2** and **PW19/D19,** the prosecution demonstrated how the monies paid by **PW2/D1** through **Exhibit 5,** into the account of 2nd Accused and 3rd Accused persons, produced as **Exhibit 46 & 95,** were traced to the 1st Accused's account produced as **Exhibit 52 & 98; 48 & 99** and **50** as follows:

(i) Vide **Exhibit 34 a & b**, two transfers of Kshs. 5,000,000/- each, from Web Tribe Limited on 14/01/2019 and 16/01/2019, to the 2nd and 3rd Accused persons' account, to wit, **Exhibit 46** and **95,** totalling to Kshs. 10,000,000/-; and

(ii) Vide **Exhibit 35 a & b** , two transfers of Kshs. 5,000,000/- each, from Web Tribe Limited on 25/04/2019 and 30/04/2019, to the 2nd and 3rd Accused persons' account, to wit, **Exhibit 46 and 95,** totalling to Kshs. 10,000,000/-.

(20) Consequnelty, it is urged that the four (4) transfers were the bribe demanded and subsequently received by the 1st Accused, through the 2nd and 3rd Accused persons, as per the testimony of **PW2/D1** as per his recorded statement, produced as **Dexhibit 7.** It is urged further that the Kshs. 20,000,000/-, was not for any commercial purposes or work done by the 2nd Accused. It is submitted that **PW9/D2,** corroborated **PW2/D1,** that the said four payments in favour of 2nd and 3rd Accused persons, were for facilitation of the payments made by the NCCG to Web Tribe Limited on 09/01/2019, 16/04/2019 and 17/04/2019 and that **PW2/D1** reiterated that **Exhibit 8, Exhibit 9** and **Exhibit 10 (a - g)** originated from the 2nd and 3rd Accused persons, with the aim of supporting the four bank transfers to the 2nd and 3rd Accused persons by Web Tribe Limited, in an atempt to circumvent the investigations by EACC on instructions of the 1st Accused, by himself and his agents, **'Shaw Wa Governor'** and the 3rd Accused. It is submitted further that **PW2/D1** testified that the WhatsApp conversation refered to the bribe as **"files"** which he understood to mean a bribe as demanded by the 1st Accused and that this is corroborated and documented in the report produced as **Exhibit 60** by **Pw 14/D17** as follows:

(i) The WhatsApp conversation of 10/01/2019, where **PW2/D1** informs the 1st Accused person that "**i am here**" and the 1st Accused responds "**Ok**" and again, **PW2/D1** states "**Outside....Kikambala.**"

(ii) The WhatsApp conversation of 3/03/2019, where the 1st Accused informs **PW2/D1** that **"your files coming this week"**and **PW2/D1** gives a thumbs up.

(iii) The WhatsApp conversation of 13/04/2019, where **PW2/D1** informs the 1st Accused that **"Bro. Pls ask the guys to send the files to us"** and the 1st Accused responds, **"It was done"** and that **PW2/D1** further inquires from the 1st Accused in the conversation as follows **"Do I send the files to the same place?"**.

(iv) The WhatsApp conversation of 24/04/2019, where **PW2/D1** informs the 1st Accused as follows: **"Good morning bro. Have a good day. Files on the way. Na Mungu akubariki."**

(21) It is urged that this Court finds that the conversations confirm that the prosecution's evidence on demand and receipt of the bribe for the monies paid to Web Tribe Limited on 16/04/2019 and 17/04/2019. It is further submitted that the testimony of PW2/D1 that that while at Nairobi, a person who descrfibed himself as ***"Shaw wa Governor"*** reached him on phone using phone number +254724xxx333, and directed him to pay the bribe to the 2nd Accused and that from **Exhibit 60,** at page 9, the communication between **PW2/D1** and +254724xxx333 belonging to ***"Shaw wa Governor"*** of 18/04/2019 provides **PW2/D1** with the account number of the 2nd Accused, number 0950xxxxx6136, **Exhibits 95/46,** and several invoices of of the 2nd Accused and also forwarded the 2nd Accused person's telephone number 0707xxx677, whereupon the said mobile number, was established to have been registered in the name of the 3rd Accused, as per **Exhibit 92.** Further, it is submitted that **PW18/D13,** a Legal Officer from Equity Bank produced:

(i) **Exhibit (84 and 47)** and **Exhibit (46 and 95),** being the Bank Account opening documents and bank account number 0950xxxxx6136 respectively for the 2nd Accused, for the period 01/7/2015 to 28/03/2019;

(ii) **Exhibit {53(a - e) and 85}** and **Exhibit {52 and 98}** – account opening documents and bank statement for account number 0350xxxxx5757 respectively for the 1st Accused;

(iii) **Exhibit {49 (a & b) and 86}** and **Exhibit {48 and 99},** being the accCount opening documents and bank statement for account number 1380xxxxx3608 respectively for the 1st Accused, and

(iv) **Exhibit 51(a & b)** and **Exhibit 50,** being the account opening documents and statement for account number 1620xxxxx9567 respectively for the 1st Accused.

(22) It is submitted that **PW2/D1** submitted his electronic gadgets for forensic examinations, which was conducted by **PW14/D17,** a Digital Forensic Analyst from EACC, who confirmed examination of **PW2/D1's** electronic gadgets and produced his two reports, **Exhibits 60** and **61.** It is further submitted that **PW18/D21,** a fraud investigator with Safaricom Ltd, produced **Exhibits 90, 91** and **92,** which contained the call data records and customer subscriber details for telephone numbers:

(i) 0705xxx335, 0720xxx441, 0722xxx600, **0727xxx777** 0746xxx110, 0740xxx565, and 0799xxx938 belonging to the 1st Accused; and

(ii) **0707xxx677**, and 0722xxx200, belonging to the 3rd Accused.

(23) In the foregoing connection, it is urged that the prosecution ably demonstrated the communucation beween **PW 2/D1**, the 1st, 3rd Accused persons, and the 3rd party namely ***'Shaw wa Governor'*** sometime in September 2019, who fraudulently prepared the agreements and invoices produced as **Exhibit 8, Exhibit 9** and **Exhibit 10 (a - g)** in a bid to falsely and fraudulently give an explanation to EACC during the investigations, with the aim of concealing the actual and true purpose of the bribe of Kshs. 20,000,000/= paid by **PW2/D1** to the 1st Accused, through the 2nd and 3rd Accused, for facilitating the payments due to Web Tribe Limited.

(24) Finally, it is urged that from the evidence on record, the testimony of **PW2/D1** is corroborated by independent witnesses and documents which confirm that indeed **PW 2/D1's** statement earlier recorded at EACC, contained falsehoods ochestrated by the influence of the 1st and 2nd Accused persons, to defeat the investigations by EACC. It is thus concluded that the evidence contained in the statement of **PW2/D1** dated 24th January 2020 and produced as **DExhibit 7,** contains a true account of the facts as testified by **PW 2/D1,** which evidence has not been controverted by the defence.

(25) Consequently, the named learned prosecution counsel have urged this Court to find that all the Accused persons have a case to answer and put them on their defence under section 211 of the CPC.

(26) In his oral highlights of the written submissions, Mr. Akula largely reiterated the written submissions.

PART IV: THE 1ST ACCUSED'S SUBMISSIONS

(27) In their written submissions dated 26th December 2024 and filed on 27th December 2024, learned Counsel Mr. A. Nyakundi and Mr. E. Cheruiyot, instructed by the 1st Accused, adopted the 1st Accused's written submissions dated 21st September 2022 (sic, the correct date is 20th September 2022 and filed on 21st September 2022) and the supplementary submissions dated 29th September 2022 (sic, the correct date is 21st September 2022 and filed on 29th September 2022) respectively.

(28) The written submissions dated 26th December 2024, raised preliminary questions of law only. Concerning arguments on the merits of the prosecution case, the arguments are housed in the 1st Accused's written submissions dated 20st September 2022 and filed on 21st September 2022; and the Supplementary written Submissions dated 21st September 2022 and filed on 29th September 2022.

(29) In addition to the said adopted submissions, the said learned counsel submitted that the charges set out in the amended charge sheet are incurably defective. It is urged that the charges are do not meet the standards set by law for being slovenly set out and couched in terms that would render

the 1st Accused person bewildered and uncertain to a degree that would embarrass his defence. It is submitted that under Count 1, all the Accused persons are described as **"Governor of Nairobi City County, a private Limited Liability Company and its director."** In this connection, it is submitted that the failure of the prosecution to distinguish the 1st Accused in that regard, renders the charges vague, otiose, duplex and bad in law and incapable of any cure, as the prosecution appears to imply that some speculation and imagination can do so. It is urged that the same fate befalls Counts 4, 8 and 11.

(30) Concerning Counts 1,2,3,8,9 and 10, it is submitted that the drafter introduced a novel element that reads **"between, on or about"** apart from the fact that this phraseology, is completely meaningless and it renders the charges vague and embarrasses the defence.in this context, it is urged that a charge would be rendered defective, if it lacks sufficient details or particulars to enable an Accused know exactly what he is being Accused of both in space and time and the phraseology "between, on, or about" is absolutely vague. In this connection, reliance is placed upon **Idah Nziza Kikubi &Anor vs. Republic Criminal Appeal No. 30 230 of 2021,** where it is submitted that **Odunga, J.** (as he then was), cited the case of **Fappyton Mutuku Ngai vs. Republic [2020] eKLR,** in which the Court held that a charge sheet should specify the offence in a clear, unambiguous manner, and should be accurate since technical defects would entitle the Accused to acquittal upon appeal. In further connection to this position, it is submitted that the 1st Accused's right to a fair trial was abrogated by the manner in which this charge was framed in a deliberate attempt to not only remain largely vague and ambiguous, but also allocate itself the space to run to in the event the evidence would be obscure and contradictory as was the case during this trial. Section 134 of the CPC is cited to fortify this position.

(31) Besides, it is urged that the description of the 1st Accused in *aliases* was meant to prejudice his trial in which no iota of explanation was rendered for the *aliases.* It is submitted that an *alias,* by definition, is a false assumed identity and in this context, the prosecution owed a duty to lead evidence to show the part of identity of the 1st Accused which was real and that which was assumed false. It is argued that an *alias* is a distortion bordering on fraud.

(32) In addition, it is submitted that The Anti Corruption & Economic Crimes Act No.3 of 2003 was the correct description as in Count 1 but in Count 2, **"Act no. 3 of 2003"** is missing and the Act is also described as **"The Anti Corruption and Economic Crime Act".** This submission is applied to Counts 3, 9 and 10.

(33) Further, for the 1st Accused, this Court is urged to find that the sum effect of the foregoing is amounts to an incurable defect, for which reason this should find that the prosecution failed the cut of a *prima facie* case, dismiss the charges and acquit the 1st Accused under section 210 of the CPC.

(34) As afore-stated, regarding arguments on the merits of the prosecution case, the arguments are housed in the 1st Accused's written submissions dated 20th September 2022 and filed on 21st September 2022; and the Supplementary written Submissions dated 21st September 2022 and filed on 29th September 2022.

(35) In their written submissions dated 20th September 2022 and filed on 21st September 2022, learned Counsel Mr. A. Nyakundi and Mr. E. Cheruiyot, proposed five questions for determination as follows: **(i) whether the charge sheet as drawn/framed by the prosecution discloses an offence(s) known to law, is defective, fatal and bad in law; (ii) whether the 1st Accused demanded a bribe from PW2 to facilitate payments by NCCG to Web Tribe Limited; (iii) whether a total of Kshs. 20,000,000 allegedly paid to 2nd & 3rd Accused persons by Web Tribe Limited in tranches was a bribe to facilitate payments by NCCG to Web Tribe Limited; (iv) whether payments to Web Tribe Limited were occasioned as a result of the 1st Accused's influence;** and **(v) whether the payments which were made to the 2nd & 3rd Accused persons were proceeds of crime.**

(36) Concerning the first proposed question for determination whether the charge sheet as drawn/framed by the prosecution discloses an offence(s) known to law, is defective, fatal and bad in law, the submissions have been set out above.

(37) In relation to the second to fifth proposed questions for determination, they have all been answered in the negative, arguing that the evidence on record is insufficient to make the cut for a *prima facie* case.

(38) For the 1st Accused, the said learned counsel submit that PW2 was initially a suspect in this matter but in inexplicable circumstances, he turned up as a prosecution witness. In this connection, it is submitted that the evidence of PW2 is discredited and unreliable and that it will amount to a gross miscarriage of justice if this Court placed reliance on Pw2's evidence.

(39) Regarding the markers of a *prima facie* case, reliance is placed upon the ***Canadian Court Commentary of Judge Roger Salhany, Criminal Trial Handbook (Toronto) Carswell 1992*** (See also **R vs. Monteleone (1987) 2 SCR 54**) where the following statement was made: **"If the trial Judge is satisfied, as a matter of Law, that the crown has failed to establish a *prima facie* case, or she must direct the jury to return a verdict of not guilty, if the Judge is the trier of fact, he or she must acquit the Accused. The Judge must rule immediately on the question of whether there is a *prima facie* case."** It is further submitted that it is improper to put the 1st Accused on his defence only to fill the gaps of the prosecution case. In this regard, reliance is placed upon ***Seamans, 1978, 41, CC 2d 446.*** Further, it is submitted that the standard of proof in this connection is beyond reasonable doubt, citing the decision of the Supreme Court of Canada in **R vs. Morabito [1949] SCR 172** and **Republic vs. Prazad [1979] 2A Crim R 45.**

(40) Regarding the proposed questions whether the 1st Accused demanded a bribe from PW2 to facilitate payments by NCCG to Web Tribe Limited; whether a total of Kshs. 20,000,000 allegedly paid to 2nd & 3rd Accused persons by Web Tribe Limited in tranches was a bribe to facilitate payments by NCCG to Web Tribe Limited; whether payments to Web Tribe Limited were occasioned as a result of the 1st Accused's influence; and whether the payments which were made to the 2nd & 3rd Accused persons were proceeds of crime, it is submitted that the evidence adduced by the prosecution witnesses does not answer the four questions of fact in the affirmative. It is submitted that the element of demanding the bribe was not proved, either expressly or impliedly by PW2. It is argued that in **Patrick Munguti Nunga vs. Republic [2013] eKLR,** it was held that

the element of demanding a bribe is critical and the prosecution must prove it. Further, it is submitted that the evidence of PW2, being evidence of an accomplice, must be corroborated and there was none. It is submitted that the prosecution failed to discharge their burden of proof, citing the holding in **Peter Mwangi Kariuki vs. R [2015] eKLR;** and **H.L. Woolmington vs. DPP [1935] AC 462.** It is submitted that the evidence of PW2 was contradicted by the evidence of PW8, who asserted in cross-examination that the money he approved for transfer to the 2nd Accused was not bribe money. Finally, it is submitted that there was no evidence that the money which was paid by Web Tribe Limited to the 2nd Accused were proceeds of crime.

(41) And in their Supplementary written submissions dated 21st September 2022 and filed on 29th September 2022, learned Counsel Mr. A. Nyakundi and Mr. E. Cheruiyot, submit that the claim by PW2 that the 1st Accused demanded a bribe was not corroborated by any evidence. It is submitted that the evidence of PW2, being of an accomplice, must be corroborated, in support of this proposition, fortification was sought in **Antony Kinyanjui Kimani v Republic [2011] eKLR; Bernard Mununji Njau vs. Republic [1979] eKLR; Haroon Haji Abdulla vs. State of Maharastra** (sic)**; Choge vs. Republic [1985] KLR;** and **Waringa vs. Republic [1984] KLR.**

(42) In his oral highlights of the written submissions, learned counsel Mr. A Nyakundi reiterated the said written submissions. Most notably, learned counsel for the 1st Accused, advances a thesis to the effect that remittal of this matter by the High Court did not, at all, cure the defects in the charge sheet dated 7th September 2020, since it shares defects similar to the charge sheet dated 27th January 2020.

PART V: THE 2ND & 3RD ACCUSED PERSONS' SUBMISSIONS

(43) In her written submissions dated 24th December 2024 and filed on 27th December 2024, learned Counsel Ms. P. Atukunda, instructed by the 2nd and 3rd Accused persons, submits that in **Ramanlal Trambaklal Bhatt vs. The Republic [1957] E.A 332** (hereinafter "the Bhatt decision"), the principles of a *prima facie* case were enunciated as follows: **"The onus is on the Prosecution to prove its case beyond reasonable doubt – and a "prima facie case" is made only if the evidence adduced by the Prosecution at the close of their case is that- on which a Reasonable Tribunal, properly directing its mind to the Law and the evidence before it, could convict if no explanation is offered by the Defence."** In this connection, learned counsel advances an argument that this principle requires that a trial Court ought not require an Accused to fill in the gaps left by the prosecution if at the close of the prosecution case, the evidence is not sufficient to sustain a conviction and instead, a finding of **"No case to Answer"** should be entered, citing **Republic vs. Joshua Koikai Sitaya [2016] eKLR** to fortify this proposition.

(44) For the 2nd and 3rd Accused persons, it is submitted that the burden of proof lies on the prosecution, to prove that there is a *prima facie* case against the 2nd and 3rd Accused persons. In buttressing this position, reliance has been placed upon sections 107 and 109 of the Evidence Act, and the holding in **Republic vs. Juliana Wambui Thiongo [2018] eKLR**, that **"In criminal trails that burden of proof is always on the Prosecution. A trial Court is therefore enjoined by law to determine whether at the conclusion of the Prosecution case there exists a case discharging that burden of proof."**

(45) Learned counsel submits that the germane issues for establishing a prosecution case are: (i) the test of a *prima facie* case; and (ii) the standard of proof in determining whether a *prima facie* case has been made. In both, this Court is invited to be guided by ***the Bhatt decision*** and **Anthony Njue Njeru vs. Republic [2006] eKLR.**

(46) In this connection, learned counsel representing the 2nd and 3rd Accused persons proposed two issues for determination as follows: **(i) Whether the prosecution has established a *prima facie* case against the 2nd and 3rd Accused persons; and (ii) whether the decision to charge the 2nd and 3rd Accused persons was rational or fair.**

(47) In respect to the first question whether the prosecution has established a *prima facie* case against the 2nd and 3rd Accused persons, counsel submitted on each cluster of the offences.

(48) And so, concerning the charge on conspiracy facing the 2nd and 3rd Accused persons under Counts 1 and 8, relying on the definition of conspiracy by the **Black's Law Dictionary, 9th Edition, at Page 351;** and ***Archibold's Criminal Proceedings, Evidence and Practice 2010 (Sweet & Maxwell) at pages 3025 and 3026,*** it is submitted that the prosecution is required to prove beyond reasonable doubt the following four elements of the offence of conspiracy: **(a) an agreement between at least two parties; (b) meant to achieve an illegal goal; (c) all parties alleged to be involved have to have knowledge of the conspiracy and participate in the conspiracy in some way;** and **(d) at least one person involved in the conspiracy has to make an overt act in furtherance of the Conspiracy.** In this regard, reliance is placed upon **Rebecca Mwikali Nabutola & 2 others vs. Republic [2016] e KLR.**

(49) It is thus submitted that this Court ought to consider whether there was an agreement to execute an unlawful act, which may have been either express or implied, from the circumstances of the case.

(50) In respect to Count 1, it is submitted that the prosecution failed to establish a *prima facie* case against the 2nd and 3rd Accused persons for the offence of conspiracy to commit corruption for the following reasons:

(i) That it was the testimony of PW2, a Director/ Chief Executive Officer of Web Tribe Limited, that around January, 2019, in a meeting in Kikambala, Kanamai, Kilifi he met with the 1st Accused who demanded a bribe of Kenya Shillings Ten Million (Ksh. 10,000,000.00). That it is evident from PW1's testimony that neither the 2nd Accused, their representative nor the 3rd Accused were present at the said meeting where the alleged demand for the bribe occurred. The prosecution failed to establish the agreement between all the Accused persons to demand a bribe in the sum of **Ksh. 10,000,000.00/=** as an inducement to facilitate payments to Web Tribe Limited by the Nairobi City County Government;

(ii) That it was the testimony of PW2 that the 2nd and 3rd Accused were not present at the alleged meeting in Kanamai and therefore could not have agreed to demand a bribe from PW2;

(iii) That PW8, a Shareholder and formerly Non-Executive Director of Web Tribe Limited, testified that he made the payments to the 2nd Accused Company and categorically stated that the said payments were not a bribe and that he confirmed that Web Tribe Limited never paid a bribe to the 2nd and 3rd Accused persons. That in light of this evidence, the charges of conspiracy to commit and offence of corruption namely bribery in Count 1; and

(iv) That importantly, the 2nd and 3rd Accused persons have not been subject to any legal proceedings under the Bribery Act No. 47 of 2016 in relation to the allegations on bribery contained in Count 1.

(51) In respect to the charge on Conspiracy in Count 8, it is submitted that the prosecution failed and did not establish a *prima facie* case against the 2nd and 3rd Accused persons, for the following reasons:

(i) That section 46 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 defines the offence of abuse of office as: **"A person who uses his office to improperly confer a benefit on himself or anyone else";**

(ii) That a plain interpretation of section 46 demonstrates that the offence of abuse of office is specific to persons that hold public office and have control of public resources/funds;

(iii) That the 2nd and 3rd persons are a private entity and private persons respectively that do not hold public office within the Nairobi County Government and therefore could not have conspired to commit the offence of abuse of office;

(iv) That it was the testimony of **PW1**, an ICT Officer at the Nairobi City County Government, the user department of the contract between the Nairobi City County Government and Web Tribe Limited, that the 3rd Accused did not work at the ICT Department, only the Accounting Officer of the ICT department could authorize transactions, and that a non-employee of the Nairobi City County does not play a role in the payment by the ICT Department;

(v) That it was the testimony of **PW3**, the Acting County Secretary between September 2018-June 2019, who testified on Exhibits 2, 3 and 4 the Contract and addenda thereto, by confirming that the 2nd Accused was not a party and that the 3rd Accused was not a signatory;

(vi) That it was the evidence of **PW4,** County Attorney, who testified on her role in executing Exhibits 3 and 4 the addenda to the contract and that she confirmed that the 2nd and 3rd Accused were not parties or signatories to the addendums;

(vii) That **PW5**, County Secretary and Head of County Public Service, confirmed in her testimony the parties and signatories to Exhibit 2, the Contract as Nairobi City County Government and Web Tribe Limited;

(viii) That **PW6,** Chief Officer Finance & Economic Planning, testified in his capacity as the Accounting Officer and the AIE holder, and confirmed payments were made to Web Tribe Limited and that monies paid to a service provider cease to belong to the Nairobi County Government;

(ix) That **PW7,** Head of County Treasury, Accounting testified on the payment processes of the Nairobi County Government, and confirmed that the 2nd and 3rd Accused did not play any role in the payments made to Web Tribe Limited and that she averred that she had approved the payments to Web Tribe Limited; and

(x) That the prosecution, through **PW14,** a Digital Forensics Analyst at the Ethics and Anti-Corruption Laboratory produced two reports Exhibit 60 and 61, to establish communication between the parties in this case and prove the charges of conspiracy but the evidence and testimony of PW14 is unreliable and should be treated with contempt for the following reasons:

a. The casual and unprofessional manner in which the devices were seized from PW2. That during cross-examination, it was PW14's testimony that on the 23rd of January 2022, he seized two mobile phones and a laptop from PW2 at the EACC offices in Integrity Centre, and he obtained the passwords in the presence of the Investigating Officers and thereafter left the gadgets seized with them and returned to the laboratory where they were later returned to him. It is submitted in this connection that the information obtained from this exercise cannot be trusted as the Exhibits were mishandled and exposed to a high likelihood of tampering; and

b. That PW14 admitted that he did not establish the registration and ownership of the devices he seized for the extraction and reports.

(52) Regarding the charge on money laundering facing the 2nd and 3rd Accused persons under Counts 4 and 11, it is submitted that money laundering is defined as an offence under section 3 (b) (i) of the Proceeds of Crime and Anti- Money Laundering Act No. 9 of 2009. It is submitted that a purposive interpretation of the definition of Money Laundering under Section 3(b) (i) of the Proceeds of Crime and Anti Money Laundering Act No. 9 of 2009 establishes the following elements of the offence: (a) The source of the funds must be an illegal activity; (b) The party must have knowledge of the unlawful source of the funds; (c) There must be an intention to launder, conceal, disguise or convert the illegal funds; and (d) There must be a nexus to an unlawful activity. It is urged that the prosecution failed to establish *prima facie* evidence on the elements of the offence of money laundering as follows:

(i) That the prosecution did not present any evidence to demonstrate that the source of funds paid by Web Tribe Limited to the 2nd and 3rd Accused persons were from an unlawful activity;

(ii) That it is undisputed that Web Tribe Limited had a valid contract for the Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution with the Nairobi City County Government;

(iii) That it was also not disputed that all payments received from the Nairobi City County Government to Web Tribe Limited were valid/ legal payments under the said contract;

(iv) That it was also confirmed that once the payments for services rendered by Web Tribe Limited to the Nairobi City County Government, the said monies ceased being public funds and constituted private funds lawfully earned by Web Tribe Limited;

(v) That **PW2**, testified that Web Tribe Limited had a valid contract with the Nairobi City County Government which had been performed and services had duly been provided by Web Tribe Limited for which they were paid and that in his evidence, PW2 confirmed that payments from the Nairobi City County Government were legitimate and therefore, cannot be said to form proceeds of a crime to be laundered;

(vi) That as to whether the prosecution's case that Web Tribe Limited transferred a bribe into the account of the 2nd Accused and that the said transfer constituted proceeds of crime which were being laundered by the 2nd and 3rd Accused, there was no *prima facie* evidence since the evidence-in-chief of **PW8,** a Shareholder and Non-executive Director of Web Tribe Limited, confirmed that he was the authorized mandate for payments on behalf of Web Tribe Limited for the amount of Ksh. 600,000 and above and he further confirmed that he was the one that authorized the payments to the 2nd Accused from a trust account belonging to Web Tribe Limited that received monies from different entities and he could not confirm the source of funds that were paid to the 2nd Accused's account;

(vii) That from the evidence of PW8, the source of funds of the monies transferred to the 2nd Accused's account by Web Tribe Limited cannot be ascertained and have not been linked to any crime so as to form a proceed of crime being laundered by the 2nd and 3rd Accused persons;

(viii) That in authorizing payments to the 2nd Accused and all payments were made with a reason for payment being Payment to ROG Security Limited and that any subsequent/ onward payments/transactions from the 2nd and 3rd Accused persons formed part of different and independent transactions separate from the one with Web Tribe Limited;

(ix) That **PW6,** Chief Officer Finance & Economic Planning, testified in his capacity as the Accounting Officer and the AIE holder, he confirmed payments were made to Web Tribe Limited and that monies paid to a service provider cease to belong to the Nairobi County Government;

(x) That **PW12,** an officer from Registrar of Companies, who presented evidence of company registration documents for the 2nd Accused and Web Tribe Limited to confirm the ownership i.e Exhibits 37-44, presented no commonality in ownership or Directorship

between the two private companies and the Accused persons and so, the prosecution failed to demonstrate that the 2nd and 3rd Accused had a relation/ knowledge to the source of funds/ activities of Web Tribe Limited a separate entity;

(xi) That concerning the element of a fraudulent activity, the Prosecution relied on the uncorroborated evidence of PW2 against the holding in **Karanja & Another vs. Republic [1990] eKLR**, where the Court of Appeal of Kenya (hereinafter "the COA") reversed the decision of the High Court which convicted the Accused persons on the basis that the Court had relied on uncorroborated evidence of an accomplice;

(xii) That in respect to the evidence of PW2, no date was given when the 2nd or 3rd Accused persons committed the offence of forgery as alleged by the PW2 and that the evidence adduced by PW2 in this regard was not in tandem with the charges before this Court; and

(xiii) That Ksh. 20,000.000.00 is the subject of the prosecution's case as contained in the charges sheet which is specific but the prosecution presented vague and contradictory case on different specific amounts between what was demanded as a bribe by the 1st Accused, what was invoiced by the 2nd Accused and what was actually paid to the 2nd and 3rd Accused as follows:

a. That **PW2,** a key witness, stated that the 1st Accused demanded Ksh. 10,000,000.00;

b. That **PW9,** testified on Exhibits 10 (a)-(g), that Accused 2 had provided invoices totalling to Ksh. 13,310,000.00;

c. That **PW8,** testified that he made a total payment of Ksh. 20,000,000 to the 2nd Accused;

d. That it is *prima facie* that the prosecution failed to present evidence to support their charge contained in the charge sheet amounting to Ksh, 20,000,000.00; and

e. That the prosecution also led in evidence **PW18,** a legal officer from Equity Bank Limited, who produced Exhibits 95 being the account statement for the 2nd Accused ROG Security Limited Account number 0950xxxxx6136 which was allegedly used to launder the monies received from Web Tribe Limited, and that the Account statements were obtained pursuant to a Court Order in Miscellaneous Application 2594 of 2019 dated 21st June 2019 for the period of 1st July 2015 to 28th March 2019, produced as Exhibit 94. That during cross-examination, PW18 admitted that the Account statements did not comply with the order of the Court in Exhibit 94, and therefore the evidence produced by this witness cannot to be relied upon as it does not comply with a Court Order in Exhibit 94.

(53) Regarding the charge of acquisition of proceeds of crime, it is submitted that the 2nd and 3rd Accused persons face four Counts of acquisition of proceeds of crime namely Counts 5, 6, 12 and

13. It is submitted in this regard that **section 2 of the Proceeds of Crime and Anti- Money Laundering Act No. 9 of 2009** defines Proceeds of crime. It is submitted that an interpretation of section 2 demonstrates that the prosecution is required to firstly establish the crime from which the proceeds have been acquired in order to constitute the offence of acquisition of proceeds of crime. For the 2nd and 3rd Accused persons, it is submitted that it is trite law that a crime contains two ingredients namely *mens rea* and *actus reus* that ought to be proved by the prosecution. It argued in this connection that the prosecution relied on Exhibits **94, 95** and **96,** being Equity Bank statements of the 2nd Accused, to establish whether the account received funds from Web Tribe Limited but the prosecution failed to establish a *prima facie* case that: (a) That the money in Web Tribe Account was illegitimate/ proceeds of crime; and (b) that the 2nd and 3rd Accused persons knew the source of funds from the Web Tribe Limited account. It is finally urged in this connection that it is undisputed that Web Tribe Limited and ROG Security Limited are both private entities and the prosecution did not to demonstrate that the monies exchanged between the two private entities constituted of public funds/ proceeds of crime and therefore subject of these proceedings.

(54) Regarding the second question proposed for determination namely whether the decision to charge the 2nd and 3rd Accused persons was rational or fair, it is submitted that the genesis of criminal proceedings is rooted in the **Decision to Charge** which is an administrative function performed solely by the DPP. It is submitted that in making the decision, it should be done within the legal precincts of the Constitution and statute. It is submitted that the exercise of the administrative function of the DPP is guided by a legal framework which constitutes the following laws: *(a) The Constitution, 2010; (b) Fair Administrative Actions Act CAP 7L; (c) The Office of the Director to Public Prosecutions Act, 2013; (d) Guidelines on the Decision to Charge, 2019; and (e) National Prosecution Policy and the General Prosecution Guidelines.* It is submitted that the origin of all legal authority on the decision to charge in Kenya is the Constitution, which is the supreme law and that Article 2 of the Constitution 2010 underscores the supremacy of the Constitution which binds all state organs and persons exercising state authority to act in adherence to its principles. It is submitted that the overriding objective of the Constitution inscribed in its preamble, which is to administer the aspirations of all Kenyans for a Government that is based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. In exercising state authority, it is submitted that all state Organs and persons are bound by the Constitutional values, principles and obligations; as such all actions and decisions must adhere to the Constitution and its provisions.

(55) For the 2nd and 3rd Accused persons, it is submitted that the Office of the Director of Public Prosecutions (hereinafter "the ODPP") is a state organ established by Article **157** of the Constitution and vested with the sole power to exercise the state power of prosecution in criminal proceedings under the person of the DPP and that in exercising his Constitutional mandate to prosecute, the DPP is mandated by the further provisions in **Article 157 (11)** to have regard to the principles of Public Interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process. Further, it is submitted that **The Office of the Director of Public Prosecutions Act, CAP 6B** (hereinafter **"the ODPP Act")** was enacted as an Act of Parliament to give effect to the objectives of **Article 157** of the Constitution on the mandate and powers of the DPP in criminal proceedings. It is submitted that in fulfilling the mandate of the ODPP, section 4 of the ODPP Act provides for guiding principles that are pertinent to the decision to charge within which the DPP can exercise its authority on the decision to charge as follows: **"(c)**

rules of natural justice; (d) promotion of public confidence in the integrity of the office; (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest; (g) protection of the sovereignty of the people; (h) secure the observance of democratic values and principles; and (i) promotion of constitutionalism." Besides, it is submitted that the Constitution, in **Article 47**, provides the right to every person to a lawful and reasonable administrative action/decision; therefore, in exercising the administrative function on making the decision to charge the DPP must take into consideration the principles of Fair Administrative Action and that **Article 47** led to the enactment of the **Fair Administrative Action Act, CAP 7L,** (hereinafter "the FAA") to provide for the powers, functions and duties of all state, non-state agencies and any person exercising administrative authority. It is submitted that under section 3 (a) and (c) of the FAA, the FAA applies to state and non-state organs including any person exercising administrative authority; and whose action, omission or decision affects the legal rights or interest of any person to whom such action, omission or decision relates.

(56) The 2nd and 3rd Accused persons take a view that the administrative decision by the DPP to charge them should be put to test as to whether it conformed with the basic principles of administrative law in the Constitution and the F.A.A such as fairness, reasonability, legality and rationality, in order to curb the unreasonable or arbitrary exercise of public power. It is further submitted that the FAA grants authority to Courts to review an administrative action or decision that violates the Constitution and it principles, under section 7(2) thereof.

(57) It is submitted further that in compliance with the Constitutional requirements in exercise of its mandate, the ODPP devised **Guidelines on the decision to charge, 2019** (hereinafter "the Guidelines") whose primary purpose is to provide a framework to ensure that justice is served to all and preserve the quality of prosecutorial decisions. It is argued that the Guidelines established the decision to charge as the hallmark of the institution of criminal proceedings and the heart of the States' Criminal Justice and it thus behooves the DPP to act with independence, integrity, impartiality and professionalism in the administration of justice. It is submitted that **Chapter 3 of the Guidelines** define the decision to charge as the Prosecution Counsels' determination as to whether evidence availed by an investigator or investigative agencies is sufficient to warrant the institution of prosecution proceedings against an Accused person in a Court of law and that an interpretation of the definition under the guidelines demonstrates that there must be sufficient evidence as a condition precedent presented by an investigator in order to justify the decision to charge. It is submitted that **Chapter 3; 3.1.1** further places an obligation on the Prosecutor to make an objective and independent analysis of the case to determine its propriety based on evidence before a decision to charge is made to place the case before the Court and that the Guidelines dictate the standard required in making a decision to charge as whether there is a reasonable prospect of conviction.

(58) It is submitted that in accordance with the Guidelines, the DPP must consider the key evidence and minimum requirements of the inquiry file and in determining the reasonability, the Guidelines provide for a two-stage test or the threshold test. In this context, it is urged that the decision to charge the 2nd and 3rd Accused persons was unfair, illegal, unreasonable and irrational for the following reasons:

(i) That the totality of the prosecution's case against the Accused persons is on a basis of a bribery allegations contained in the Bribery Act No. 47 of 2016, but no reason, rationale or basis was laid as to why the Accused persons were subjected to answer to charges under different set of laws;

(ii) That the 2nd and 3rd Accused persons have been adversely exposed to selective prosecution, which is illustrated by not framing charges against persons that played direct roles in the payments made to the Web Tribe Limited by the Nairobi City Government. It is submitted that it was the evidence of NCCG officials namely **PW1, PW3, PW4, PW5, PW6, PW7** that they directly participated in the procurement and payment process of the contract between the County Government and Web Tribe Limited that the 2nd and 3rd Accused persons played no role in the procurement and payment process in the contract;

(iii) That there was no rationale as to why PW8 was not charged alongside the Accused persons and yet in his testimony before the Court that he categorically admits that he made the impugned payments to the 2nd Accused;

(iv) That there was no rationale/ basis to not to charge PW2 with the offences herein to which he has admitted in his testimony and evidence and selective prosecution is yet again demonstrated by not charging PW2 who played a central and direct role in the allegations before the Court. In buttressing this position, the decision in **Peter Anthony D'Cosh vs. AG and Another, Petition No. 83 of 2013 eKLR** (sic) is cited and submitted that the Court held that **"The Process of Court must be used properly, honestly and in good faith and must not be abused. This means that the Court will not allow its function as a Court of Law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation it follows that where there is an abuse of Court process there is a breach of the Petitioners fundamental rights as the Petitioner will not receive a fair trial. It is the duty of the Court to stop such abuse of the justice system".** Further reliance is placed upon **Stanley Munga Githunguri vs. Republic [1986] eKLR,** where it was held that **"A prosecution is not to be made good by what it turns up. It is good or bad when it starts.";**

(v) That the 2nd and 3rd Accused persons were not the subject of the investigations that led to the decision to charge the parties in this case and that **PW19,** the Investigating Officer, stated in his evidence that the Investigations team was constituted after getting a report on allegation of corruption touching on irregular procurement awards at Nairobi City County Government[2] the 2nd and 3rd Accused persons do not offer any services to the County Government of Nairobi as was demonstrated by the witnesses from the County. That PW19 further led vague evidence on the parties that were involved in the investigations conducted by the Ethics and Anti-Corruption Commission that led to the proceedings before this Court. For instance during his examination in chief he stated that **"Before the work plan was implemented the Commission received complaints touching on Companies trading with the Nairobi City County.";** and

(vi) That the 2nd and 3rd Accused persons are Constitutionally entitled by **Article 50 (2) (b)** to information with sufficient detail in relation to the charges laid against them which was concealed and their right to Fair trial denied. That PW19 established during his investigations through Exhibits 43, 44, 41 and 38 that Web Tribe Limited and ROG Security Limited were separate legal entities, and there was no rationale or basis drawn in concluding that the 2nd Accused knew the affairs/dealings of Web Tribe Limited and *vice versa*.

(59) In closing, this Court is urged to find that no *prima facie* evidence has been established by the prosecution and acquit the 2nd and 3rd Accused persons under section 210 of the CPC.

(60) In her oral highlights of the written submissions, learned counsel Mr. P. Atukunda reiterated the written submissions and further adopted the submissions of learned counsel for the 1st Accused.

PART VI: QUESTIONS FOR DETERMINATION

(61) Flowing from the evidence recorded and the rival Submissions, thirteen (13) principal questions have crystallized for determination as follows:

(i) **Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 10th January 2019 and 19th January 2019, in Nairobi City County, within the Republic of Kenya, being the Governor of Nairobi City County Government, a private limited liability company and its director, all the three Accused persons jointly and knowingly conspired to commit an offence of corruption, namely abuse of office by extorting the payment of Kshs. 10,000,000/= as an inducement to facilitate payments to Web Tribe Limited by Nairobi City County Government, and thereby improperly conferred a benefit on the Governor of Nairobi City County Government and Antony Ombok through ROG Security Limited (as charged under 1).**

(ii) **Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 10th January 2019 and 19th January 2019, in Nairobi City County, within the Republic of Kenya, being the Governor of Nairobi City County Government, in abuse of his office, the 1st Accused improperly conferred upon himself a benefit of Kshs. 10,000,000/= from Web Tribe Limited through ROG Security Limited as an inducement to facilitate payments to Web Tribe Limited by Nairobi City County Government (as charged under 2).**

(iii) **Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that between 10th January 2019 and 19th January 2019, within the Republic of Kenya, being an agent of a public body, to wit the Governor of Nairobi City County Government, the 1st Accused knowingly acquired an indirect private interest in a contract connected with a public body, to wit Contract for Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, issued by Nairobi City County Government to Web Tribe Limited by Nairobi**

City County Government, by receiving a sum of Kshs. 10,000,000/= from Web Tribe Limited, through ROG Security Limited (as charged under 3).

(iv) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that between 14th January 2019 and 19th January 2019, within the Republic of Kenya, being the Governor of Nairobi City County Government, a private limited liability company and its director, with intent to unlawfully dispose of monies received from Web Tribe Limited, all the three Accused persons jointly engaged in transaction to conceal an amount of Kshs. 10,000,000/= whilst having reason to believe that the said monies were proceeds of crime (as charged under 4).

(v) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 14th January 2019, at Equity Bank Limited within the Republic of Kenya, being a private limited liability company and its director, the 2nd and 3rd Accused persons received property namely a sum of Kshs. 5,000,000/= from Web Tribe Limited through Equity Bank Limited account number 0950xxxxx6136, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime (as charged under 5).

(vi) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 16th January 2019, at Equity Bank Limited within the Republic of Kenya, being a private limited liability company and its director, the 2nd and 3rd Accused persons received property namely a sum of Kshs. 5,000,000/= from Web Tribe Limited through Equity Bank Limited account number 0950xxxxx6136, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime (as charged under 6).

(vii) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 19th January 2019, at Equity Bank Limited within the Republic of Kenya, being an agent of a public body to wit the Governor of Nairobi City County, the 1st Accused received property namely a sum of Kshs. 3,000,000/= from ROG Security Limited through Equity Bank Limited account numbers 1380xxxxx3608; 0350xxxxx5757; and 1620xxxxx9567, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime (as charged under 7).

(viii) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 13th April 2019 and 30th April 2019, in Nairobi City County, within the Republic of Kenya, being the Governor of Nairobi City County Government, a private limited liability company and its director, all the three Accused persons jointly and knowingly conspired to commit an offence of corruption, namely

abuse of office by extorting the payment of Kshs. 10,000,000/= as an inducement to facilitate payments to Web Tribe Limited by Nairobi City County Government, and thereby improperly conferred a benefit on the Governor of Nairobi City County Government and Antony Ombok through ROG Security Limited (as charged under 8).

(ix) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 13th April 2019 and 30th April 2019, in Nairobi City County, within the Republic of Kenya, being the Governor of Nairobi City County Government, in abuse of his office, the 1st Accused improperly conferred upon himself a benefit of Kshs. 10,000,000/= from Web Tribe Limited through ROG Security Limited as an inducement to facilitate payments to Web Tribe Limited by Nairobi City County Government (as charged under 9).

(x) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that between 13th April 2019 and 30th April 2019, within the Republic of Kenya, being an agent of a public body, to wit the Governor of Nairobi City County Government, the 1st Accused knowingly acquired an indirect private interest in a contract connected with a public body, to wit Contract for Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, issued by Nairobi City County Government to Web Tribe Limited by Nairobi City County Government, by receiving a sum of Kshs. 10,000,000/= from Web Tribe Limited, through ROG Security Limited (as charged under 10).

(xi) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that between 25th April 2019 and 30th April 2019, within the Republic of Kenya, being the Governor of Nairobi City County Government, a private limited liability company and its director, with intent to unlawfully dispose of monies received from Web Tribe Limited, all the three Accused persons jointly engaged in transaction to conceal an amount of Kshs. 10,000,000/= whilst having reason to believe that the said monies were proceeds of crime (as charged under 11).

(xii) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 25th April 2019, at Equity Bank Limited within the Republic of Kenya, being a private limited liability company and its director, the 2nd and 3rd Accused persons received property namely a sum of Kshs. 5,000,000/= from Web Tribe Limited through Equity Bank Limited account number 0950xxxxx6136, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime (as charged under 12).

(xiii) Whether or not, the evidence presented by the prosecution has surmounted the test of a *prima facie* case that on or about 30th April 2019, at Equity Bank Limited within the Republic of Kenya, being a private limited liability company and its director, the 2nd and 3rd Accused persons received property namely a sum of Kshs. 5,000,000/= from

Web Tribe Limited through Equity Bank Limited account number 0950xxxxx6136, being a benefit in respect of a contract namely Supply, Implementation and Maintenance of an Electronic Revenue Collection and Payments Solution, whilst knowing that the said property formed part of proceeds of crime (as charged under 13).

PART VII: ANALYSIS AND DETERMINATION

(62) At this intermediate stage, the duty of this Court as contemplated under sections 210 and/or 211 of the CPC, is to subject the prosecution evidence to the test of a *prima facie* case. Section 210 of the CPC provides that **"If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the Accused person or his advocate may wish to put forward, it appears to the Court that a case is not made out against the Accused person sufficiently to require him to make a defence, the Court shall dismiss the case and shall forthwith acquit him."** And section 211 of the CPC provides that **"(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the Court that a case is made out against the Accused person sufficiently to require him to make a defence, the Court shall again explain the substance of the charge to the Accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the Court shall then hear the Accused and his witnesses and other evidence (if any). (2) If the Accused person states that he has witnesses to call but that they are not present in Court, and the Court is satisfied that the absence of those witnesses is not due to any fault or neglect of the Accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the Accused person, the Court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."**

(63) What then amounts to a *prima facie* case? Since there is no statutory definition of this phraseology, this Court resorts to secondary sources of law. **The Black's Law Dictionary (9th ed., 2009),** at page 1310, defines a "*prima facie* case" in the following terms: **"... 1. The establishment of a legally required rebuttable presumption... 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor..."**

(64) In what has become the *locus classicus* precedent on the test of a *prima facie* case, the Court of Appeal of East Africa (hereinafter "EACA")[3] interpreted section 205 of the CPC of Tanzania (the equivalent of section 210 of the CPC of Kenya) in **Ramanlal Trambaklal Bhatt vs. R [1957] 1 EA 332** (hereinafter "the Bhatt decision"). In that case, the appellant, a sub-inspector of police, was charged with two Counts of corruption namely corruptly soliciting TShs. 1,000 from one Juma Sued on account of his "closing a case" against Juma Sued; and corruptly receiving TShs. 400 from one Abdulla on account of having released Juma Sued. The evidence for the prosecution showed that Juma Sued and one Isaac were used as agents provocateurs by the police, in order to test the honesty of the appellant who was a police officer at Bukoba. The Magistrate accepted the evidence of the agents that the appellant asked Juma Sued **"Have you got TShs. 1,000/-?"** but

[3] A bench constituting **Sir Newnham Worley P, Sir Ronald Sinclair V-P and Bacon JA,** as they then were, sitting in Dar-Es-Salaam Tanzania.

disbelieved Isaac who quoted the appellant as saying **"Do not worry. I will finish the matter."** The Magistrate considered that this question **("Have you got TShs. 1,000/-?")** was not sufficient to warrant a defence and proceeded to discharge the appellant on both Counts. The Attorney-General filed an appeal at the High Court. **Lowe, J.** (as he then was) remitted the case to the same Magistrate, with an express direction to put the appellant on his defence in respect of both Counts and to hear and determine the case according to law. The Magistrate put the appellant on his defence as directed, convicted him on both the Counts and sentenced him to serve imprisonment for twelve months on each Count. An appeal to the High Court was dismissed (by **Law, Ag. J.**, as he then was) and the sentence was in fact enhanced to three years for each Count, to run concurrently. Aggrieved, the appellant filed an appeal against both conviction and sentence at EACA. In reversing the conviction on the Magistrate as upheld by the High Court on grounds that the Appellant should not have been put on his defence on Count I but for the misdirection of the High Court, the following test of a *prima facie* case was laid down by EACA. Some evidence – regardless of weight, credibility and nexus - cannot score the threshold of a *prima facie* case, if insufficient to warrant a Defence. In other words, a mere scintilla of evidence is not enough nor is any amount of worthless or discredited evidence. The onus is on the prosecution to prove its case beyond reasonable doubt and in this context, a *prima facie* case is that **"which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence"**, and it certainly does not amount to a *prima facie* case if at the close of the prosecution case, the case is merely one **"which on full consideration might possibly be thought sufficient to sustain a conviction."** On the question of remitting a case to the same Magistrate with a direction to put the Accused on his Defence, EACA held that the learned Judge misdirected himself on the law and as a result led the Magistrate to arrive at a decision he would not have reached, had he not been influenced by the express misdirection. In his leading Judgment at pages 334-335, **Sir Newnham Worley P** (as he then was), pronounced himself as follows with **Sir Ronald Sinclair V-P and Bacon JA** (as they then were) concurring: **"We find ourselves unable to agree wholly with either of the passages cited above. Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the Court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the Accused on his defence." A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a "*prima facie* case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence..."**

(65) For a similar meaning, see also ***Oxford Companion of Law, at page 907,*** which defines *prima facie case* to mean **"A case which is sufficient to all an answer while *prima facie* evidence which is**

sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive." Further, see ***Mozley and Whiteley's Law Dictionary, 11th Edition,*** which defines a *prima facie* case as follows: **"A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."**

(66) Relatedly, **R. Nyakundi, J.** in **Republic vs. Alex Mwanzia Mutangili [2017] eKLR** (hereinafter "the Mutangili decision"), quoted in approval a Malaysian Court holding by **Augustine Paul, J.** in **PP vs. Datoseri Anwar bin Ibrahim (No. 3 of 1999 2CLJ 215** (at Pages 274 – 275), where the Court while discussing the extent to which a Court can go in weighing whether an Accused has a case to answer or not, rendered himself as follows: **"A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence, must be such that, if rebutted, it is sufficient to induce the Court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the Court can rule that a *prima facie* case has been made out in order to call for the Defence."**

(67) It pays to underscore at this juncture, that a decision under section 210 or 211 of the CPC should not be mixed-up with a decision under section 215 of the CPC, granted that the standards of evidence required in the two detached instances are dissimilar. The *prima facie* evidence required by sections 210 or 211 of the CPC, is certainly not one where the Court has to decide whether the Accused is guilt or not, but that which, in the fair estimation of the Court, a conclusion is reached that the prosecution has put up a case which in all fairness warrant a defence. See **Republic vs. Charles Kimani Mbugua [2017] eKLR** (hereinafter "the Mbugua decision"), where the Court pronounced itself as follows: **"However, at this stage of the trial it is enough that the evidence adduced affirms that the allegation is made out to the reasonable satisfaction of the Court ... My understanding of a *prima facie* case is not one where this Court has to decide the Accused innocence or guilt, but to review the evidence and consider whether the prosecution has put up a case and materials to the extent to fairly call the Accused to defend himself."** On the other hand, a determination under section 215 of the CPC, is certainly one where the Court has to decide whether the Accused is guilt or not.

(68) Sufficiency or otherwise, of evidence at the close of the prosecution case, is a question of law. It follows that a determination under sections 210 or 211 of the CPC is a question of law. In the ***Wachira decision,*** it was held thus **"An appeal under s. 348A of the Criminal Procedure Code, by the Attorney-General, only lies on a matter of law. However it has been settled for many years that the sufficiency or otherwise of the evidence at the close of the prosecution case, so as to require an Accused to make his defence thereto, is a matter of law."** See also ***the Bhatt decision;*** and ***the Murimi decision.***

(69) Granted that sufficiency or otherwise of evidence is a question of law, it further follows that a Court is only entitled to acquit at that stage if there is no evidence of a material ingredient of the

offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict. In ***the Wachira decision,*** it was thus held that **"A Court is only entitled to acquit at that stage if there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict."** See also the ***Bhatt decision; the Murimi decision; the Patel decision; the Bracegirdle decision; the Edwards decision,*** et alia.

(70) Further, given the indispensability of identification evidence in a criminal charge, it has been enunciated that as part of the package constituting *prima facie* evidence, the prosecution evidence must have laid a nexus between the offence and the Accused. In **Daniel Manuthu vs. Republic, Nairobi High Court Criminal Case Number 9 of 1998 (Unreported), Onyango Otieno J.** (as he then was) held that at this stage, a nexus between the crime and/or offence and the Accused person(s) must be demonstrated and that the Court has to pose and answer whether **"without their evidence the Court is being asked to imagine what could have happened and thus create its own evidence."**

(71) Similarly, regarding the hallmarks of a *prima facie* case, see also **Republic vs. Wachira [1975] 1 EA 262** (hereinafter "the Wachira decision"), **Murimi vs. Republic [1967] 1 EA 542** (hereinafter "the Murimi decision"); **Patel vs. Republic [1968] E.A. 97** (hereinafter "the Patel decision"); **Bracegirdle vs. Oxley, [1947] 1 All E.R. 126** (hereinafter "the Bracegirdle decision"); **Edwards vs. Bairstow [1955] 3 All E.R. 48** (hereinafter "the Edwards decision"); **Republic vs. Joshua Koikai Sitaya [2016] eKLR**(hereinafter "the Sitaya decision"); **Republic vs. Juliana Wambui Thiongo [2018] eKLR**(hereinafter "the Thiongo decision"); **Anthony Njue Njeru vs. Republic [2006] eKLR**(hereinafter "the Njeru decision"), *et alia.*

(72) Conceptually, therefore, there are no lesser than six cardinal pillars which underpin a *prima facie* case, all of which are questions of law. **First,** the act(s) or omission(s) or both complained of, must have constituted an offence known to the written law of Kenya. **Second,** *ex facie,* without a protracted examination or deep interrogation, the evidence laid before Court must have disclosed the material ingredients of the offence known to the written law of Kenya. **Third,** *ex facie,* without a protracted examination or deep interrogation, the evidence presented by the prosecution must have surmounted the evidential rules which govern relevancy and admissibility of evidence. **Fourth,** *ex facie,* without a protracted examination or deep interrogation, the threshold of evidence which turns on the fulcrum of the standard of evidence, the probative value of the evidence, the propensity of evidence, and the weight of the evidence presented, must have risen to a threshold incapable of shifting the burden to the Accused. Under this pillar, several rules of evidence are factored including corroborative evidence. **Fifth,** *ex facie,* without a protracted examination or deep interrogation, the credibility of witnesses must have risen to the level which cannot possibly leave the presiding officer's mind in reasonable doubt and the evidence must not be so discredited or worthless that it cannot sustain a conviction ultimately. Under this pillar, several rules of evidence are factored including but not limited to rules which govern inconsistencies and discrepancies, and their innate dissimilarities. **Sixth,** *ex facie,* without a protracted examination or deep interrogation, the evidence presented by the prosecution must have laid sufficient nexus between the offence set out in the charge, and the Accused.

(73) Turning to the law underpinning the charges, section 42 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (hereinafter "ACECA") defines the offences related to conflict of interest generally. Although the focus of the charges under Counts III and IV, is section 42(3) thereof, I find it necessary to reproduce the whole section for ease of contextualization and stipulates as follows: **"(1) If an agent has a direct or indirect private interest in a decision that his principal is to make the agent is guilty of an offence if — (a) the agent knows or has reason to believe that the principal is unaware of the interest and the agent fails to disclose the interest; and (b) the agent votes or participates in the proceedings of his principal in relation to the decision. (2) A private body may authorize its agent to vote or participate in the proceedings of the private body and the voting or participation of an agent as so authorized is not a contravention of subsection (1). (3) An agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body is guilty of an offence. (4) Subsection (3) does not apply with respect to an employment contract of the agent, or a related or similar contract or agreement or to any prescribed contract, agreement or investment."** {Emphasis supplied}

(74) Section 46 of ACECA defines the offence of abuse office as follows: **"A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence."**

(75) Section 47A of ACECA defines inchoate offences in respect to corruption and economic crimes. Although the focus of the charges under Counts I and II, is section 47A (3) thereof, I find it necessary to reproduce section 47A *in extenso* for ease of contextualization and stipulates as follows: **"(1) A person who attempts to commit an offence involving corruption or an economic crime is guilty of an offence. (2) For the purposes of this section, a person attempts to commit an offence of corruption or an economic crime if the person, with the intention of committing the offence, does or omits to do something designed to its fulfilment but does not fulfil the intention to such an extent as to commit the offence. (3) A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence. (4) A person who incites another to do any act or make any omission of such a nature that, if that act were done or the omission were made, an offence of corruption or an economic crime would thereby be committed, is guilty of an offence."** {Emphasis supplied}

(76) Section 48 of ACECA provides the general punishment for offences defined under Part V of ACECA, which span between sections 40 and 47A of ACECA. The general punishments for Accused persons convicted for any of the said defined offences are as follows: **"(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. (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."

(77) Section 3 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009 (hereinafter "POCAMLA") defines the offence of money laundering. Although the focus of the charges under Counts V and VI, is section 3(b)(i) thereof, I find it necessary to reproduce the whole section for ease of contextualization and stipulates as follows: **"A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and— (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or (b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to — (i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or (iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence."**

(78) Section 4 of POCAMLA defines the offence of acquisition, possession or use of proceeds of crime. I also find it useful to reproduce it *in extenso* for ease of contextualization and stipulates as follows: **"A person who — (a) acquires; (b) uses; or (c) has possession of, property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence."**

(79) Section 16 of POCAMLA provides the general punishment for each offence defined under POCAMLA. The general punishments for Accused persons convicted for any of the said defined offences are as follows: **"(1) A person who contravenes any of the provisions of sections 3, 4 or 7 is on conviction liable — (a) in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; and (b) in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher. (2) A person who contravenes any of the provisions of sections 5, 8, 11(1) or 13 is on conviction liable — (a) in the case of a natural person, to imprisonment for a term not exceeding seven years, or a fine not exceeding two million, five hundred thousand shillings, or to both and (b) in the case of a body corporate, to a fine not exceeding ten million shillings or the amount of the value of the property involved in the offence, whichever is the higher. (3) A person who contravenes the provisions of section 12(3) is on conviction, liable to a fine not exceeding ten percent of the amount of the monetary instruments involved in the offence. (4) A person who contravenes the provisions of section 9, 10 or 14 is on conviction liable — (a) in the case of a natural person, to imprisonment for a term not exceeding two years, or a fine not exceeding one million shillings, or to both and (b) in the case of a body corporate, to a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher. (5)** ***Deleted by Act No. 51 of 2012.*** **(6) Where any offence under**

this Part is committed by a body corporate with the consent or connivance of any director, manager, secretary or any other officer of the body corporate, or any person purporting to act in such capacity, that person, as well as the body corporate, shall be prosecuted in accordance with the provisions of this Act."

(80) Throughout the thirteen Counts, certain phraseologies, words or terminologies have been applied and its necessary to appreciate their legal purport. Section 2 of ACECA defines:

(i) a "**benefit**" to mean "**any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage.**"

(ii) "**corruption**" to mean "**(a) an offence under any of the provisions of sections 39, 44, 46 and 47; (b) bribery; (c) fraud; (d) embezzlement or misappropriation of public funds; (e) abuse of office; (f) breach of trust; or (g) an offence involving dishonesty — (i) in connection with any tax, rate or impost levied under any Act; or (ii) under any written law relating to the elections of persons to public office.**"

(iii) an "**economic crime**" to mean "**(a) an offence under section 45; or (b) an offence involving dishonesty under any written law providing for the maintenance or protection of the public revenue; (c) an offence involving the laundering of the proceeds of corruption.**"

(iv) a "**private body**" to mean "**any person or organisation not being a public body and includes a voluntary organisation, charitable organisation, company, partnership, club and any other body or organisation howsoever constituted.**"

(v) a "**public body**" to mean "**(a) the Government, including Cabinet, or any department, service or undertaking of the Government; (b) the National Assembly or the Parliamentary Service; (c) a local authority; (d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or (e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition.**"

(vi) a "**public officer**" to mean "**an officer, employee or member of a public body, including one that is unpaid, part-time or temporary.**"

(81) Section 38 of ACECA defines an "**agent**" and "**principal**" as follows: "**(1) In this Part — "agent" means a person who, in any capacity, and whether in the public or private sector, is employed by or acts for or on behalf of another person; "principal" means a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent acts. (2) If a person has a power under the Constitution or an Act and it is unclear, under the**

law, with respect to that power whether the person is an agent or which public body is the agent's principal, the person shall be deemed, for the purposes of this Part, to be an agent for the Government and the exercise of the power shall be deemed to be a matter relating to the business or affairs of the Government. (3) For the purposes of this Part— (a) a Cabinet Secretary shall be deemed to be an agent for both the Cabinet and the Government; and (b) the holder of a prescribed office or position shall be deemed to be an agent for the prescribed principal. (4) The regulations made under this Act may prescribe offices, positions and principals for the purposes of subsection (3)(b)."

(82) Quite unlike the express direction of the High Court that the then trial Magistrate puts Bhatt on his defence - which direction was construed by EACA in ***the Bhatt decision*** as a misdirection - this Court has construed the direction of the High Court in this matter to mean that this Court is expected to independently make a determination either under section 210 and/or 211 of the CPC, based on the correct charges set out in the amended charge sheet dated 7th September 2020 and stated to the Accused persons on 14th September 2020.

(83) Upon interrogating and critically examining the prosecution evidence and having considered key issues emerging from cross-examination of the prosecution witnesses all in the context of both the weighty questions of both fact and law raised in the well-articulated and compelling submissions of learned counsel Mr. A. Nyakundi & Mr. E. Cheruiyot for the 1st Accused, and Ms. P. Atukunda for the 2nd & 3rd Accused persons, key among them being: **(i) that the charges are defective on account of duplicity and ambiguity; (ii) that the evidence of the star witness, PW2, is uncorroborated; (iii) that the evidence presented by the prosecution is characterized with material inconsistencies; (iv) that evidence of PW2, does not pass the test of the evidence of an accomplice generally as discussed in *inter alia*, the decision of the COA in Karanja & Another vs. Republic [1990] eKLR; (v) that the established principle that at this stage, a Court should proceed with caution not to shift the burden of proof by putting the Accused persons on defence in circumstances where there's no *prima facie* evidence; and (vi) that the evidence presented by the prosecution is insufficient and too discredited to surmount the threshold of a *prima facie* case,** and upon addressing my judicial mind to the preliminary points of law raised, the relevant law and the test of a *prima facie* case discussed *supra,* this Court enter the findings below.

(84) It is now trite law that preliminary points of law have a deleterious effect, capable of determining a matter at the preliminary stage. In that vein, it becomes obligatory upon the Court to dispose all preliminary points of law at the earliest opportunity. It follows that before turning to consider the charges on merit, if at all this Court will get there, it is imperative to consider all the preliminary questions of law.

(85) Besides attacking the charges on merit, the defence assailed the charges on basis of multifaceted defects. **First,** it is the defence's fervent position that the Accused persons are ambiguously and abstrusely described in the charge sheet. The **second** defect urged by the defence is that the charges are duplex. Although the two points of law were originally raised by the 1st Accused, the 2nd and 3rd Accused persons sought association with the 1st Accused's submissions.

(86) **First,** concerning the defect of ambiguity, the 1st Accused raised four issues as follows: ***(i) that the manner in which the Accused persons were described is nebulous as not to tell the true identity of any of the Accused persons in a manner that resultantly frustrates or embarrasses the Accused persons; (ii) that the manner in which dates were framed using the phraseology "between, on or about" is meaningless, rendering the charges vague and duplex; (iii) that the manner of description of the 1st Accused in aliases was meant to prejudice his trial in which no iota of explanation was rendered for the aliases; (iv) that The Anti Corruption & Economic Crimes Act No. 3 of 2003 was the correct description as set out in Count 1, but in Count 2, "Act No. 3 of 2003" is missing and the Act is also wrongly described as "The Anti Corruption and Economic Crime Act".*** The 1st Accused urged this Court to reach a conclusion that the sum effect of the foregoing ambiguities amount to an incurable defect, for which reason this Court should dismiss the charges and acquit the 1st Accused under section 210 of the CPC. It's instructive to underscore that although the four issues were originally raised by the 1st Accused, the 2nd and 3rd Accused persons sought association with the 1st Accused's submissions.

(87) This Court will open the analysis with the first issue namely the manner in which the Accused persons were described in the charges. In this regard, this Court has noted from the Ruling of my learned brother, Hon. Dr. D. Ogoti addressed his mind at length to this defect and ultimately reached a conclusion that the 8 charges, as set out in the Charge Sheet dated 27th January 2020, were defective in substance for ambiguity leading to incurable prejudice and embarrassment to the Accused persons, in contravention of section 134 of the CPC. On the premise of this preliminary point of law alone, my learned brother reached a conclusion that the prosecution had failed to make a case sufficiently to require a defence. Put differently, determination of a *prima facie* case by learned brother did not turn on the merits of the prosecution case, having tumbled on basis of the said preliminary point of law.

(88) However, upon appeal against the decision of my said learned brother, the questions were determined by the High Court in the Judgment which was rendered on 11th December 2024, in ***Criminal Anti-Corruption Appeal Number E016 of 2022,*** where the learned Judge, Prof. Dr. Nixon Sifuna, held that my learned brother **"fell into grave error"** having based his decision on a void charge sheet dated 27th January 2020, instead of the amended Charge Sheet dated 7th September 2020 and read to the Accused persons on 14th September 2020.

(89) It follows that this Court is not estopped from examining, *de novo,* whether the charges set out in the amended Charge Sheet dated 7th September 2020 and read to the Accused persons on 14th September 2020, are tainted with defects namely ambiguity and/or duplicity and if the answer is to the affirmative, whether the defects are fatal or otherwise.

(90) Learned counsel for the 1st Accused, advances a thesis to the effect that remittal of this matter by the High Court did not, at all, cure the defects in the charge sheet dated 7th September 2020, since it shares defects similar to the charge sheet dated 27th January 2020. Learned counsel for the 2nd and 3rd Accused persons having adopted the submissions of learned counsel for the 1st Accused, the 2nd and 3rd Accused persons also share the same view.

(91) Having examined the charges set out in the amended Charge Sheet dated 7th September 2020 and read to the Accused persons on 14th September 2020, this Court concurs with the position advanced by learned counsel for the 1st Accused and adopted by learned counsel for the 2nd and

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(91) Having examined the charges set out in the amended Charge Sheet dated 7th September 2020 and read to the Accused persons on 14th September 2020, this Court concurs with the position advanced by learned counsel for the 1st Accused and adopted by learned counsel for the 2nd and

3rd Accused persons that the charges are framed in the same posture as the charges set out in the Charge Sheet dated 27th January 2020, upon which Hon. Dr. Ogoti anchored his decision, and ultimately dismissed all charges against all Accused persons on account of ambiguity.

(92) This matter having been remitted for a fresh decision under sections 210 or 211 of the CPC, it is incumbent upon this Court to satisfy itself, independently, whether the charges set out in the amended Charge Sheet dated 7th September 2020 and read to the Accused persons on 14th September 2020, are incurably ambiguous.

(93) Every charge or information is required to contain and set out with ssufficient detail, a statement of the specific offence or offences, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. See section 134 of the CPC. Further comprehensive rules of framing charges, including how to describe various things or persons which was a subject of the position taken by the defence in this matter, are enacted in section 137 of the CPC which stipulates as follows: **"The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code — (a) (i) Mode in which offences are to be charged.—a Count of a charge or information shall commence with a statement of the offence charged, called the statement of offence; (ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence; (iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required; (iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case; (v) where a charge or information contains more than one Count, the Counts shall be numbered consecutively; (b) (i) Provisions as to statutory offences — where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the Count charging the offence; (ii) it shall not be necessary, in a Count charging an offence constituted by an enactment, to negative any exception or exemption from, or qualifications to, the operation of the enactment creating the offence; ... (d) *Description of persons.*—the description or designation in a charge or information of the Accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a**

description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as "a person unknown";... (f) *General rule as to description*—subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to;..." {Emphasis supplied}

(94) In this connection, it will be necessary to consider whether the High Court applied itself to the defects of ambiguity and duplicity, granted that the findings of the High Court have a binding effect.

(95) This Court has noted from this Judgment, that the High Court applied itself to the defect of ambiguity of the charges dated 27th January 2020, which was raised by the defence and determined by my learned brother. In the Judgment in ***Criminal Anti-Corruption Appeal Number E016 of 2022,*** at paragraphs 21-22, His Lordship expressed the threshold to be applied in determining defectiveness of charges: **"21. Any defects in a charge sheet need be those that are manifest on the face of the record, and not those that 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 to this; rather than an abstract and academic approach. 22. I hold that it is not every minor or minute error or slip or goof in a charge that would amount to an actionable defect as to abort the charge. Such an approach would fly in the face of the express provisions of Article 159 of the Kenya Constitution. Which provisions enjoin Courts to determine cases on merits and substantive justice, and not on lofty procedural technicalities."**

(96) Although evidently, the High Court addressed the question of ambiguity and proceeded to give its judicial view limited to issue of ambiguity, since the decision of my learned brother **Hon. Dr. D. Ogoti** did not turn on duplicity, the question of duplicity was not available to the High Court for determination.

(97) The above rendition and threshold set by the High Court on appeal - as I discern it – is that it will be unreasonable and impractical to expect perfection and/or faultlessness in drafting charges. Put differently, considering inherent human frailties which were evidently in contemplation when Article 159(2)(c) of the Constitution was drafted, the High Court holds a dim view of a faultless or perfect drafting scenario, for it is unreasonable and unpragmatic to so expect. Simply put, a faultless drafting or framing of charges does not exist and charges can only be faulted to have scored below this threshold if, viewed through a plain, obvious and pragmatic lens, they are so hopelessly framed as to cause extreme frustration, embarrassment, prejudice and injustice to the Accused when taking plea.

(98) Limited to the defect of ambiguity and since the charges dated 27th January 2020 and 7th September 2020 adopt a similar frame, it follows that by dint of the doctrine of *stare decisis,* this Court is bound by the rendition held and threshold set by the High Court in the said Judgment dated 11th December 2024, in ***Criminal Anti-Corruption Appeal Number E016 of 2022,*** paragraphs 21-22.

Having considered the charges set out in the amended Charge Sheet dated 7th September 2020 and read to the Accused persons on 14th September 2020, and granted that the charge sheet dated 7th September 2020 is framed in a similar style as the charge sheet dated 27th January 2020, which was questioned by the defence at the lower Court and on appeal, addressed by the High Court in paragraphs 21-22 set out verbatim above, and upon deploying the said rendition and threshold to the ambiguity described in the first issue - which rendition, approach and threshold invoked Article 159(2)(d) of the Constitution which commands this Court that justice shall be administered without undue regard to procedural technicalities - this Court is unable to find the charges as framed defective in substance on account of ambiguity. However, this Court acknowledges that there are manifest defects in form. Whereas the former (defect in substance) is fatal, the latter (defect in form) is otherwise.

(99) Further, having deployed the same rendition, threshold and approach to the ambiguities raised in the second, third and fourth issues, similarly, this Court is unable to find the charges as framed defective in substance, although to some degree, this Court acknowledges that there are undeniably manifest defects in form, which is not fatal. In particular, concerning the second issue - that the manner in which dates were framed using the phraseology **"between, on or about"** is meaningless, rendering the charges vague and duplex - faced with a similar situation in **Wabwire vs. Republic (Criminal Appeal E032 of 2023) [2024] KEHC 1989 (KLR) (29 February 2024) (Judgment), Githua, J.** was of the judicial view that provided that the particulars of the offence, with sufficient clarity, disclose only one offence the Accused is alleged to have committed, then it is not fatal to state two or more dates in one Count. At paragraph 18, Her Ladyship held thus: **"The fact that the particulars supporting the charge in the main Count referred to diverse dates does not by itself make the charge duplex given that the particulars were clear that the appellant allegedly committed the offence of defilement on the dates stated therein. No other offence was expressly or impliedly stated in the main Count. The Court record also reveals that the appellant clearly understood the charge levelled against him and strenuously defended himself accordingly. Nothing therefore turns on that ground of appeal."**

(100) Turning to the preliminary point of law namely duplicity, **The Black's Law Dictionary (9th ed., 2009),** at page 578, defines the term **'duplicity'** as follows: **"... 1. Deceitfulness; double-dealing. 2. The charging of the same offense in more than one Count of an indictment. 3. The pleading of two or more distinct grounds of complaint or defense for the same issue. In criminal procedure, this takes the form of joining two or more offenses in the same Count of an indictment..."**

(101) The relevant law is housed in section 135 of the CPC which stipulates the rules of joinder of charges as follows: **"(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."

(102) Further rules of framing charges as to avoid duplicity are enacted, comprehensively, in section 137 of the CPC (reproduced above). Notably, see section 137(1)(b)(i) of the CPC which prescribes the rule on charging an Accused with alternative offences, and section 137(1)(d) of the CPC which prescribes the rule on describing time.

(103) In **R E W Pope vs. R [1960] 1 EA 132** (hereinafter "the Pope decision") where EACA[4] described a duplex charge as follows: **"It is well established that a Count which charges two offences is bad for duplicity..."** See also the decision of the COA[5] in **Joseph Njuguna Mwaura & 2 others vs. Republic [2013] KECA 541 (KLR).**

(104) The clusters and nuances of of duplicity have not and will never close. However, there are three commonplace clusters. The **first cluster of duplicity** arises in circumstances where two or more offences are fused and charged as a single Count. The **second cluster of duplicity** occurs where, arising from the same set of facts and in circumstances where the same offence is defined by different statutes, the Accused is charged with multiple Counts of the same offence under different statutes, contrary to the rule of election. The **third cluster of duplicity** occurs in circumstances where the Accused is charged with multiple Counts of offences constituting a blend of inchoate offences and their corresponding substantive offences, in a separatist and independent posture, contrary to the rule of election instead of charging the inchoate offences as alternatives to the corresponding substantive offences.

(105) Although the law does not adopt an abolitionist approach to duplicity, it takes a stance that it is undesirable to plead charges in a duplex manner for doing so potentially frustrates, embarrasses and/or prejudices the Accused when pleading to charges. The general rule, therefore, is that where there is an effective and sufficient charge of a substantive offence, the addition of a charge of conspiracy is highly undesirable. It is thus desirable for the prosecution to either join charges on inchoate offences as alternatives to charges on the effective substantive offences or elect between preferring charges on inchoate offences or substantive offences. In this connection, conspiracy being an inchoate offence, it is highly desirable that it is charged in alternative to the substantive offence. Conversely, it is highly undesirable to join charges on inchoate and substantive offences as separate and independent charges, since doing so considerably prejudices or embarrasses the Accused.

(106) In the decision of the COA[6] in **John Mburu Kinyanjui vs. Republic [1988] KECA 63 (KLR)** (hereinafter "the Kinyanjui decision"), the Court held as follows: **"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... The problem is deeper than simply changing**

[4] A bench constituted of **Alastair Forbes VP, Gould and Windham JJA,** as they then were.
[5] A bench constituted of **Mwera, JA, as he then was, Warsame, Kiage, Gatembu & J. Mohammed JJ.A.**
[6] A bench constituted of **HG Platt, JM Gachuhi, FK Apaloo, JJA,** as they then were.

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." For a similar judicial view, see also **Musinga vs. R (1951) 18 EACA 211; R vs. Cooper & Compton [1947] 2 All ER 701;** and the principles stated in ***Archbold Criminal Pleading Evidence and Practice, 40th Edition, paragragh 4073.***

(107) In ***the Kinyanjui decision,*** the COA proceeded to enunciate the general rule and exceptions as follows: **"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."**

(108) In ***the Kinyanjui decision,*** the COA posed a question thus: **"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."** Having found that the charges as framed presented a confusion, difficulty and thus prejudice to the Accused persons, in ***the Kinyanjui decision,*** the COA remitted the case to the Magistrate's Court for the state to elect.

(109) Having subjected the circumstances of this case to the principles which were enunciated in ***the Kinyanjui decision,*** and having further subjected the charges to the three clusters of duplicity, this Court finds that none of the charges can said to have taken the form of either the first or the second

facet of duplicity.

(110) However, it seems to this Court that the state may not have observed the third facet of duplicity. **The Black's Law Dictionary (9th ed., 2009),** at page 351, in its closing remarks on **'conspiracy'** describes it's legal status as follows: **"... <u>Conspiracy is a separate offense from the crime that is the object of the conspiracy.</u> A conspiracy ends when the unlawful act has been committed or (in some states) when the agreement has been abandoned. A conspiracy does not automatically end if the conspiracy's object is defeated..."** {Emphasis supplied}

(111) Having incontestably arisen from the same set of facts, and in light of the overwhelming assertion of the prosecution by conduct that the facts available point to the direction that the conspiracy had crystallized into effective substantive offences as demonstrated by way of preferring substantive charges under Counts 2, 3,4,5,6,7, 9,10,11,12 & 13, crowned with the unflinching submissions thereon, this Court finds the circumstances of this case inherently gravitating towards the general rule laid down in ***the Kinyanjui decision*** (and inherently ill-disposed to the exceptions thereto). In this context, this Court finds that the decision to prefer a blend of the inchoate offences set out under Counts 1 and 8 which had already suffered a natural death upon crossing the rubicon of crystallization, together with their corresponding substantive charges under Counts 2, 3,4,5,6,7, 9,10,11,12 & 13, in a separatist and independent frame, offends the rule of election resident in the general rule in ***the Kinyanjui decision.*** Under the rule of election, the prosecution should have elected to charge either the inchoate offences set out under Counts 1 & 8 to the exclusion of the substantive charges or the substantive charges under Counts 2, 3,4,5,6,7, 9,10,11,12 & 13 to the exclusion of the inchoate offences or place the inchoate offences under Counts 1 & 8 as alternatives to any of the Counts 2, 3,4,5,6,7, 9,10,11,12 & 13. The inconsistent positions adopted by the DPP, further offends the doctrine approbation and reprobation.

(112) In the circumstances, this Court finds that it was decidedly undesirable and objectionable to charge the Accused persons for the inchoate offences set out under Counts 1 & 8 (where the three Accused persons were charged with the offence of conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003) alongside charges of substantive offences set out under Counts 2, 3,4,5,6,7, 9,10,11,12 and 13. Wherefore this Court reaches a conclusion that the charges set out under Counts 1 & 8 are duplex.

(113) **Third,** turning to the issue raised by all Accused persons that the charges are unfair, illegal, unreasonable and irrational, this Court conceives it to be a question of both law and fact. Unlike the preliminary points of law, some evidence is thus required to dispose it. Although the question is in the nature of a judicial review question best suited for the High Court sitting in its Judicial Review jurisdiction, alive to the remit of the jurisdiction of this Court as a trier of fact, in determining whether or not a case has been made against the Accused persons sufficiently to warrant a defence, if it emerges from the facts on record, *prima facie*, that the charges are unfair, illegal, unreasonable and irrational and that there was no rationale or basis to charge the Accused persons or any of them, and/or if it emerges that the machinery of this Court has been put into the use it was not curved for, in a manner amounting to abuse of the Court process, to vex or oppress any Accused, this Court is not estopped and it will not hesitate, if there is no *prima facie*

evidence against the Accused persons - of course underpinned by the six pillars of a *prima facie* case afore-discussed – that the charges are manifestly unfair, illegal, unreasonable, irrational, vexing., oppressing and/or an abuse of the Court process, this Court will not hesitate to make a finding on the listed issues in the determination of whether there is a *prima facie* case. In this matter, so far, this Court has not spotted *ex facie* and it does not emerge from the evidence on record, *prima facie,* that the charges are unfair, illegal, unreasonable, irrational, vexing, oppressing and/or that the machinery of this Court has been put into the use it was not curved for, in a manner amounting to abuse of the Court process, to vex or oppress any Accused persons.

(114)**Fourth,** pertaining Counts 2, 3,4,5,6,7, 9,10,11,12 & 13, this Court has circumspectingly and agonizingly considered the totality of oral and documentary evidence presented by the prosecution, all in the context of all the key issues emerging from cross-examination of the prosecution witnesses and in the further context of the weighty questions of fact and law raised in the well-articulated and compelling submissions of learned counsel Mr. A. Nyakundi & Mr. E. Cheruiyot for the 1st Accused, and Ms. P. Atukunda for the 2nd & 3rd Accused persons, and upon addressing my judicial mind to the preliminary points of law raised by all Accused persons, the law upon which the charges are founded and the test of a *prima facie* case, of course viewed through the lens of the six cardinal pillars which anchor a *prima facie* case as discussed herein above - as distilled from ***the Wachira; Bhatt; Murimi; Patel; Bracegirdle; Edwards, Mutangili, Mbugua, Sitaya, Thiongo*** and ***Njeru decisions,*** *et alia* – and *ex facie,* without a protracted examination or deep interrogation thereof, the evidence on record has generated persuasion in my mind that the prosecution has made a *prima facie* case against each Accused, warranting a Defence from each, limited to Counts 2, 3,4,5,6,7, 9,10,11,12 & 13.

PART VIII: DISPOSITION

(115)Wherefore, this Court orders and directs as follows:

(i) Having failed to present *prima facie* evidence in support thereof and having further offended the rule against duplicity, Count 1 is dismissed and all the three Accused persons are acquitted therefrom, under section 210 of the CPC.

(ii) Having failed to present *prima facie* evidence in support thereof and having further offended the rule against duplicity, Count 8 is dismissed and all the three Accused persons are acquitted therefrom, under section 210 of the CPC.

(iii) Having presented *prima facie* evidence in support of Count 2, the 1st Accused is called upon to make his defence.

(iv) Having presented *prima facie* evidence in support of Count 3, the 1st Accused is called upon to make his defence.

(v) Having presented *prima facie* evidence in support of Count 4, all the three Accused persons are called upon to make their defence.

(vi) Having presented *prima facie* evidence in support of Count 5, the 2nd and 3rd Accused persons are called upon to make their defence.

(vii) Having presented *prima facie* evidence in support of Count 6, the 2nd and 3rd Accused persons are called upon to make their defence.

(viii) Having presented *prima facie* evidence in support of Count 7, the 1st Accused is called upon to make his defence.

(ix) Having presented *prima facie* evidence in support of Count 9, the 1st Accused is called upon to make his defence.

(x) Having presented *prima facie* evidence in support of Count 10, the 1st Accused is called upon to make his defence.

(xi) Having presented *prima facie* evidence in support of Count 11, all the three Accused persons are called upon to make their defence.

(xii) Having presented *prima facie* evidence in support of Count 12, the 2nd and 3rd Accused persons are called upon to make their defence.

(xiii) Having presented *prima facie* evidence in support of Count 13, the 2nd and 3rd Accused persons are called upon to make their defence.

Delivered, Signed and Dated at Milimani Anti-Corruption Court this 10th day of January, 2025

.....

C.N. Ondieki
Principal Magistrate

In the presence of:

The 1st, 2nd and 3rd Accused Persons

Prosecution Counsel: Mr. Nyamache and Mr. Akula

Advocates for the 1st Accused: Mr. A. Nyakundi & Mr. E. Cheruiyot

Advocate for the 2nd and 3rd Accused Persons: Ms. P. Atukunda

Court Assistant: Mr. Mule