IN THE HIGH COURT OF ZAMBIA **HPA /16/2009**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

L. T. GEN. GEOJAGO ROBERT CHASWE MUSENGULE **1ST APPELLANT**

AMON SIBANDE **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

BEFORE THE HON. MR. JUSTICE C. KAJIMANGA, MADAM JUSTICE F. LENGALENGA AND MRS. JUSTICE E. P. MWIKISA THIS 16TH DAY OF MARCH, 2012

FOR THE 1ST APPELLANT: Mr. E. S. Silwamba, SC and Mr. L. Lubinda, Messrs Eric Silwamba & Co.
FOR THE 2ND APPELLANT: Mr. R. Mainza, Messrs Mainza & Co. and Mr. C. Sianondo, Messrs Malambo & Co.
FOR THE RESPONDENT: Mrs. F. L. S. Siyuni, Chief State Advocate and Mrs. M. B. Nawa, Acting Principal State Advocate

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J U D G M E N T

Cases referred to:

(1) Joshua Mapushi v The Queen (1963-1964) Z and LRLR 90
(2) Patel v Attorney General (1969) Z. R. 97
(3) People v Henry Kunda (1977) Z. R. 223
(4) In re Thomas Mumba v The People (1984) Z. R. 38

(5) Mwewa Murono v The People (2004) Z. R. 207
(6) The People v Winter Makowela & Another (1979) Z. R. 290
(7) Nkhata and Four Others v. The Attorney General (1966) Z. R. 174
(8) Moonga v. The People (1969) Z. R. 63
(9) Samuel Sooli v The People (1981) Z. R. 298
(10) Stephen Manda v The People (1980) Z. R. 116
(11) William Muzala Chipango & Others v The People (1978) Z. R. 304
(12) Kafuti Vilongo v The people (1977) Z. R. 423
(13) Chabala v The People (1976) Z. R. 14
(14) Abel Banda v The People (1986 Z. R. 105
(15) Kalebu Banda v The People (1977) Z. R. 169
(16) David Zulu v The People (1977) Z. R. 151
(17) Eagle Charalambous Transport Limited v Gideon Phiri (1994) Z. R. 52
(18) Attorney-General v Peter M. Ndhlovu (1986) Z. R. 12
(19) Maseka v The People (1972) Z. R. 9
(20) Mushemi Mushemi v The People (1982) Z. R. 71
(21) Kalaluka Musole v The People (1963 – 1964) & N. R. L. R. 173 (C. A.)
(22) Mutale and Richard Phiri v The People (1997) Z. R. 51 (S. C.)
(23) Yotam Manda v The People (1989) Z. R.
(24) Attorney-General v Marcus Kampumba Achiume (1983) Z. R. 1
(25) Esther Mwiimbe v The People (1986) Z. R. 15 (S. C.)
(26) Makin v Attorney-General for New South Wales (1894) AC 57
(27) R v Kilbournes [1973] AC 729
(28) Chuba v The People (1976) Z. R. 272 (S. C.)
(29) Sithole v The State Lotteries Board (1975) Z. R. 106
(30) R v Silverlock [1894] 2 QB 766
(31) George Bienga v The People (1978) Z. R.32
(32) Lumus Agricultural Services Company (Z) Limited v Gwembe Valley Development Company Limited (In receivership) (1999) Z. R. 1 (S. C.)
(33) Clerke v the People (1973) Z. R. 179
(34) Mwanza (AB) v The People (1973) Z. R. 329
(35) Liyongile Muzwanolo v The People (1986) Z. R. 46
(36) F/SGT John Ezekiel Mumba v The People (2006) Z. R. 93
(37) Mulwanda v The People (1976) Z. R. 133 (S. C.)
(38) The People v Silva and Freitas (1969) Z. R. 121
(39) Fluckson Mwandila v The People (1979) Z. R. 174
(40) R v Harris [1969] 2 ALL ER 599
(41) Zyambo v The People (1977) Z. R. 153
(42) Musole v The People (1963-4) Z. R. 178
(43) Saluwena v The People (1965) Z. R. 4
(44) Ticky v The People (1968) Z. R. 21

Legislation referred to:

1. Anti-Corruption Commission Act No. 42 of 1996
2. Authentication of Documents Act Chapter 75 of the Laws of Zambia
3. Commissioner for Oaths Act Chapter 33 of the Laws of Zambia
4. Constitution of Zambia Cap 1 of the Laws of Zambia
5. Criminal Procedure Code Chapter 88 of the Laws of Zambia
6. Mutual Legal Assistance in Criminal Matters Act Chapter 98 of the Laws of Zambia
7. National Tender Board Act Chapter 394 of the Laws of Zambia (repealed)
8. Penal Code Chapter 87 of the Laws of Zambia
9. Public Procurement Act No. 12 of 2008

Other Work referred to:

Blacks Law Dictionary 6th edition

This is an appeal by the 1st appellant, Lt. Gen. Geojago Robert Musengule and the 2nd appellant, Amon Sibande against the judgment of the trial magistrate delivered on 2nd March, 2009, following their conviction and sentence. The 1st appellant was convicted on seven counts of offences under the Anti-Corruption Commission Act No. 42 of 1996 (hereinafter called "the ACC Act"). He was sentenced to three years on count one; four years on count two; one year on count three; one year on count five; one year on count seven; three years on count nine; and three years on count eleven. The sentences were to run concurrently. The first and second counts were that of abuse of authority of office contrary to Section 37(2) (a) as read with Section 41 of the ACC Act. The particulars were that on count one, it was alleged that on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, being a public officer, namely Zambia Army Commander did abuse his authority of office by engaging Base Chemicals Zambia Limited (hereinafter called "Base Chemicals") in which Amon Sibande is an executive officer to supply fuel with a total value of US$1,278,511.46 to the Zambia

Army in the Ministry of Defence in order to obtain property, wealth, advantage or profit directly or indirectly.

On the second count it was alleged that the 1st appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, being a public officer namely, Zambia Army Commander did abuse his authority of office by engaging Base Chemicals in which Amon Sibande is an executive officer to do repairs and construction works with a total value of US$1,079,888.44.

Counts three, five, seven, nine and eleven were all for corrupt practices by a public officer contrary to Section 29(1) as read with Section 41 of the ACC Act albeit with different facts. Under count three, it was alleged that the 1st appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, being a public officer namely, Zambia Army Commander corruptly received two garage doors valued at US$2,500.00 gratification from Amon Sibande, a chief executive officer of Base Chemicals as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body.

Under count five, it was alleged that the 1st appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka District in the Lusaka District of the Lusaka Province of the Republic of Zambia, being a public officer namely, Zambia Army Commander corruptly received one milking tank valued at US$2,500.00 gratification from Amon Sibande, a chief executive officer of Base Chemicals as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or

transaction which concerned the Zambia Army of the Ministry of Defence, a public body.

Under count seven it was alleged that the 1st appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, being a public officer namely, Zambia Army Commander corruptly received three steel structures valued at US$13,500.00 gratification from Amon Sibande, a chief executive officer of Base Chemicals as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body.

Under count nine, it was alleged that the 1st appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, being a public officer namely, Zambia Army Commander corruptly received some building materials valued at K14, 561,000.00 gratification from Amon Sibande, a chief executive officer of Base Chemicals as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body. Under count eleven it was alleged that the 1st appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, being a public officer namely, Zambia Army Commander corruptly received milking equipment comprising two mini-milkers, two header and heat sealer, two pasteurisers, two chillers, 30,000 1 litre sachets printed 30½ litre sachets all valued at US$23,875.00 gratification from Amon Sibande, a chief executive officer of Base Chemicals as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs

and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body.

The 2nd appellant was convicted on five counts of offences under the ACC Act. He was sentenced to six months on count four; six months on count six; two years on count eight; three years on count ten; and one year on count twelve. The sentences were to run concurrently. All the counts were for corrupt practices with a public officer contrary to Section 29(2) of the ACC Act as read with Section 41 of the ACC Act albeit on different facts. Under count four, it was alleged that the 2nd appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, corruptly gave two garage doors valued at US$2,500.00 gratification to the 1st appellant, a public officer namely, Zambia Army Commander as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body.

Under count six it was alleged that the 2nd appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, corruptly gave one milking tank valued at US$2,500.00 gratification to the 1st appellant a public officer namely Zambia Army Commander as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body. Under count eight it was alleged that the 2nd appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, corruptly gave three steel structures valued at US$13,500.00 gratification to the 1st appellant, a public officer namely, Zambia Army Commander as an

inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body.

Under count ten, it was alleged that the 2nd appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, corruptly gave some building materials valued at K14,561,000.00 gratification to the 1st appellant, a public officer namely, Zambia Army Commander, as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body. Under count twelve, it was alleged that the 2nd appellant on dates unknown but between 1st January, 2001 and 30th June, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, corruptly gave milking equipment comprising two mini-milkers, two header and heat sealer, two pressurizers, two chillers, thirty 1 litre sachets printed 30½ litre sachets all valued at US$23,875.00 gratification to the 1st appellant, a public officer namely, Zambia Army Commander as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body.

In support of count one, PW1 Col. D. J. Lwendo, director of transport testified that he procured oil from the British Petroleum Company (BP) within Zambia as well as Caltex and Total and that he found this arrangement when he began the duties of director of transport. He said that this arrangement was later changed by the Army Commander, (1st appellant) who gave him an

order to start procuring petroleum products from Base Chemicals in Lusaka where he dealt with the 2nd appellant.

Under cross-examination, PW1 said that the order given by the 1st appellant was verbal. He testified that although he was ordered to stop procuring from BP, Caltex and Total, there was fuel at BP and Total. He said that after the verbal order from the 1st appellant he prepared a local purchase order based on the quotation from Base Chemicals and he procured the first truck in 2001 in a month he could not recall.

PW1 also testified that he did not know the price difference between BP and Base Chemicals because the latter did not indicate the price per cubic litres. He said that their operational problems were not being met by BP at the time. The witness told the Court that he did not report this problem as fuel was in short supply through out the country at that time.

PW1 further testified that he was aware that the Army was supplied fuel by the Zambia Air Force who did not tell him where the oil had come from but that it was procured from the Air Force after the verbal order given by the 1st appellant in May 2001. He said that he only received a quotation from the Zambia Air Force and then prepared a local purchase order in which he reflected that Zambia Army was buying fuel from Zambia Air Force worth K350,000,000.00 but that he did not know the quantity.

PW5, Lt. Col. Hanzuki, deputy director of finance said that he made available to the Task Force documents relating to the payments made to Base Chemicals.

Col. Milton Njolomba (PW12), military assistant when the 1st appellant was Army Commander testified that he used to write loose minutes and that in relation to this case he wrote exhibits P5D, P6B, P7D, P8B, P9D, P12B and P15B on behalf and on authority of the 1st appellant to order the director of

finance to pay funds and that one of the companies paid was Base Chemicals.

In his defence, the 1st appellant testified that the Army was in dire need of fuel at the material time in order to guarantee security for Zambia and its people. He said that the Army could not obtain fuel from its previous sources such as BP due to its indebtedness. In cross-examination, the 1st appellant stated that the Army tender committee did not sit to discuss the projects and transactions in this matter.

The trial magistrate found as a fact on this count that the Zambia Army procured fuel from Base Chemicals and at some point from the Zambia Air force. The 1st appellant was the Army Commander in the Zambia Army, a public body and was therefore a public officer and the 2nd appellant is the majority shareholder in Base Chemicals. And at page 18 of her judgment, she found as follows:

> ***"As regards the manner in which the Army began to procure fuel from Base Chemicals there is no evidence before court showing that quotations were received from other suppliers or that authority was obtained from Zambia National Tender Board (ZNTB) to purchase the fuel from that source. Indeed even A1 in his defence stated that the Army tender committee did not sit to discuss the projects and transactions in this matter. The state of affairs in the country at the time, i.e. shortage of fuel and the deployment of officers at borders is not justification for disregarding legal requirements in awarding contracts in public bodies. The Zambia National Tender Board Act, Cap 394 of the Laws of Zambia clearly provides rules that public bodies should follow when procuring materials or services. The defence did not show that during***

this time the ZNTB waived or varied the rules so as to give leeway to the Army in the manner of procuring fuel."

The trial magistrate then concluded that on the totality of the evidence she was satisfied that the prosecution had established the guilt of the 1st appellant on count one beyond all reasonable doubt.

In support of count two, the evidence of PW2, Brigadier General Harris Simulemba (Quarter Master General) was that he received instructions from the 1st appellant about Kaoma barracks where they were to construct prefabricated houses – 5 units for first warrant officers; 5 units for second warrant officers and staff sergeants; and 20 X 2 units for corporals. He said that the 1st appellant gave instructions that the task of building would be undertaken by Base Chemicals and that prior to this, he had not worked with that company. He instructed the director of engineering to prepare drawings which were given to Base chemicals and a contract was signed between the Zambia Army and Base Chemicals. According to PW2 he signed the contract on behalf of the Zambia Army on instructions from the 1st appellant and that its value was US$1,079,888.44. The witness testified that although the contract was for pre-fabricated houses, conventional buildings were constructed instead and as Quarter Master General, he did not tell Base Chemicals to build conventional buildings. According to PW2, Base Chemicals said that it was authorized by the 1st appellant to build conventional structures after soil samples had been carried out indicating that the soil could not support pre-fabricated structures.

In cross-examination PW2 stated that the instructions from the 1st appellant were given prior to October, 2001, on a date he could not recall. The Army received quotations for structures in October and that it was the first time that Base Chemicals was to build Zambia army structures. He later learned through correspondence from Base Chemicals some time in October 2001 that the company that was to build the structures was Mazzonites

Zambia Limited (hereinafter called “Mazzonites”), a subsidiary of Base Chemicals. PW2 also said that it was wrong to state that the Kaoma contract (exhibit P1) was offered to Mazzonites and that they in turn invited Base Chemicals to participate. He stated that the Army had correspondence from Base Chemicals which introduced Mr. Simasiku of Mazzonites and that that was the reason why he signed the contract with Mazzonites. The witness testified that at the time he signed the contract on 28th January, 2002, the 1st appellant was the Army Commander. He said that the quotation of 17th October, 2001, for the supply of pre-fabricated structures and construction works was faxed by the 2nd appellant and that the plans for the structures were also given to him. The witness also testified that he was not aware of any discussions that necessitated the sampling of soil in Kaoma.

In re-examination, PW2 told the lower Court that the parties to the contract were Base Chemicals and Mazzonites who were included thereto on a later date and that the commencement date of the said contract was 8th November, 2001. According to PW2 this was so because immediately Base Chemicals gave the Army the quotation, the 1st appellant gave instructions for the payment of US$500, 000.00 to Base Chemicals towards the project. He said that by the time of the 1st appellant’s resignation, the Army had already disbursed the funds and works were on going.

PW3 was Charles Geoffrey Phiri, an architect working at Buildings Department in the Ministry of Works and Supply who the Court ruled as an expert witness based on his experience and qualifications. His testimony was that in July 2002 he was instructed by his director upon request from the Army to be part of a team comprising an architect, quantity surveyor, structural engineer, electrical engineer and water and drainage engineer to travel to Kaoma and inspect the housing project, for the purpose of providing a technical report to the Army. He testified that he was the team leader and that the inspections revealed that some of the blocks and concrete used to

put up the building were of poor quality. He said that after the inspections the team concluded that the workmanship was below normal government standards. He testified that the Army was part of government in relation to his work and that the contract (exhibit P1) did not conform to government standards.

In his defence, the 1st appellant testified that he did not negotiate the contents of the contract. He said that he did not sit with anyone from Base Chemicals to award the contract. According to him, the Quarter Master General dealt with the contract after the 1st appellant approved the recommendation from Q-Branch that Mazzonites would be an ideal company to do the works. The contract was signed on 28th January, 2002, by Brigadier General Phiri who was acting as Quarter Master General then while he (1st appellant) retired on 24th January, 2002.

The 1st appellant also testified that when he saw the deplorable state of accommodation at Kaoma barracks he decided that pre-fabricated buildings would be the quickest solution to the problem. He said that he gave the job to Mazzonites, a company he knew had done well on previous Army projects. He stated that he came to know much later that Base Chemicals was involved with Mazzonites and that he had nothing to do with their arrangement.

In cross-examination, the 1st appellant testified that he authorized payment to Base Chemicals as per exhibit P8B and not Mazzonites for the Kaoma project in 2001 before a contract for a building was signed and that it was normal to pay a contractor before a contract is executed. He said that there were records in the Army showing that Mazzonites introduced Base Chemicals to him and other Army officials and that the arrangement between the two companies was explained. He testified that it was on that basis that he instructed that Base Chemicals be paid. He said that no pre-fabricated structures were constructed at Kaoma barracks but that he could not go into

details of change in quotation from pre-fabricated structures to conventional buildings.

The trial magistrate found that there was a contract for the construction of Army personnel quarters in Kaoma barracks at the value of US$1,079,888.44, initially for pre-fabricated housing units but conventional structures were later built. She also found that exhibit P76 contains receipt number 301 indicating that US$500,000.00 was received from Zambia Army on 20th October 2001 and that exhibit, a ZRA payment voucher dated 19th October, 2001 indicates that this amount was indeed paid to Base Chemicals. Further, that exhibit P8A contains yet another LPO dated 18th October, 2001 in the sum of US$1,079,888.44 noted as being payment to Base Chemicals for 'housing pre-fabs for Kaoma…'

The trial magistrate also found that no evidence was produced to support the claim that the soil conditions in Kaoma necessitated for change from pre-fabricated units to conventional structures. Contrary to the claims by the defence that the contract (exhibit P1) was awarded to Mazzonites the evidence clearly indicates that the contract was awarded to Base Chemicals. She further found that although the state of housing for Army officers in Kaoma and perhaps elsewhere was deplorable, this was not the justification for awarding a building contract without following the laid down tender procedures.

The trial magistrate considered counts three and four together. In support of these counts, PW15 Friday Tembo, a police officer with the Task Force who investigated and dealt with this matter testified that the allegation was that the 1st appellant gave a contract to Base Chemicals owned by the 2nd appellant for the supply of fuels and lubricants as well as for construction works in Kaoma barracks. He said that it was alleged that out of this contract, the 1st appellant corruptly received two garage doors acquired by the 2nd appellant from Kirk Wentworth of Greenwood Enterprises as per

exhibit P74, fourth page. According to PW15, the garage doors were brought into Zambia and installed at the 1st appellant's property, house number 5644 Lufubu road Kalundu in Lusaka by Kirk Wentworth and that PW15 visited the said property were he saw a garage with doors.

PW15 stated that the document which talks about garage doors is dated 13th November, 2001 addressed to the Zambia Army Commander and that four moulds, one electric motor and one compactor were itemized on the document totalling R9,500.00. At the scene the witness showed the court the two garage doors (exhibit P77) which he said he saw during his investigations.

In cross-examination, PW15 testified that he did not suggest that the value of the garage doors was US$2,500.00 and that although he charged the two accused on the issue of the garage doors he could not recall their value. He said that the invoice in respect of the garage doors lists items whose value is R9,500.00 and that the charge sheet indicates the value of the garage doors as US$2,500.00 but he did not pay attention to the dollar equivalent of the invoice amount. The witness stated that the documents relating to the doors (exhibit P74; fourth page) which were collected from Kirk Wentworth in South Africa are dated 14th December, 2001 and addressed to the Army Commander.

In his defence, the 1st appellant said that he asked Kirk Wentworth to source him some security gates and garage doors and that in this regard a quotation was given to him towards the end of 2001 for milking equipment, security gates and garage doors. He said that he paid Kirk Wentworth US$10,700.00 whose breakdown was US$6,500.00 for the 6 point milking machine; US$3,600.00 for the security gates and US$600.00 for transport in January 2002 and that Wentworth gave him a receipt for this payment dated 10th January, 2002 as per exhibit D33. The 1st appellant testified that the total amount he paid translated into R147,000.00 plus R65,000.00 leaving a

balance of R82,000.00 as per exhibit D34. After payment, the 6 point milking machine was delivered to his Makeni farm while three steel gates and two garage doors were delivered to his home in Kalundu, namely, house number 5644, Lufubu road.

In his defence, the 2nd appellant denied having given the 1st appellant two garage doors and said that the ones imported by one of his companies from South Africa were at Base Chemicals warehouse. He led the Court to the said warehouse and identified equipment stating that it contained garage doors, moulds and mortars. According to the 2nd appellant the two garage doors listed on the invoice contained in exhibit P74, fourth page, were part of those he identified at the warehouse. He testified that the invoice was addressed to the 1st appellant because most of the items on it in Kirk Wentworth's vannette were meant for the Kaoma barracks project.

Relying on exhibit P74, fourth page, the trial magistrate was satisfied that the 2nd appellant bought garage doors for the 1st appellant. She was not convinced that exhibits D49 shown to the Court by the 2nd appellant nullify the allegation of the garage doors in these counts and as such she was convinced that the doors included in exhibit D49 were in no way related to exhibit P77. She found that had the 1st appellant bought equipment from Kirk Wentworth in 2002, it would have been prudent for him to have shown relevant documents such as D33 to the officers during the time he was questioned so as to remove all suspicions and to defend himself against the allegations.

The trial magistrate also found that it was unacceptable to invoice material meant for public works for a public institution to a private individual regardless of the explanation offered. On this evidence she concluded that although she was not satisfied that the cost of the garage doors was not as stated in the count, the charges were proved against the appellants as they failed to give reasonable explanations.

The trial magistrate considered counts five, six, eleven and twelve together. In support of these counts PW10 Mbewe Mbewe an employee of Barclays Bank told the Court below that having been requested to submit documents submitted to the bank by a client, Base Chemicals, he provided a letter of instruction (exhibit P22) to issue a bank draft for US$18,875.00 payable to Greenwood Enterprises for purchase of milking machines dated 18th May, 2001 by order of Base Chemicals and signed by the 2nd appellant.

And PW15 testified that he and Vincent Machila (PW13), a senior investigations officer from the Task Force went to Greenwood Enterprises where they collected documents pertaining to the acquisition of milking machines such as an invoice number 1727 dated 7th May, 2001 (exhibit P74) addressed to the Zambia Army Commander. He said that the total purchase price for the milking equipment and sachets was US$23,875.00. The witness told the Court that another document from Nedbank shows the amount of US$18,875.00 and that a copy of a bank draft issued from Barclays Bank Holiday Inn – Prestige dated 18th May, 2001 shows that the amount was paid to the owner of Greenwood Enterprises and the ordering client was Base Chemicals. According to PW15, a deposit of US$5,000.00 was paid leaving a balance of US$18,875.00 and that the said balance was paid by Base Chemicals. He testified that he got some ZRA documents addressed to the Zambia Army Commander showing that the said machines entered Zambia. He said that having gone through the documents collected from Base Chemicals it was ascertained that the milking equipment was paid from a Base Chemicals account for US$18,875.00.

Both witnesses testified that Base Chemicals imported, among other things, steel structures, dairy machinery, milking machinery and their accessories such as milk sachets and garage doors and it was noted that the consignee for the milking machinery was the Army Commander. They said that they went to the 1st appellant's premises in Makeni where they found

already assembled milking equipment such as milkers, milking tank and other parts for assembling the machinery.

It was also their evidence that the complimentary slip titled “cash accounting Army” (exhibit P38) discusses business transactions in terms of receipt of petroleum products from Base Chemicals to Zambia Army and that on the expenses, it discusses items such as milking equipment, 2 chillers, 2 fillers, 2 milkers, 2 pasteurisers, duty and VAT, plus structures, milking tanks and transport and against these items there are amounts or figures. It was pointed out that the name of the 1st appellant was then indicated on the said slip with cash available but no indication of an amount.

In his defence the 1st appellant told the court that Lt. Gen. Kayumba told him that the 2nd appellant could introduce him to a South African who was assisting him to procure dairy equipment and that he spoke to the 2nd appellant who introduced him to Kirk Wentworth. He testified that he paid Kirk Wentworth US$10,700.00 whose breakdown was US$6,500.00 for the 6 point milking machine; US$3,600.00 for the security gates and US$600.00 for transport in January 2002. The 1st appellant told the Court that Kirk Wentworth gave him a receipt (exhibit D33) for payment dated 10th January, 2002. He said that the amount he paid translated into R147,000.00 plus R65,000.00 leaving a balance of R82,000.00. He told the Court that the equipment indicated on exhibit D34 was delivered in August 2002 but that it was different from the one he had paid for. The 1st appellant stated that because he received smaller tanks than he had paid for he got a price reduction on the balance and that he finally paid R74,000.00 in 2002 instead of R82,000.00 as per exhibit D35. According to the 1st appellant, the 6 point milking machines were delivered to his farm in Makeni known as Ambrosia Milk World after payment.

Regarding exhibit P64, he told the Court that he was not listed on any of the documents as consignee and neither was his farm. He also denied

receiving milking equipment through Redline Carriers as reflected on exhibit P64. It was his evidence that he never bought equipment valued at R20,000.00 from Kirk Wentworth and that he did not know the item listed on page 3 of exhibit P74 indicated as a mini-milker addressed to him as Army Commander. He denied receiving a mini-milker from Greenwood Enterprises through the 2nd appellant. As regards exhibit P68, the 1st appellant told the Court that this was a transport tank which he bought in 2002 from a South African dealer for milk as per exhibits D37 and D38.

In cross-examination, the 1st appellant testified that he started the dairy project in 2000 and that he first received milking equipment in March, 2002. He said that it was a mere coincidence that both him and Lt. Gen. Kayumba were mentioned in exhibit P64 and according to him the documents were not correct. He told the Court that he did not know why equipment not intended for him would be consigned to him and insisted that he did not have any dairy business with the 2nd appellant. The 1st appellant said that page 3 of exhibit P74, an invoice addressed to the Army Commander dated 21st May, 2001 bearing a list of milking equipment had nothing to do with him and meant nothing to him.

He told the Court that according to exhibit P74, the 2nd appellant was getting his equipment from Greenwood Enterprises but he insisted that he was not the one who introduced him to Kirk Wentworth, thereby changing his earlier position. The 1st appellant denied that exhibit P38 headed “cash accounting Army” had anything to do with him. He also denied that exhibit P22, a letter from Base Chemicals dated 18th May, 2001 instructing the Barclays Bank manager to issue a bank draft to Greenwood Enterprises for a milking machine had anything to do with his own milking machine. With regard to page 7 of exhibit P74, the 1st appellant said that he was the Army Commander at the time the invoice was written on 7th May, 2001.

In his defence the 2nd appellant told the Court that the items listed in the invoice (exhibit P74) were addressed to the 1st appellant because most of the items in Kirk Wentworth's van were meant for Kaoma barracks project. He denied giving the 1st appellant a milking tank (exhibit P68) valued at US$2,500.00 or any other amount or supplying him with milking equipment.

In cross-examination, he told the Court that page 7 of exhibit P74 was neither here nor there as it was a stand alone document retrieved from Base Chemicals. The 2nd appellant testified that he authored the contents about the 1st appellant on exhibit P38 but that the supply of fuel to the Army had nothing to do with the 1st appellant's private milking project. According to the 2nd appellant exhibit P22 is a letter for a bank draft in respect of Lt. Gen. Kayumba and not the 1st appellant.

After considering the evidence, the trial magistrate found that had the 1st appellant bought milking equipment from Kirk Wentworth in 2001 he should have made this clear by producing relevant evidence to the investigating officers at the time he was being questioned prior to the matter coming to court; and that she was not convinced that all the equipment (exhibits P65 and P66) found at the 1st appellant's farm were bought by him from Kirk Wentworth.

She also found that when pages 2 and 11 of exhibit P74 are read together with exhibits P22, P38 and page 7 of exhibit P64 there was no doubt that the 2nd appellant bought equipment for the 1st appellant through Base Chemicals. The trial magistrate accordingly concluded that having not been provided with a reasonable explanation by the defence she was satisfied that the charges under counts five, six, eleven and twelve had been established against the appellants beyond all reasonable doubt.

The trial magistrate considered counts seven, eight, nine and ten together. In support of these counts, PW4, Richard Nyoni, a contractor told

the court that the 2nd appellant took him to the 1st appellant's farm in Makeni to construct a milking parlour, three calf panes and a servant's quarter. He said that labour charges were agreed between him and the 2nd appellant as follows: K500,000.00 for the milking parlour and K3,500,000.00 for calf panes; and that the charges for the servant's quarter would be agreed upon later. PW4 testified that on a Monday morning, the 2nd appellant gave him K6,100,000.00 whose break down was K2,100,00.00 as an advance for his labour and K4,000,000.00 to purchase equipment and materials.

The witness told the Court that he mobilized his workers and they started building the milking parlour and the servant's quarter. He said that the milking parlour was a steel framed structure with galvanized iron sheets while the servant's quarter was constructed up to slab level due to various factors that arose as works progressed. He told the Court that to the best of his knowledge the steel frames came from Base Chemicals because in his previous job with the 2nd appellant he was to put up four similar structures which came in a consignment of five, four of which were for the project at Lt. Gen. Kayumba's farm and one structure was to go to the 1st appellant's farm.

PW4 testified that when the time came to erect the frame he informed the 2nd appellant who undertook to transport it the following day. The witness inspected the frames before they were off loaded from the truck and he took an inventory in the presence of the 2nd appellant; the 2nd appellant's store man; and his own foreman. He said that it was at this time that the 2nd appellant informed him that one structure should be erected at the 1st appellant's farm. He stated that by the time he left the project he had already erected the steel frame and that he was aware that a Mr. Simasiku of Mazzonites took over the works from him. He led the Court to the Ambrosia farm in Makeni where he identified the structure he had worked on.

PW4 also told the Court that the two projects he did under instructions of the 2nd appellant were carried out between June and October 2001 and

that at the time of the project in Makeni the 1st appellant was the Zambia Army Commander. He said that the 2nd appellant supplied the construction materials and he was also the one who paid him for his labour for both projects.

In cross-examination, PW4 testified that he received K6,500,000.00 from the 2nd appellant sometime in September 2001 in respect of the work he did at the 1st appellant's farm. He reiterated that he received instructions from the 2nd appellant to erect four steel structures at a farm in Ibex Hill belonging to Lt. Gen. Kayumba who was the Air Force Commander then. The witness told the Court that the fifth structure was to be erected at the 1st appellant's farm in Makeni where he put up one structure of five partials and a foundation for the servant's quarter. He said that he did not know whether the structures put up at Lt. Gen. Kayumba's farm and the 1st appellant's farm were paid for.

In re-examination, PW4 testified that the conditions of the contract stipulated that the 2nd appellant should supply the materials while labour would be provided by himself.

PW10, (Mbewe Mbewe) testified that he provided a letter of instruction to issue a

bank draft (exhibit P21) to Pick-a-Structure for R150,000.00 dated 18th May, 2001 by order of Base Chemicals and signed by the 2nd appellant; a statement of account for Base Chemicals account number 1928105 and sheet number 17 (exhibit P23); and a deal ticket or receipt dated 21st May, 2001 (exhibit P24) for the sale of R150,000.00 to Base Chemicals with kwacha equivalent being K66,000,000.00. He said that this was a confirmation of a foreign currency transaction done by the bank on behalf of Base Chemicals.

In cross-examination, PW10 stated that he had no idea how the money remitted by the bank on behalf of Base Chemicals was used. He also said that he was not aware that Base Chemicals ran a trading and construction company.

PW13 testified that he took twenty-six documents and six cheques (exhibits 32 to 63) collected from Base Chemicals to a handwriting expert at Zambia Police Service for the purpose of ascertaining whether the documents were authored by one or more persons. He told the Court that he had kept all the documents listed on exhibit P31 in his custody since they were retrieved from Zambia Police and that the findings were communicated to him by a letter whose subject was "Verification of Handwriting" (exhibit P30) bearing Zambia Police Service letter head and signed by officer Nyumba.

With regard to steel structures both PW13 and PW15 testified that they were consigned by 'Pick-a-Structure' to the Air Force Commander, Livingstone Air Base. They said that when interviewed a Lt. Col. Sinkamba stated that part of the consignment had proceeded to Lusaka for the construction of a gym at the Zambia Air Force Headquarters. They said that after a visit to ZAF Headquarters and upon interviewing a witness responsible for construction works it was discovered that no gym was constructed. Both witnesses said that they saw similar structures at Lt. Gen. Kayumba's and the 1st appellant's farm.

PW13 testified under cross-examination that he never came across any information that the 1st appellant's wife paid K5,000,000.00 to Mrs. Kaira (DW3) of Base Chemicals. He said that the document he was shown appeared to be a petty cash voucher turned into a receipt referring to additional payments from the 1st appellant's wife and received by DW3 and that the signature on the document appeared like that of DW3.

In cross-examination, P15 stated that PW4 indicated to the officers while being interviewed that he used the steel structures in question to erect a milking parlour, a milking shade and a chicken run at the 1st appellant's farm in Makeni and that they came from Base Chemicals where he found three structures. PW15 said that the building materials were allegedly bought by the 2nd appellant and sourced by PW4.

In his defence, the 1st appellant testified that he bought one structure from the 2nd appellant for K7,500,000.00 and that he made an initial payment of K3,500,000.00. He said that he later told his wife (DW1) to go and pay the 2nd appellant K7,300,000.00. The 1st appellant said that later, PW4 went to his farm to put up the structures on the instruction of the 2nd appellant but that he only did the foundation and disappeared before he could put up the structures. As regards count ten, he stated that he did not receive any building materials from the 2nd appellant worth the amount indicated therein.

In cross-examination, the 1st appellant initially said that he could not recall getting a receipt for the payment he made to the 2nd appellant for the steel structures. He later said that the receipt for the payment was not mentioned in his examination-in-chief because he did not see it fit to talk about it.

In his defence, the 2nd appellant led the court to what he said was Base Chemicals warehouse where he identified steel structures which he said had come in through Livingstone and that this was the place where the steel structures found at the 1st appellant's farm were stored prior to being erected there. He then led the Court to what he called a family farm in Balastone park, Lusaka West where he yet again identified steel structures.

In cross-examination, the 2nd appellant stated that the structures he identified were not the same ones he supplied to the 1st appellant. He said

that Lt. Gen. Kayumba bought steel through Base Chemicals from South Africa which came into Zambia in May 2001; that the remainder of the steel was sold to the 1st appellant; and that the payment was received from his wife in the sum of K7,400,000.00. He said that he could not recall exactly when the structure was sold to the 1st appellant.

The 1st appellant's wife, Muriel Mwango Musengule (DW1) testified that her husband gave her K7,300,00.00 to deliver to the 2nd appellant as part payment for building materials in 2001. She said that she gave the money to Mrs. Kaira (DW3) who gave her a receipt (exhibit D62). In cross-examination, DW1 told the Court that the receipt was not created after this matter had already commenced.

In her testimony, Mrs. Kaira (DW3), marketing manager for Base Chemicals confirmed having received K7,300,000.00 in 2001 as additional payment for building materials from DW1 after which she said she gave her a receipt (exhibit D66). In cross-examination, DW3 told the Court that Base Chemicals was not a seller of building materials. When asked about other transactions between Base Chemicals and the Zambia Army as marketing manager of the company, she said that she knew no details concerning the building projects undertaken by the company for the Army.

On counts seven and eight, the trial magistrate found that:

> ***"… it is not plausible that structures bought by Base Chemicals on behalf of Gen. Kayumba should be sold to A1 again by Base Chemicals. There is no evidence from the defence, apart from word of mouth, showing that Gen. Kayumba paid for the structures and that he was refunded for the extra that he did not collect as per A2. I state this because the claim by A2 that Gen. Kayumba paid for the structures through his company Magnavolt using ABSA, a bank in South***

Africa in May 2001 is not convincing because the said Magnavolt was incorporated on 24th August, 2001. This is obviously 3 months after the payment is said to have been made. I find this impossible to believe. A1 said he paid for the structures/additional building materials to Base Chemicals through his wife, DW1. Again there are inconsistencies in this claim, firstly in that A1 could not initially recall having received a receipt for the said payment but later said his wife showed him a receipt. Secondly he said one structure cost K3.6m but he told the court that he initially paid K3.5m and later paid K7.3 through his wife, this amounts to K10.8m. Further the defence through DW1 and DW3 produced D62 and D66 as evidence of payment for the structures/additional building materials to Base Chemicals and D63/D64 are payments to Handyman's Paradise for purchase of building materials. The defence failed to produce the receipt for the prior payments; this was a big oversight as D62/D63 clearly indicates 'additional payment'. When exhibits P21, P23 and P24 are read together with page 1 of P36 it becomes clear that Base Chemicals made payments to purchase steel structures for A1. Given that the defence have not offered a reasonable explanation for these transactions and also that the evidence of the prosecution leaves no doubts in my mind with regard to the guilt of the two accused persons, I find that counts 7, 8, 9 and 10 have been proved beyond all reasonable doubt."

The trial magistrate found, with regard to counts nine and ten as follows:

"… that the testimony of PW4 was very overwhelming and it is supported by P36 a record of payments from Base Chemicals

to various projects indicates that PW4 was given money for building materials plus P75. In addition under the title 'Lt. Gen. Musengule Cash' mentions 'structure construction' and on top of the page, costs for petrol/diesel and Kalewa are also indicated. This document was authored by A2 as admitted by him. Unfortunately he failed to explain why his reconciliations done on company paper in his writing combines business transactions with the Army and milking equipment, structures, construction and structures for A1".

The 1st appellant filed twenty-four grounds of appeal. Ground one was that the trial Court erred in law when it declined to give the 1st appellant adequate time and facilities for the preparation of his defence pursuant to the provisions of Article 18(2)(c) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia ("hereinafter called the Constitution"). Ground two was that the trial Court erred in fact and in law by convicting the 1st appellant on counts three, five, nine and eleven of the charge sheet when the provisions of Section 29(2) as read with Section 41 of the ACC Act which provide for the possibility of defence supplementation of the prosecution case are *ultra vires* the provisions of Article 18(7) of the Constitution. Ground three was that the trial Court erred both in fact and in law by convicting the 1st appellant for the offence of abuse of authority in counts one and two of the charge sheet and by holding that the 1st appellant did not follow the laid down tender procedure of the Zambia Army in the absence of any evidence of the tender procedures and practices used by the Zambia Army in procuring goods and services; and by holding that the provisions of the repealed Zambia National Tender Board Act, Chapter 394, of the Laws of Zambia and even if the Public Procurement Act, No. 12 of 2008 were applicable to the procurement of goods and services of the Zambia Army, the prosecution in any event, caused the appropriate and requisite amendment on the 5th day of September, 2005.

Ground four was that the trial Court erred in law by convicting the 1st appellant in count two of the charge sheet and holding that the 1st appellant did not offer a reasonable explanation to the allegation notwithstanding the fact that the defence adduced a satisfactory explanation supported by *viva voce* evidence and the limited available documentary evidence disproving the allegation against him. Ground five was that the trial Court erred in fact and in law by convicting the 1st appellant in counts three and five of the charge sheet and holding that the accused persons failed to give reasonable explanations notwithstanding the inconsistencies in the value of the gates and the evidence on record showing how he acquired the said gates. Ground six was that the trial Court erred both in fact and in law by convicting the 1st appellant under counts three and five of the charge sheet by holding that it is unacceptable to invoice materials meant for public works for a public institution to a private individual regardless of a reasonable explanation being offered and notwithstanding the evidence of the prosecution that the 1st appellant purchased items from the Republic of South Africa directly with his own resources.

Ground seven was that the trial Court erred both in fact and in law by convicting the 1st appellant in counts three and five of the charge sheet relying on evidence characterized by gross inconsistencies and incidents of dereliction of duty leading to the evidence on record being inconclusive. Ground eight was that the trial Court erred both in fact and in law by convicting the 1st appellant in count seven of the charge sheet and in holding that the 1st appellant was engaged in corrupt practices in that he received steel structures from the 2nd appellant valued at US$13,500.00 notwithstanding the evidence of the prosecution witnesses who testified that the 1st appellant duly made payment of the same and therefore denied any personal pecuniary advantage. Ground nine was that the trial Court erred in law by convicting the 1st appellant under count seven of the charge sheet without giving reasons for the verdict in the judgment.

Ground ten was that the trial Court erred in fact and in law by convicting the 1st appellant under count nine of the charge sheet notwithstanding the prosecution's failure to adduce evidence and prove its case beyond reasonable doubt. Ground eleven was that the trial Court erred in law by convicting the 1st appellant in count nine of the charge sheet and by excluding the uncontroverted evidence on record in form of documentary proof and *viva voce* testimony demonstrating that the 1st appellant paid the 2nd appellant money for building materials. Ground twelve was that the trial Court erred both in fact and in law by convicting the 1st appellant in count eleven of the charge sheet notwithstanding the inconsistent evidence of the prosecution and the failure to positively identify the equipment allegedly received by the 1st appellant. Ground thirteen was that the trial Court erred in fact and in law by convicting the 1st appellant in counts one, two, three, seven and nine of the charge sheet by admitting purportedly similar facts evidence without regard to the prejudicial effect thereof.

Ground fourteen was that the trial Court erred in law by convicting the 1st appellant in count eleven of the charge sheet without giving reasons for the conviction and without stating the evidence it relied upon to reach its conclusion. Ground fifteen was that the trial Court misdirected itself in law by convicting the 1st appellant in counts one, two, three, five, seven, nine and eleven of the charge sheet notwithstanding the incidents of dereliction of duty on the part of the investigation officers. Ground sixteen was that the trial Court erred in fact and in law when it convicted the 1st appellant in counts one, two, three, five, seven, nine and eleven without the requisite *actus reus* and *mens rea*. Ground seventeen was that the trial Court erred in fact and in law when it admitted in evidence and relied on the purported report of the handwriting expert without observing due procedure, videlicet, the necessity of placing all materials used by the expert in arriving at her opinion before the Court to enable it weigh the relative significance.

Ground eighteen was that the trial Court erred in law and in fact when it admitted as expert evidence testimony of PW3 when the prosecution had not established the question of peritus as he was essentially a witness of fact and not opinion. Ground nineteen was that the trial Court erred in law and fact when it admitted in evidence and relied on documents produced by PW5, Lt. Col. Joe Hanzuki, as the said documents offended the provisions of Section 5 of the Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia. Ground twenty was that the trial Court erred in law and in fact when it admitted in evidence and relied on documents produced by PW10 (Mbewe Mbewe), as the said documents offended the provisions of Section 5 of the Commissioners for Oaths Act, Chapter 33 of the Laws of Zambia as the same were purportedly certified by persons with an interest in the matter. Ground twenty-one was that the trial Court erred in law and fact when it admitted and relied upon documents produced by PW 15, Friday Tembo, an officer with the Anti-Corruption Commission, when the said documents offended the provisions of Part III of the Mutual Legal Assistance in Criminal Matters Act, Chapter 98 of the Laws of Zambia as read with Section 3 of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia and the Hague Convention of 5th October, 1961 as the said documents were not duly notarized.

Ground twenty-two was that the learned trial Court erred in law when it considered the evidence of PW 9 Anna Mwitwa, Legal Officer, Ministry of Lands; PW 10 Mbewe Mbewe, Banker, Barclays Bank (Z) Plc; PW11 Lt. Col. Edwine Kasoma, Assistant Adjutant General – Manpower and Personnel Administration which had not been reviewed by the learned Director of Public Prosecutions pursuant to the provisions of Section 84 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia and Section 46(1) of the ACC Act, and consequently rendered the purported trial a nullity. Ground twenty-three was that the learned trial Court was *coram non judice* as prosecuting counsel was part of the investigating team. Ground twenty-four

was that the trial Court erred both in fact and in law by sentencing the 1st appellant to a custodial sentence to run concurrently for 4 years being the longest period despite the mitigatory factors attached to the circumstances of the case.

The 2nd appellant filed seven grounds of appeal. Ground one was that the court below erred in law by convicting the 2nd appellant on counts four, six, eight, ten and twelve which counts are anchored on legal provisions which contravene the Constitution in that they require the appellant to break his right to remain silent when put on his defence. Ground two was that the Court below erred both in law and in fact when it convicted the 2nd appellant on count 4 on account of the 1st appellant's alleged failure to render an explanation to the investigation team despite the fact that the prosecution produced no statement to show that the 1st and 2nd appellants were cautioned or adduced any evidence to prove that the 1st appellant had failed to render an explanation to the investigation team. Ground three was that the court below erred both in law and in fact when it convicted the 2nd appellant on count six notwithstanding that the prosecution had failed to prove the said allegation beyond reasonable doubt as required by law. Ground four was that the Court below misdirected itself in fact and in law when it failed to state the reasons in the judgment why the Court had elected not to accept the evidence of the 1st and 2nd appellants in rebuttal to the allegation contained in count six.

Ground five was that the Court below erred in law and in fact when it convicted the 2nd appellant on count eight in the face of evidence that the prosecution witness, PW4 conceded that the 1st appellant was unhappy at the slow pace of progress and that he had paid the 2nd appellant for the steel structures. Ground six was that the Court below erred both in law and in fact when it convicted the 2nd appellant on count ten against the weight of the evidence and in the face of evidence that the prosecution witness readily

admitted that the 1st appellant complained of delays in the execution of the project and that he had paid the 2nd appellant for building materials. Ground seven was that the Court below erred both in law and in fact when it convicted the 2nd appellant on count twelve in the face of evidence that cheque No. 00022929 appearing at page 2 of exhibit P72 was produced in this matter as well as in the case in which the 2nd appellant was jointly charged with Lt. Gen. Kayumba.

On behalf of the 1st appellant, Mr. Silwamba, SC submitted on grounds one and two that the Constitution guarantees any person charged with a criminal offence the right to be afforded a fair, impartial and independent hearing characterized with the availability of facilities to prepare a defence. They invited the Court to look at the provisions of Article 18 of the Constitution and in particular, Article 18(7) which provides

that:

> ***"(7) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial."***

It was further submitted that the 1st appellant was not accorded time and facilities to prepare his defence by the learned trial magistrate. Reference was also made to Article 18 (2) (c) and (d) of the Constitution, which provisions state that:

> ***"(2) Every person who is charged with a criminal offence –***
>
> ***(c) shall be given adequate time and facilities for preparation of his defence;***

(d) shall unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the court in person, or at his own expense, by a legal representative of his own choice;"

It was the 1st appellant's contention that the trial Court was obliged by the Constitutional provisions to give the 1st appellant adequate time and facilities for preparation of his defence. It was submitted that consistent with the provisions of Article 18(2) (d) of the Constitution the 1st appellant retained Mr. Vincent Blackskin Malambo, SC as his legal representative and when the learned trial magistrate assumed conduct of the matter on 21st June, 2005, the 1st appellant was duly represented as indicated at pages 7 to 9 of the record of appeal and that the 1st appellant and his legal representative always attended all the properly scheduled court sessions. It was submitted further that on 11th August, 2006 the State closed the case for the prosecution and the learned trial magistrate indicated at page 272 of the record of

appeal that:

"Date for Ruling will be communicated to the parties. Adjourned to 6th September, 2006 for mention."

It was submitted that the matter came up for mention on 6th September, 2006 before Hon. S. N. Kaunda, Resident Magistrate who adjourned it to 6th October, 2006 and on that date, the matter came up for mention before Hon. E. L. Musona, Principal Resident Magistrate and it was adjourned to 6th November, 2006. On 6th November, 2006, the matter came up for mention before Hon. E. L. Musona, Principal Resident Magistrate who

adjourned it to 6th December, 2006 and when it came up for mention before Hon. E. L. Musona, the Public Prosecutor announced:

> ***"Matter for mention. It is before L. B. Tembo who is currently out of the country for studies. May it come on 21/12/2006 for mention."***

The matter was accordingly adjourned to 21st December, 2006 and it came before Hon. E. L. Musona for mention and it was adjourned to 19th January 2007. It was submitted that curiously on 7th January, 2007, the learned trial magistrate *ex proprio motu* delivered the ruling on a case to answer in the absence of Mr. Vincent Malambo, SC the 1st appellant's legal representative amid pleas by the 1st appellant for the Court to allow his advocate to be present to receive the ruling but the learned trial Court's view was that the 1st appellant would not be occasioned with any injustice. It was contended that this was a gross misdirection since the 1st appellant was obliged to testify in his defence once he was found with a case to answer.

The learned state counsel submitted further that a ruling pursuant to the provisions of section 207 of the Criminal Procedure Code is an important part of the trial and that the 1st appellant was entitled to have his legal representative present and that this was a gross misdirection, especially in the light of the fact that the 1st appellant in counts three, five, seven, nine and eleven of the charge sheet was arrested for corrupt practices by public officer contrary to section 29 (2) as read with section 41 of the ACC Act which essentially provides for the possibility of defence supplementation of the prosecution case. He also pointed out that the ruling of the learned trial magistrate is not in the record of appeal.

Mr. Silwamba, SC submitted that on 16th July, 2007 and 18th July, 2007, the defence extensively submitted that they needed documents in order to adequately prepare for the defence of the 1st appellant as can be seen at pages 280 to 290 of the record of appeal. He added that on 25th July, 2007, the learned defence counsel for the 1st appellant made an application to defer the taking of the 1st appellant's evidence in order to adequately prepare for the defence as indicated at pages 290 to 293 of the record of appeal but the learned trial magistrate ruled that the ***"general practice is that where there are multiple accused persons and more than one accused elect to give evidence, they should do so in the order in which they appear on the charge sheet"*** and state counsel drew the Court's attention to the ruling on page 293 of the record of appeal. It was his contention that the learned trial magistrate misdirected herself when she forced the 1st appellant to testify in his defence when he was ill prepared. He referred the Court to the case of ***Joshua Mapushi v The Queen(1)***, where it was held, *inter alia*, that:

> ***"… An accused person has the right to be tried in a manner and form prescribed by law and the accepted practice of the criminal courts or the purpose of ensuring a fair trial and all that it involves. Consequently, if that right is infringed by disregarding the manner and form in any particular and the accused is convicted, he has prima facie suffered an injustice and that injustice becomes substantial."***

Learned state counsel also referred us to the case of ***Patel v Attorney General(2)***, where Skinner CJ (as he then was) sitting as a puisne judge and making reference to Sections 20 and 28 of the Constitution and the Protection of Fundamental
Rights rules, stated that:

"…The manifest object of section 20 is to ensure that every accused person is accorded a fair trial. The provisions of the section including those guaranteeing the right to Counsel are designed to ensure that the accused has a fair trial."

Mr. Silwamba, SC submitted that it is clear from the evidence on record that the State collected all documents relating to this case from the Zambia Army but they did not produce all the relevant documents as shown at page 16 of the record of appeal that PW1 referred to local purchase orders which he did not bring to court and PW2 also mentioned a file which had correspondence but these documents were not brought to court. Further PW5, Lt Colonel Joe Hanzuki stated at page 93 of the record of appeal that he did not look at folios 4 to 8 as the documents were not in court but at command. Learned state counsel submitted that these are a few of the many incidents that demonstrated that the State chose to leave out pertinent documentation and that this led to the 1st appellant applying to be assisted with documentation to aid his defence, on 11th July, 2007 and the Court ruled that if the 1st appellant needed to refer to documents not available before the Court, he could be recalled upon the defence's application and at the Court's discretion and the ruling can be found at pages 293 and 294 of the record of appeal. He argued that the constitutional rights of the accused as entrenched in the provisions of Article 18 (2) (c) of the Constitution cannot be at the discretion of the Court of inferior jurisdiction. He submitted further that the trial Court's decision that the matter proceeds notwithstanding the fact that the 1st appellant had requested for documents which the State had neglected or refused to furnish, was a derogation to the 1st appellant's entrenched right to a fair trial which ultimately led to an injustice and the learned state counsel relied on the case of ***The People v Henry Kunda(3)***. He also submitted that the 1st appellant had retired from service and he did not have access to

documentation which would have demonstrated the price structure of fuel from the oil marketing companies, in order to rebut the evidence of PW1, Colonel P.J. Lwendo.

He also contended that the trial Court was duty bound to give the 1st appellant sufficient time and facilities to proceed with his defence but to the contrary, the trial Court ordered the 1st appellant to proceed with his defence and failed to assist him by invoking its powers of summoning the persons in custody of the documents to produce them so that the 1st appellant could proceed with his defence accordingly. He asked the Court to examine the status of the ruling delivered pursuant to the provisions of section 207 of the Criminal Procedure Code.

Mr. Silwamba, SC submitted further that the 1st appellant's constitutional right to remain silent was a legal fiction in the light of the provisions of Part VI of the ACC Act, as the Act required a satisfactory explanation from a person charged with an offence under Part IV. He submitted that the learned trial magistrate was merely fulfilling a procedural fixture in the trial and that the trial Court was satisfied that the 1st appellant had to say something in his defence and that he would have elected to remain silent at his own peril. The learned state counsel further submitted that the High Court considered similar provisions in the Corrupt Practices Act, No. 10 of 1980 (repealed) and an example is the case of ***In re Thomas Mumba v The People(4).***

In conclusion Mr. Silwamba, SC submitted that the learned trial Court should have seriously considered the provisions of Parts IV and VI of the ACC Act as the said provisions required the 1st appellant to supplement the evidence of the State and that the said provisions essentially condone self

incrimination. He, therefore, urged the Court to set aside the 1st appellant's conviction.

On behalf of the respondent, Mrs. Nawa submitted that the State conceded only to the extent that the trial Court misdirected itself in the interpretation of the sequence in which accused persons are to give evidence as the Criminal Procedure Code does not stipulate such a sequence. She, however, contended that although the Court had ordered the 1st appellant who was allegedly not ready to give evidence before the 2nd appellant who was ready, this was not fatal as the record shows that the 1st appellant succeeded in applying for an adjournment, thereby having ample time to prepare.

Regarding the contention that the Court had failed to assist the 1st appellant in accessing the documents which had been seized by the prosecution, Mrs. Nawa submitted that this was unfounded as the Court had ordered that the 1st appellant would be given an opportunity to be re-called both by the defence and at the Court's discretion if at all he sought to rely on documents which were not availed to him. She further contended that a perusal of the record shows that the Court below had actually made an order to the effect that the documents held by the prosecution be availed to the 1st and 2nd appellants for their defence; and that although the documents were photocopies, the Court allowed the defence to produce them and this Court was referred to pages 423 to 424 of the record of appeal. It was accordingly her contention that grounds one and two have no merit.

Further, the learned acting principal state advocate submitted that the 1st appellant's argument that the requirement by the ACC Act for an accused to give a satisfactory explanation in pursuance of the provisions of the Act was tantamount to the defence supplementation of the prosecution and therefore *ultra vires* the provisions of the Constitution lacks merit. She submitted that in criminal matters, the burden of proof lies with the

prosecution and that this burden never shifts. She contended that even in respect of the provisions of the ACC Act, the burden still lies with the prosecution to prove the case beyond any reasonable doubt. She further submitted that, therefore, where the prosecution fails to establish a *prima facie* case, the Court is then mandated to acquit the accused and she referred the Court to the case of ***Mwewa Murono v The People(5)***. She added that where the prosecution establishes a *prima facie* case, then an accused is put on his/her defence and it is at this point that an accused is entitled to the three options and these are: (i) giving evidence on oath (ii) giving an unsworn statement or (iii) remaining silent. She posed a question whether the 1st appellant who was ably represented was forced to give evidence in his defence. She answered the question in the negative as the 1st appellant still had the option of remaining silent and that it would have been left to the trial Court to adjudicate based on the prosecution evidence and that, therefore, the contention that this *is ultra vires* the Constitutional provisions lacks merit.

In reply, Mr. Silwamba, SC submitted that the respondent's advocate had conceded that the trial Court misdirected itself only to the extent that the Criminal Procedure Code does not stipulate the sequence in which accused persons are to give evidence but it was not at all fatal for the 1st appellant, who was allegedly not ready, to give evidence before the 2nd appellant was asked to testify. He submitted that the learned acting principal state advocate had also stated that from the record, it was clear that the 1st appellant succeeded in applying for an adjournment thereby giving him ample time to prepare his defence. The learned state counsel further submitted that in support of the respondent's submissions, Mrs. Nawa had invited this Court's attention to pages 423 and 424 of the record of appeal. He contended that she was misleading the Court as the testimony on those pages is that of the 2nd appellant.

The learned state counsel submitted further that the 1st appellant had consistently lamented the lack of documents to aid his defence and that he was grossly prejudiced when he was denied access to documents to aid his defence and they invited the Court's attention to pages 280 to 368 of the record of appeal. He also submitted that the basis of appeal proceedings is that it is a re-hearing on the record and that the submission by the respondent by way of an attempt to summarise the evidence should not be entertained and they urged the Court to only consider the evidence and proceedings in the Court below. He also submitted that out of the twenty-four grounds of appeal, the respondent's submissions had only addressed ten of them namely, grounds twenty-four, twenty-two, nineteen, seventeen, fifteen, thirteen, nine, eight, five, and four.

Mr. Silwamba, SC further submitted that the State to its credit has expressly admitted and conceded that grounds one and two have merit save to state that the misdirection is not fatal. He, however, argued that it was a fatal misdirection for the trial Court to have forced the 1st appellant to quickly proceed on defence when he had indicated that he required ample time. He submitted that this is a serious misdirection that is prescribed by the provisions of the Constitution.

It was also his contention that the State at page 12 of its submissions expressly admitted that PW4 was not a reliable witness when they state that the Court should not have entertained his evidence as he was not privy to the transactions between the appellants. He argued that this was the witness that the Court relied upon whom the State on appeal is discrediting in its submissions and that if PW4 was unreliable as alleged by the prosecution then the 1st appellant should have been found with no case to answer. Mr. Silwamba, SC therefore, submitted that it was incumbent on this

Court to proceed to acquit the 1st appellant and he relied on the case of ***The People v Winter Makowela & Another(6)*** where it was held that a submission of no case to answer may be properly made and upheld when there has been no evidence to prove an essential element in the alleged offence; and when the evidence of the prosecution has been so discredited as a result of cross-examination, and it is also manifestly unreliable that no reasonable tribunal can convict on it.

Mr. Silwamba, SC further contended that the prosecution has attempted to mislead the Court that there was no evidence to support the 1st appellant's submission that he paid for the building materials. He submitted that this was wrong and misconceived given the fact that there was documentary evidence (exhibit D66) which was produced and never challenged in the Court below as indicated on page 483 of the record of appeal. The learned state counsel finally submitted that the incidents of admissions not only exhibited merit in the appeal but also show that this is a proper case where the 1st appellant must be acquitted.

We have considered the 1st appellant's arguments in support of grounds one and two as well as the respondent's arguments in opposition and the evidence on the record of appeal. It is the 1st appellant's contention that he was not accorded time and facilities to prepare his defence by the learned trial magistrate contrary to the provisions of Articles 18(2) (c), (d) and 18(7) of the Constitution which have been quoted above. This ground of appeal is anchored on the fact that the prosecution in the Court below had insisted on the 1st appellant giving his defence first before the 2nd appellant even though it was the 2nd appellant who was ready. The basis for that insistence was that that was the procedure according to the Criminal Procedure Code. The respondent's advocate, Mrs. Nawa conceded that the learned trial magistrate misdirected herself only to that extent but that however, the said misdirection was not fatal as the 1st appellant managed to

get an adjournment and to prepare for his defence. At the outset, we wish to acknowledge the supremacy of the Constitutional provisions cited, specifically Articles 18(2) (c), (d) and 18(7) over all other subsequent legislation. The gist of the 1st appellant's allegation is that the prosecution in the Court below by requiring the 1st appellant to conduct his defence before the 2nd appellant at the time he was not prepared, was not only contrary to Article 18(7) and (2) (c) and (d) of the Constitution but prejudicial to his defence. Considering the evidence on the record of appeal, we are also inclined to accept that the learned trial magistrate misdirected herself only to the extent of accepting the prosecution's insistence for the 1st appellant to proceed with his defence first based on what she claimed was the procedure under the provisions of the Criminal Procedure Code. However, as the learned acting principal state advocate aptly submitted, the misdirection was not fatal to the 1st appellant's defence since the case was adjourned from 25th July, 2007 to 30th July, 2007 for the 1st appellant's defence. We observed from the record at page 294 that this date of 30th July, 2007 was the date that was proposed by defence counsel for the 1st appellant and was not a date imposed by the Court. In the circumstances, the issue of the 1st appellant not being afforded adequate time to prepare his defence cannot, therefore, arise and the alleged contravention of Article 18 (2) (c) of the Constitution cannot be successfully relied upon as the defence chose the date for the 1st appellant's defence case and by so doing, they were confident that the time between the date of adjournment and the next hearing date was sufficient to prepare the 1st appellant's defence case. Further, in relation to Article 18 (2) (d) of the Constitution, we agree that the 1st appellant was ably represented by counsel and so he cannot claim to have been denied representation of his choice. The only time counsel for the 1st appellant was not present was during the delivery of the ruling on a case to answer, but even then the defence counsel was aware of the contents of the ruling and the appellants were duly informed of their rights. We are also

of the considered view that delivery of the ruling in the absence of the defence counsel was also not fatal since the 1st appellant did not proceed with his defence in the absence of his lawyer.

We also agree with the respondent that in all criminal matters, including those under Part IV of the ACC Act, the burden of proving a matter beyond reasonable doubt lies with the prosecution. In our view, the requirement under the ACC Act for an accused person to give a satisfactory explanation can not be tantamount to the defence supplementation of the prosecution. All it requires is for an accused person to give a reasonable explanation in his defence which is satisfactory to the Court. Should an accused remain silent, a right to which he is entitled, the Court will still have to determine whether the prosecution have proved their case beyond reasonable doubt to warrant a conviction. It is therefore our firm view that the provisions of the ACC Act under part IV are not *ultra vires* Article 18(7) of the Constitution.

For the aforestated reasons, we find that grounds one and two lack merit and
are accordingly dismissed.

On ground three it was argued by Mr. Silwamba, SC that the 1st appellant was charged in counts one and two of the charge sheet for the offence of abuse of authority of office contrary to section 37(2)a as read with section 41 of the Act. On 17th June, 2006, the prosecution applied to amend counts four, six, eight, ten, and twelve, which amendment, he submitted, did not affect the 1st appellant at all. On 19th August, 2005, the prosecution yet again applied and were granted leave to amend counts one and two with the deletion of the words **“without following laid down tender procedure”.** According to the learned state counsel, this amendment meant that the

prosecution was not concerned with the aspect of breach, if any, of tender procedures.

It was further submitted that for one to be convicted of the offence of abuse of authority, it was cardinal for the State to demonstrate exactly what authority an accused was possessed with and also the manner it was exercised that is contrary to the normal course of practice. It was submitted that there was a gross misdirection by the trial Court in its judgment when the learned magistrate proceeded to pronounce that the 1st appellant did not follow the laid down tender procedures because the Army Tender Committee did not sit. Mr. Silwamba, SC stated that this was a gross misdirection because the particulars in the statement of offence were amended with the deletion of the words "without following tender procedures."

It was further argued that even if the court was called upon to consider whether the 1st appellant flouted any tender procedures, the evidence on record was contrary to that position as the evidence of PW12 at page 137 of the record of appeal where he testified that there was nothing wrong with the payment to Saazam or indeed Base Chemicals as the directive was within the jurisdiction of the 1st appellant who stated as follows;

> ***"It was a normal directive within the Army. There is nothing wrong in Army paying for fuel it received for its use."***

The Court was also referred to page 141 of the record of appeal where the witness stated that:

> ***"Loose minute is usually enough; it is a normal way of communicating instructions, it was always there and it is the system I found. Accused 1 found the system as well. That is how it is done up to today."***

It was also submitted that PW5 confirmed that exhibit P128 was sufficient authority, clearly indicating that no procedures were breached. That it was therefore difficult to discern from the record where the trial Court found evidence that the 1st appellant breached any of the tender procedures. The learned counsel referred the court to the case of ***Nkhata and Four Others v. The Attorney General(7)***, where it was held that:

> ***" By his grounds of appeal the appellant, in substance attacks certain of the learned trial judge's findings of fact. A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:***
>
> ***(a) By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he did accept; or***
>
> ***(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or***
>
> ***(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or***
>
> ***(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted, is not credible, as for instance, where***

those witnesses have on some collateral matter deliberately given an untrue answer."

It was also submitted that the trial Court at page 10 of the judgment proceeded to state that in order for the prosecution to prove the offence in counts one and two of the charge sheet, the prosecution must have established that the 1st appellant at the material time:

(a) had been a public officer;

(b) had misused or abused his office;

(c) thereby obtaining advantage, wealth, property, or profit directly or indirectly; and

(d) following which he has failed to give a reasonable explanation.

It was contended that it was the duty of the prosecution to prove all ingredients of an offence for a conviction to be achieved. Counsel referred the court to the case of ***Moonga v The People(8).***

The learned state counsel submitted that it was not in dispute that the 1st appellant was a public officer at the material time but the trial Court did not have evidence for all other ingredients of the offence. It was also contended that the trial Court, in its analysis of counts one and two, did not make reference to any advantage, wealth, or property obtained by the 1st appellant and that this was contrary to Section 169 of the Criminal Procedure Code which regulates what a judgment must contain. Mr. Silwamba, SC further submitted that the trial Court did not even state in its judgment that the 1st appellant failed to give a reasonable explanation which was contrary to its assertions that the ingredients of the offence had been proved. It was also argued that the particulars of the offence offered no indication of what

exactly the 1st appellant obtained that made him abuse his office. It was therefore submitted that the conviction was wrong and must be quashed.

For the respondents, Mrs. Nawa submitted that PW5 testified about payments from Zambia Army to Base Chemicals and produced original documents such as exhibit P75. It was submitted that this witness, by virtue of his office was the custodian of the documents that he produced in court. In cross-examination PW5 said the ***"Army Commander is in control of account"***. PW5 told the Court below that PW1 could only authorize payments upon receiving instructions from the Army Commander who was the controller of account. He produced exhibit "P11B" showing instructions from the Army Commander.

Furthermore, the Respondents submitted that these illegal transactions were so glaring and the prosecution adduced overwhelming evidence which proved each of the ingredients of the offences charged.

We have considered the submissions of the 1st appellant and the respondent. To the extent that the Court below granted the prosecution leave to amend counts one and two by deleting the words ***"without following laid down tender procedure",*** we agree with the learned state counsel that as a consequence of this amendment the aspect of breach of tender procedures was no longer a critical issue in determining this ground of appeal. However, from the evidence on record, we are satisfied with the trial magistrate's conviction of the 1st appellant on counts one and two for abuse of authority as the ingredients for this offence were established by the prosecution.

There is no dispute that as Army Commander, the 1st appellant was a public officer at the time. According to PW1, he used to procure fuel from BP, Caltex and Total, the arrangement he found when he assumed the duties

of transport officer. He testified that this arrangement was later changed by the 1st appellant who verbally ordered him to start procuring petroleum products from Base Chemicals where he dealt with the 2nd appellant. Most significantly, PW1 told the Court below that although he was ordered to stop procuring fuel from BP, Caltex and Total there was fuel at these companies. We find as unsatisfactory, the 1st appellant's defence that the Army could not obtain fuel from its previous sources due to its indebtedness. In our view, if the Army could find US$1,278,511.46 to pay Base Chemicals for fuel, it meant that it had money to service its debt with the three oil companies. It is quite clear to us that the sudden departure from the status quo when the 1st appellant unilaterally ordered PW1 to start procuring fuel from Base Chemicals meant that the process was devoid of transparency.

The same can be said about construction of houses at Kaoma barracks. The evidence on record shows that in a similar fashion, the 1st appellant unilaterally and single handedly engaged Base Chemicals to construct houses at Kaoma barracks worth US$1,079,888.44. According to PW2, he received instructions from the 1st appellant that the task of building the houses would be undertaken by Base Chemicals, a company he had never dealt with before. What is more glaring from the record is that the 1st appellant directed the payment of a colossal sum of US$500,000.00 to Base Chemicals even before the contract was executed between the parties. From the foregoing, there can be no doubt that the 1st appellant misused or abused his office in the manner he engaged Base Chemicals.

It was submitted that in analyzing counts one and two the Court below did not make any reference to any advantage, wealth or property obtained by the 1st appellant. While this may be true, we do not think that the omission was fatal. We note from the record that the trial Court adequately dealt with these issues in her findings, for example, in counts three, four, six,

eleven and twelve at pages 29, 37 and 46 respectively. These counts are interrelated with counts one and two.

It was also contended that the Court below did not state in its judgment that the 1st appellant failed to give a reasonable explanation. On the contrary, a perusal of the judgment indicates that the learned trial magistrate discussed the 1st appellant's failure to give a reasonable explanation at page 26 of her judgment as follows:

> ***"Upon consideration of the prosecution's evidence and having not been provided with a reasonable explanation from the defence I am satisfied that the charge under this count has been established against A1 beyond all reasonable doubt."***

We therefore find that the Court below did not err by convicting the 1st appellant on counts one and two as quite clearly the 1st appellant abused his office as Army Commander in the manner he engaged Base Chemicals to supply fuel and to carry out construction works at Kaoma barracks which works, according to PW3 proved to be of poor quality and not in line with the contract. We accordingly dismiss the 1st appellant's third ground of appeal.

On ground four Mr. Silwamba, SC submitted that the law that regulated tenders for the Government of the Republic of Zambia at the material time was the Zambia National Tender Board Act Cap 394 of the Laws of Zambia and that its provisions did not state any where that they are applicable to the Zambia Army. He contended that the Zambia Army enjoys certain privileges given its sensitivity to maintain peace and security of the country and it is therefore not subjected to the usual checks that other Government departments go through. He submitted that even if the Court found that the

provisions of the Zambia National Tender Board Act were breached, it is not a

criminal offence and the court was referred to Section 18 of the said Act which reads:

> ***"18 (1) Notwithstanding anything to the contrary contained in any written law, where any expenditure is to be incurred on any procurement of goods or services, it shall be the duty –***
>
> ***(a) in respect of a head of expenditure, of the controlling officer designated as such for that head of expenditure under section four of the Finance (Control and Management) Act; or***
>
> ***(b) in respect of a parastatal body, of the chief executive officer of that parastatal body;***
>
> ***to ensure that such procurement of goods or services is in accordance with the procedures prescribed by or under this Act.***
>
> ***(2) Subject to the provisions of subsection (3), every controlling officer and chief executive officer shall be accountable for failing to comply with the provisions of subsection(1)***
>
> ***(3) Where a controlling officer or chief executive officer satisfies the Board that he had, in accordance with the provisions of any rules or regulations made under this Act, delegated his functions under subsection (1) to any person or committee, then such other person or every member of such***

committee shall also be accountable for any failure to comply with the provisions of subsection (1).

(4) Where a controlling officer or chief executive officer satisfies the Board that he is, under the provisions of any written law, subject to the control or direction of any other person, board, committee or other body, and that it was such control or direction of such other person, board, committee or other body which caused the failure to comply with the provisions of subsection (1), then such other person or every member of such board, committee or other body shall also be accountable for such failure to comply with the provisions of subsection (1).

(5) In respect of any failure to comply with the provisions of subsection (1), the Board may take such appropriate corrective or punitive measures as it may consider necessary."

According to the learned state counsel, there was gross misdirection in the manner the trial Court applied the issues of lack of compliance with tender procedures in convicting the 1st appellant.

Mr. Silwamba, SC also submitted that albeit the trial magistrate held that the 1st appellant did not offer a reasonable explanation and convicted him of counts one and two, the record is clear as to the premises on which the Zambia Army awarded contracts to Base Chemicals for supply of fuel and construction of staff houses. He contended that while the trial magistrate acknowledged at page 26 of the judgment that the state of Kaoma barracks was deplorable she proceeded to fall into error by stating that the 1st appellant was wrong to award a contract to Base Chemicals for construction of houses without following laid down tender procedures.

The learned state counsel submitted that the 1st appellant explained in his evidence at page 301 of the record of appeal that he received instructions from the Commander-in-Chief who is the Republican President on the basis of which he would execute his duties. It was argued that the 1st appellant explained at page 317 of the record of appeal that the money used to renovate Kaoma barracks were United Nations funds and Mazzonite was a known contractor and that the contract formalities were done by the Quarter Master General. He contended that the evidence on record which was uncontroverted reveals that the said contract was even signed after 24th January, 2002 when the 1st appellant had already retired. According to Mr. Silwamba, SC this was a reasonable explanation offered by the 1st appellant which was discounted by the trial court without any reason and therefore a gross misdirection.

On the acquisition of fuel, Mr. Silwamba, SC submitted that the evidence of PW1 at page 14 of the record of appeal clearly shows that there was a shortage of fuel in 2001 as the supply by BP Zambia was not meeting operational needs. He contended that according to the 1st appellant's testimony at page 304 of the record of appeal, the Zambia Army had several operations in North-Western and Western Provinces as well as receiving and transporting refugees from the Democratic Republic of Congo at the material time and BP Zambia was not ready to supply any fuel. The learned state counsel submitted that these are all explanations offered by the 1st appellant in aid of his defence. He also contended that the 1st appellant's account of the circumstances of purchasing fuel were also confirmed by the testimony of PW5 at page 86 of the record of appeal that the 1st appellant directed the purchase of fuel for the Zambia Army at a negotiated price and the Director of Transport was ordered to attend to its clearance at the point of entry.

It was Mr. Silwamba's submission that armed with these explanations it was a gross misdirection for the trial Court to hold that the 1st appellant was

guilty of the offence in counts one and two for failure to provide a reasonable explanation and he relied on the case of ***Samuel Sooli v The People(9).***

The learned state counsel submitted that the intention of the legislature in a case of this nature is that a suspect or accused person must only offer an explanation which might reasonably be true even if the Court does not believe him. He contended that there are two burdens that have to be discharged in cases where there is the normal burden to be discharged by the prosecution and the statutory burden to offer an explanation. Mr. Silwamba, SC argued that in this case the trial Court proceeded to address its mind mainly to the statutory burden of explanation while neglecting the more important burden that created the *sine qua non* for an accused to explain and the Court was referred to the case of ***Stephen Manda v The People(10).*** The learned state counsel submitted that what the trial Court did was an injustice as it only chose and leaned towards the prosecution evidence.

Mr. Silwamba, SC also submitted that according to the trial magistrate the abuse of authority consisted of the 1st appellant personally awarding contracts without following laid down procedures. He argued that what the laid down procedure actually was and where it was so laid down does not clearly emerge from the record of appeal. It was his contention that what was abundantly clear is that the 1st appellant as chief executive officer of the Zambia Army, he was the relevant procurement unit or chair thereof, within the provisions of the Public Procurement Act No. 12 of 2008 or the equivalent under the predecessor legislation, the Zambia Tender Board Act. He submitted that under both statutes the National Defence and Security attracted different procurement procedures and that there is nothing on record to show that some one was called to assert or affirm that no special dispensation had been given to the military generally or specifically and that it was amenable to the inspectorate of the Zambia National Tender Board.

Mr. Silwamba, SC further submitted that the trial magistrate did not pronounce herself in clear terms whether the abuse was on account of an authorized person like the 1st appellant not complying with mandatory procedures or the person, in the case of the 1st appellant in fact had authority to direct the award of contracts. He argued that the trial magistrate did not seem to appreciate the distinction between want of authority and abuse of authority.

There were no submissions from the respondent on this ground. We have considered the 1st appellant's submissions on ground four. At issue in counts one and two is the allegation that the 1st appellant abused his authority of office in the manner he engaged Base Chemicals to supply fuel and do repairs and construction works at Kaoma barracks.

It was contended by the 1st appellant that the provisions of the Zambia National

Tender Board Act, the relevant procurement legislation in force at the time, did not state any where that they were applicable to the Zambia Army which enjoys certain privileges given its sensitivity to maintain peace and security of the country and is therefore not subjected to the usual checks that other government departments go through. It was also contended that even if the Court found that the provisions of the Zambia National Tender Board ACC Act were breached it is not a criminal offence.

Ingenious as this argument may sound, it cannot be sustained for the following reasons. No specific provisions of the Zambia National Tender Board Act expressly exempting the Zambia Army from complying with its provisions was cited. Furthermore, according to the evidence of the 1st appellant in the Court below, the Army tender committee did not sit to discuss the projects and transactions subject of counts one and two. From

this evidence it is plain to us that there was in existence an interim tender committee which never met to engage Base Chemicals.

At page 8 of the judgment, the trial magistrate made the following findings:

> ***"… As regards the manner in which the Army began to procure fuel from Base Chemicals there is no evidence before court showing that quotations were received from other suppliers or that authority was obtained from Zambia National Tender Board (ZNTB) to purchase the fuel from the source. Indeed even A1 in his defence stated that the Army tender committee did not sit to discuss the projects and transactions in this matter. The state of affairs in the country at the time, i. e. shortage of fuel and deployment of officers at borders is not justification for disregarding legal requirements in awarding contracts in public bodies. The Zambia National Tender Board Act, Cap 394 of the Laws of Zambia clearly provides rules that public bodies should follow when procuring materials or services. The defence did not show that during this time the ZNTB waived or varied the rules so as to give leeway to the Army in the manner of procuring fuel."***

The trial magistrate further found at page 26 of the judgment as follows;

> ***"It is noted that the state of housing for Army officers in Kaoma and perhaps elsewhere is deplorable for the most part, nonetheless this is not justification for awarding a building contract without following laid down tender procedures."***

We are in total agreement with the above findings by the Court below. It was also argued that armed with the explanations by the 1st appellant that

Kaoma barracks was in a deplorable state; that the money used to renovate it were United Nations funds; that the contract formalities were done by the Quarter Master General; and the contract was signed after the 1st appellant's retirement from the Army; that the Zambia Army had several operations in North-Western and Western Provinces as well as receiving refugees at the material time; and BP Zambia was not meeting its operational needs; it was a gross misdirection for the trial Court to hold that the 1st appellant was guilty of the offence in counts one and two for failure to provide a reasonable explanation.

Having evaluated the evidence in the Court below we have no reason to fault the trial magistrate's conviction of the 1st appellant on counts one and two. We also agree that the 1st appellant did not give a reasonable explanation which could be believed by the Court below or any reasonable tribunal for that matter, in the manner he engaged Base Chemicals to supply fuel to the Army and do repairs and construction works at Kaoma barracks. We accordingly conclude that ground four is misconceived and must be dismissed.

On ground five the court was referred to the evidence of PW4, Richard Nyoni
who stated at page 62 of the record of appeal as follows:

> ***"I did not deliver steel structure here and I do not know when they***
>
> ***were delivered. I saw structures here before they were erected. I did not build walls of milking parlour. I do not know who did. I did not put up ramp nor the grill doors."***

The Court was also referred to page 195 of the record of appeal where PW13 stated:

"It is a machine, Item No. 4 is consigned to the Air Force Commander.
It is a milking machine. Yes, I have seen item listed on page 1, none of them are consigned to accused 1."

Still at page 195 of the record of appeal reference was made to PW13's testimony where he admitted that he was not an expert in dairy equipment and that he was unable to state which of the equipment was called mini milker and that he did not find out which were called pasteurisers. He also stated that Kirk Wentworth mentioned to him that the 1st appellant bought equipment straight from Greenwood Enterprises.

It was also pointed out that PW13 at page 199 of the record of appeal stated that he could not say for certain that the equipment he showed the Court at the 1st appellant's farm was bought through the 2nd appellant. He also stated that Kirk Wentworth mentioned that he supplied equipment directly to the 1st appellant with security gates. The Court was further referred to the evidence of PW13 at page 201 as follows:

"I did not establish that P68 was imported by accused 2 for accused 1. I established my case circumstantially."

It was contended on behalf of the 1st appellant that none of the witnesses testified positively about the equipment in count five as the investigations officer literally pleaded ignorance of the equipment and that the failure by the prosecution witnesses to link the equipment found at the 1st appellant's farm to that listed on the charge sheet is a serious failure which in the consequence renders the prosecution evidence inconclusive. It was also submitted that PW13 confirmed to the trial Court that Kirk Wentworth of Greenwood Enterprises supplied the 1st appellant with gates

and milking equipment directly without any link to the 2nd appellant or the Zambia Army.

It was further submitted that PW14 contradicted himself on the value of the gates at page 258 of the record of appeal in that he stated that they were valued at R9,500.00 but later stated that it was US$1,187.00 and US$2,500.00 and told the Court that he had documents which he had not produced. Counsel also drew the Court's attention to the testimony of PW15 where he proceeded to exhibit doubts with respect to the equipment when he stated that:

> ***"It is not for me to indicate/establish that this is actual equipment purchased ..."***

It was submitted that the inconsistencies exhibited by the prosecution on the value of the gates and if at all they were actually paid for by the 2nd appellant must have led the court to make a finding of fact in the 1st appellant's favour and they relied on the view expressed by Baron DCJ (as he then was) in the case of ***William Muzala Chipango & Others v The People(11)*** when he stated:

> ***"…it is sufficient to stress that quite apart from the misdirection concerning the proper approach to witnesses, the conflicts and inconsistencies in their evidence were so serious that convictions based on their evidence could not in any event stand."***

The learned state counsel submitted that it was these doubts and non-conclusive incidents of evidence that must have led the trial court to make

findings in favour of the 1st appellant and they prayed that the conviction be quashed.

For the respondent, Mrs. Nawa submitted that the 1st appellant's evidence was to out rightly deny all the proved allegations and that in his denial, he belaboured to weaken his ties to the 2nd appellant. She contended that the ties were stronger than the defence made them appear. Mrs. Nawa submitted that if the court were to believe the out right denials by the 1st appellant it would have meant that the Court was to treat all the incidences of business, as attested by the prosecution, between the Zambia Army and various companies involving the 2nd appellant as mere or pure coincidence and that the same approach should have been adopted in respect of the personal relationship that existed between the 1st and 2nd appellants. She argued that the prosecution proved overwhelmingly that the business between the Zambia Army and the 2nd appellant was a result of the 1st appellant. According to Mrs. Nawa, the prosecution witnesses gave evidence showing that the 1st appellant selected the 2nd appellant to supply fuel and build pre-fabricated houses; deals which were big and attracted huge amounts of cash. She submitted that on a personal level there is evidence that the 1st and 2nd appellants interacted to the extent that the latter even hired labour to construct some buildings at the 1st appellant's farm and that the 2nd appellant even bought milking equipment for the 1st appellant. She contended that although the 1st appellant vehemently denied this fact, exhibit P74 gives overwhelming evidence that Base Chemicals was given a quotation by Greenwood Enterprises which had an order for Ambrosia farm, the 1st appellant's company and that there was an item relating to 20,000 Ambrosia milk sachets (and an equal amount for Friesland) valued at US$1,664.00. It was her further contention that there was also an e-mail from Base Chemicals to Kirk Wentworth directing him on the addresses for the consignment of dairy equipment.

Mrs. Nawa also submitted that the prosecution adduced further evidence to prove that the two appellants were close to the point that they were giving each other business and benefits and that this explains why the 2nd appellant was found with two complimentary notes (exhibit P38) tabulating the exact equipment the 1st appellant was to buy and the quote price thereof. She contended that the list of the equipment on exhibit P38 tallies with the pro-forma invoice made out to the 1st appellant by Greenwood Enterprises. She submitted that the trial Court analyzed the evidence and gave a reasonable judgment in convicting the 1st appellant.

The learned acting principal state advocate submitted further that they had already highlighted the prosecution evidence relating to the 1st appellant's engagement of the 2nd appellant to supply fuel and building of pre-fabricated houses and which big business deals attracted huge amounts of cash. She further submitted that on a personal level, there is evidence of the 1st and 2nd appellant's interaction and that the 2nd appellant purchased a number of equipment and materials for the 1st appellant to the extent that he even hired labour to construct some buildings at the 1st appellant's farm. She added that the 2nd appellant even bought milking equipment for the 1st appellant according to the evidence, even though the 1st appellant vehemently denied it. She argued that exhibit P74 is overwhelming evidence that Base Chemicals, the 2nd appellant's company, was given a quotation by Greenwood Enterprises which had an order for Ambrosia, the 1st appellant's farm. Mrs. Nawa also contended that there is a strong connection that emerges from the evidence by the 1st and 2nd appellants as they attempt to evade the charges by one describing the milking equipment as a six point and the other referring to it as a No. 6 milking equipment.

In conclusion, she submitted that the only reasonable inference from the overwhelming evidence before the court is that the 1st appellant was guilty of the offences he was charged with as the trial Court to its credit

analyzed the evidence and gave a reasonable judgment in convicting the 1st appellant. She submitted therefore, that the learned trial magistrate was on firm ground when she convicted the 1st appellant on all the counts of the charges he was facing as the evidence against him was overwhelming. She accordingly urged the court to dismiss the appeal for lacking merit and to uphold the convictions.

We have considered the submissions made on this ground of appeal. On the
issue of the garage doors, PW13, Vincent Machila and in reference to Kirk Wentworth's statement to him in the course of his investigation at page 199 said:

> ***"He said he supplied one garage gate to accused 1 which was paid for by accused 2."***

This witness also, with reference to the milking equipment, informed the Court at page 198 of the record of appeal that Kirk Wentworth told him that he made exports to the 2nd appellant for the benefit of the 1st appellant. PW13 testified that Kirk Wentworth did not describe the equipment he took straight to Ambrosia Milking World which was owned by the 1st appellant since he also told him that the 1st appellant bought equipment straight from Greenwood Enterprises. Our consideration of this evidence is that this direct supply of the equipment to the 1st appellant is what caused PW13 to state that he could not state for certain that the equipment he showed the Court at the 1st appellant's farm was bought through the 2nd appellant.

Further at page 231 of the record of appeal, PW15, Friday Tembo, investigating officer with ACC and seconded to Task Force testified that he and PW3, Vincent Machila collected documents pertaining to the acquisition

of milking machine and garage doors from Kirk Wentworth of Greenwood Enterprises in South Africa. He also stated that they ascertained that structures were acquired by the 2nd appellant and payment was effected from Barclays Bank and also that milking equipment was paid for from an account of Base Chemicals. Further, they also found a copy of a bank draft for US$18,875-00. PW15 also said that he visited Lt. Gen. Musengule's farm where he found milking machines. He stated further that the garage doors were also acquired by the 2nd appellant from Kirk Wentworth of Greenwood Enterprises and that they were brought to Zambia and installed at Lt. Gen. Musengule's property at Plot No. 5644 Lufubu Road, Kalundu by the said Kirk Wentworth. PW15 visited the property and saw the garage with some doors. He said that he recalled charging the two appellants with regard to the garage doors but he did not recall the value of the doors as they were not valued but from the documents they got from Kirk Wentworth, it was indicated that the two garage doors and other things were valued at R9, 500-00 as shown in exhibit P74 dated 14th December, 2001 addressed to the Army Commander. Therefore, the value of the garage doors cannot affect the conviction on that ground for as long as the allegation has been proved. From the foregoing, it is clear that the evidence against the 1st appellant is overwhelming. In our view, the excerpts of the evidence were quoted in isolation from the rest of the evidence on record, in order to water down the prosecution evidence. We, therefore, find no merit in this ground of appeal and accordingly dismiss it.

In relation to ground six, Mr. Silwamba, SC argued that the trial Court, relying on the evidence of PW15, Friday Tembo, at pages 27 and 28 of the judgment, pronounced the 1st appellant guilty when there were inconsistencies in the evidence of this witness as he admitted in the Court below that although he charged the 1st appellant on the issue of the garage doors, he could not recall their value. He contended that the Court correctly

recorded the following inconsistencies of the testimony of PW15 at pages 27 and 28 of the judgment:

> ***"In cross-examination PW15 said he did not suggest that the value of the garage doors was US$2,500.00 and that although he charged the 1st accused on the issue of the garage doors he could not recall the value of the said doors."***

He argued that the fundamental flaws in the evidence characterized by inconsistencies
should have resulted in an acquittal and relied on the case of ***Kafuti Vilongo v The People(12)***.

The learned state counsel further submitted that the Court below proceeded to state that:

> ***"He said documents relating to the doors P74; (4th page) which were collected from Kirk Wentworth in South Africa are dated 14th December, 2001 and addressed to the Army Commander."***

Mr. Silwamba, SC argued that exhibit P74 (4th page) was invoiced to the 1st appellant because he ordered and paid for it directly. He further contended that at page 29 of the judgment the trial Court proceeded to state that the 2nd appellant testified that the garage doors at the warehouse were not those brought in by Kirk Wentworth but made perverse findings of fact that indeed the 1st appellant received the doors from the 2nd appellant and without reason, rejected the explanation given by the appellants. He submitted that this was a gross misdirection as the crime in question is one that is premised in the main, on inferences and the case of ***Chabala v The People(13)*** was relied on. It was also Mr. Silwamba's contention that the

Court below misdirected itself by simply shifting the burden of proof to the 1st appellant. He further submitted that it was a gross misdirection for the Court below to state that a private individual was invoiced for works meant for a public institution as exhibit P74 clearly shows that it is the 1st appellant who was invoiced and the Army never ordered security gates.

The learned state counsel submitted that in the face of conflicting evidence the trial Court ought to have given the 1st appellant the benefit of doubt. He therefore urged the Court to set aside the conviction in this ground.

The respondent did not make submissions on this ground. We have considered the 1st appellant's submissions and evaluated the evidence on record. We note that the alleged inconsistencies of the testimony of PW15 related to the value of the gates. Apart from the excerpts of the evidence of PW15 quoted by the learned state counsel, the learned trial magistrate also summarized his evidence at page 28 of her judgment as follows:

> ***"… That the invoice in respect of the garage doors lists items whose value is R9,500.00 and that the charge sheet indicates that the garage doors are valued at US$2,500.00. He told the Court that he did not pay attention to the dollar equivalent of the invoice amount…"***

In our view, the charge having been proved by the prosecution, the alleged inconsistencies related to the value of the garage doors were aptly addressed by the learned trial magistrate in the following words:

> ***"Having said all that I am however not satisfied that the cost of these doors was as stated in the count. This***

notwithstanding, the charges are proved against the accused persons as they failed to give reasonable explanations for these state of affairs and I am satisfied that the prosecution proved their case beyond all reasonable doubt."

We do not fault the learned trial magistrate in concluding that she found it unacceptable to invoice material meant for public works for a public institution to a private individual regardless of the explanation offered. We find that the reason why the learned trial magistrate did not accept the 1st appellant's defence on this issue was because those garage doors and other items were addressed to the 1st Appellant in his official position of Army Commander and the 1st appellant did not give convincing reasons as to why the said items were addressed to him in his official capacity. Further the 2nd appellant testified that the garage doors were for the Kaoma barracks or project and yet the same were appearing on invoice P74 and addressed to the Army Commander who is the 1st appellant herein. We also find the following evidence of PW15 at page 232 of the record of appeal overwhelming wherein he states that:

"The garage doors were acquired also by Mr. Amon Sibande from Mr. Kirk Wentworth of Greenwood Enterprises. They were brought to Zambia and installed at General Musengule's property at Plot No.5644, Lufubu Road, Kalundu. Kirk Wentworth brought doors to Zambia and he installed them. I did visit property there is a garage with some doors there. I put these matters to the accused. I tried to administer a warn and caution unfortunately, Lt. Gen. Musengule remained quiet.

I also warned and cautioned Mr. Sibande and he also remained quiet. A1 admitted receiving 3 steel gates and 2 garage doors.

The invoice to Army Commander of US$23,875.00 dated 21st may, 2001 is also on P74. The said items were being paid for by the 2nd accused through Base Chemicals (Z) Limited and through Barclays bank. There is a cheque of US$18,875.00 to Greenwood Enterprises from Base Chemicals."

We find that the learned trial magistrate was on firm ground in convicting the 1st appellant on counts three and five of the charge sheet and accordingly dismiss this ground of appeal.

On grounds seven and fifteen Mr. Silwamba, SC submitted that the incidents of dereliction of duty exhibited by the investigation officers in this case must have led to the trial Court making findings in favour of the accused. He argued that at page 90 of the record of appeal, the officers mention interviewing the actual person involved in the payments, for example on exhibit P5A, the signature of Major Chris Mwewa was identified by PW5 but however, this witness was not even mentioned by the team of investigators. He further contended that at page 98 of the record of appeal, PW5 stated in his evidence that Colonel Samson Phiri would be the best person to answer questions relating to the evidence on exhibit P5D but the investigators did not at all interview this crucial witness. The learned state counsel also referred the Court to page 139 of the record of appeal where PW12 testified that there was correspondence from Directorate of Transport to appraise the Commander how much fuel there was and how much needed to be procured. He argued that this correspondence which was authored by PW1 was not produced in court. It was his contention that had these witnesses or documents been produced before Court the outcome would have favoured the defence.

It was also his argument that the fact that the prosecution did not call Kirk Wentworth must lead this Court to conclude that had he testified, the 1st

appellant would have been vindicated on the garage doors and milking equipment. Mr. Silwamba, SC relied on the case of ***Abel Banda v The People(14)*** where the Court stated as follows:

> ***"A prosecutor is under no duty to place before court all the evidence known to him, however, where he knows of a credible witness whose evidence supports the accused's innocence, he should inform the defence about him."***

The learned state counsel also argued that PW15 was quoted by the trial Court at page 32 of the record of appeal as having testified that the 2nd appellant paid Greenwood Enterprises but the missing part of the evidence is what these payments were meant for. He contended that at the same page, PW15 told the Court that he found Zambia Revenue Authority documents but neglected to even call any witness who participated in the importation or even the clearing of the goods so as to shed more light on the consignee and who made actual payments. The Court was also

referred to page 189 of the record of appeal where PW13 testified as follows:

> ***"I have no record of those files some of the documents I have produced were extracts from those files. I decided what to extract and what to leave…"***

Mr. Silwamba, SC submitted that this is a clear case where the prosecution was selective as the Court was made to rely on evidence which does not give a conclusive position. He relied on the case of ***Kalebu Banda v The People(15)*** where the Supreme Court held as follows:

> ***"The first question is whether the failure to obtain evidence was a dereliction of duty on the part of the Police which prejudiced the accused when evidence has not been obtained***

in circumstances where there was a duty to do so – and a fortiori when it was obtained and not laid before the Court and possible prejudice has resulted, then an assumption favourable to the accused must be made."

The Court was referred to page 37 of the judgment where the trial magistrate commented as follows:

"Nonetheless with the resources that the Task Force is availed efforts should be made to engage people with relevant knowledge. I point this out because I noted that PW13 had difficulties in naming some of the equipment in P65 and P66."

Mr. Silwamba, SC submitted that this finding was a demonstration of gross dereliction of duty on the prosecution as it was incumbent on it to find witnesses who would positively identify every item on the charge sheet and relate it to the exhibits before Court.

The Court was also referred to page 201 of the record of appeal where PW15 stated that he established that the 2nd appellant imported exhibit P68 for the 1st appellant by modus operandi of circumstantial evidence. The learned state counsel submitted that the use of circumstantial evidence in criminal matters of this nature to convict an accused person is proscribed unless in exceptional instances which do not include this case and he relied on the case of ***David Zulu v The People(16)*** where the Supreme Court stated, inter alia, that:

"…It is therefore incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge in our view must, in order to feel safe to convict, be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains

such a degree of cogency which can permit only an inference of guilt."

Mr. Silwamba, SC submitted that to convict the 1st appellant in counts 3 and 5 in the light of this gross dereliction of duty on the part of the investigators was an error and that this Court should accordingly acquit him for failure of the prosecution to adduce sufficient evidence.

Mrs. Nawa did not make submissions in respect of ground seven. On ground fifteen, she submitted that at pages 30 to 36 of the judgment, the Court tabulated the evidence adduced by the prosecution and gave its reasons at page 37 for convicting the 1st appellant on count eleven. She argued that the Court relied on the evidence presented through exhibit P74 which contained a copy of a document entitled "Nedbank" which confirmed evidence by PW10 that a payment, through Barclays Bank, was made by the 2nd appellant for the purchase of milking equipment to Greenwood Enterprises and that part of exhibit P74 is a pro-forma invoice from Greenwood Enterprises to the Army Commander. It was her contention that this invoice shows that a deposit of US$5,000.00 had been paid for the same goods and that both documents had the same amount and currency, namely, US$18,875.00.

The learned acting principal state advocate argued that this was the evidence adduced to support the charge in count eleven and that the trial magistrate was on firm ground when she convicted the 1st appellant on this count. She submitted that this ground has no merit and should be dismissed accordingly.

We have considered the submissions of the 1st appellant and the respondent on this ground of appeal. The 1st appellant makes reference to a number of incidents of alleged dereliction of duty which should have led the Court to make findings in favour of the accused. It was submitted, for

instance, that although on page 90 of the record of appeal, the officers mention interviewing the actual person involved in payments, such as exhibit P5A, the signature of Major Chris Mwewa was identified by PW5, but this witness was not even mentioned by the team of investigators; that at page 98 of the record of appeal, PW5 testified that Col. Samson Phiri would be the best person to answer questions relating to the evidence on exhibit P5D but the investigators did not at all interview this crucial witness; that the correspondence from Directorate of Transport to appraise the commander on how much fuel there was and how much needed to be procured which was authored by PW1 as indicated on page 139 of the record of appeal was not produced; and that the 1st appellant would have been vindicated on the garage doors and milking equipment had the prosecution called Kirk Wentworth. According to the learned state counsel, the court was made to rely on evidence which does not give a conclusive position as the prosecution was selective.

On the contrary we believe that notwithstanding the alleged incidents of dereliction of duty, there is sufficient overwhelming evidence on the record linking the 1st appellant to the offences he was charged with. For example, the evidence of PW4 who erected the equipment at the 1st appellant's farm and witnessed it at the warehouse of Base Chemicals. His evidence that the 2nd appellant paid him labour and bought materials for the works at the 1st appellant's farm was not disputed. There is also evidence of PW13 and PW15 who visited Greenwood Enterprises and obtained relevant documents from Kirk Wentworth pertaining to the purchase of the milking equipment. In our view even if Kirk Wentworth was called as a witness or Major Chris Mwewa and Col. Samson Phiri were interviewed, this would not have affected the finding of the trial magistrate given the overwhelming evidence before her. Added to the list are exhibits P74, P38, P64 and P22. We believe that the sum total of this evidence was sufficient to give the trial magistrate a conclusive position of the offences the 1st appellant is facing.

The argument, therefore, that the prosecution was selective cannot be sustained. We accordingly find no error in the conviction of the 1st appellant on counts three and five. This ground is also dismissed for lack of merit.

Grounds eight and nine both deal with count seven and because they are interrelated the two grounds will be determined together. Mr. Silwamba, SC submitted that in count seven of the charge sheet the 1st appellant was alleged to have received three steel structures valued at US$13,500.00 from the 2nd appellant as an inducement or reward for engaging Base Chemicals to supply fuel and do construction works. The Court was referred to pages 37 and 48 of the judgment where according to the learned state counsel, the Court took a global approach to heap its analysis on four counts and convicted without any reasons being forwarded; and that the Court did not even consider the evidence relating to the steel structures. He argued that the evidence of PW13 and PW15 captured at page 43 of the judgment relates to steel purchased by the Zambia Air Force Commander but there is no positive identification of the steel structures brought in by the 2nd appellant being the one that PW4 allegedly erected. The learned state counsel contended that the evidence of PW4 at page 51 of the record of appeal is that he took one steel structure to the 1st appellant's farm and four to Lt. Gen. Kayumba's farm but the Court lost sight of the fact that the allegation in count seven related to three steel structures which were not found at the 1st appellant's farm.

Mr. Silwamba, SC submitted that PW4 contradicted himself when he stated in cross-examination at page 62 of the record of appeal that:

> ***"I did not deliver steel structures here and I do not know when they were delivered. I saw structures here before they were erected. I did not build the walls for the milk parlour and I do not know who did it. I did not put up the ramp nor the grill gates."***

According to the learned state counsel this is contrary to the findings of the trial Court when it stated at page 44 of the judgment that:

> ***"In cross-examination it was pointed out that PW4 indicated to the officers while being interviewed that he used the steel structures in question to erect a milk parlour, milking shade and a chicken run at A1's farm."***

He contended that the Court proceeded to make findings of fact which are contrary to the actual *viva voce* evidence on record and urged the Court to reverse them.

Mr. Silwamba, SC also submitted that the Court fell into error when it discounted the evidence and explanations of the defence. He argued that the 1st appellant adduced evidence to demonstrate that he paid for the building materials including the steel structures to Base Chemicals and that his explanation, his wife's and that of PW4 corroborate the fact that the 1st appellant paid for the steel structures. It was his submission that their evidence was also confirmed by the 2nd appellant and DW3 (Mavis Kaira) who testified as having received funds for materials from the 1st appellant's wife (DW1) and produced a receipt, exhibit D66, but the Court proceeded without reason that it did not believe DW3.

The learned state counsel further contended that the trial magistrate erred when she failed to address the issue of demeanour adequately as the record of appeal is devoid of any remarks relating to demeanour and that she dealt with the crucial issue of credibility only in a summary manner.

Mr. Silwamba, SC contended that the trial Court did not mention the point of law or facts that it relied upon to convict the 1st appellant in count 9 of the charge sheet and that this is contrary to the provisions of section 169 of the Criminal Procedure Code which provides that:

"169 (1) The Judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which and the section of the Penal Code or other written law under which the accused person is convicted and the punishment to which he is sentenced."

The learned state counsel submitted on behalf of the 1st appellant that the Court misdirected itself by not isolating the evidence or points of law for each count for it to reach a verdict. It was argued that the Court was duty bound to link the receipt of the steel structures to the award of the contracts but this was not even discussed in the judgment. He contended that in the light of the evidence of payment for the steel structures by the 1st appellant it was incumbent on the trial Court to explain why it discounted the defence in question and it was submitted that this was a gross misdirection and the 1st appellant's counsel relied on the case of ***Eagle Charalambous Transport Limited v Gideon Phiri(17)*** where the Supreme Court reversed the findings of fact as it was clear from the quotation that the learned Commissioner did not give a balanced evaluation of the evidence before him.

Mr. Silwamba, SC also referred us to the case of ***Attorney-General v Peter M. Ndhlovu(18)*** in which the Court had followed with approval, the principles set out in the case of ***Nkhata & Others v Attorney-General*.**

On behalf of the respondent Mrs. Nawa submitted that PW4 gave factual evidence on what he saw as an eyewitness thus providing overwhelming evidence against the 1st appellant. According to Mrs. Nawa, the factual evidence advanced by PW4 was to the effect that he was contracted by the 2nd appellant and taken to the 1st appellant's house where he was given some jobs to do and the former was the one paying him. She submitted that there is documentary evidence to this effect, for example, exhibit P58. The learned acting principal state advocate contended that PW4 also stated that he saw the steel frame that came from Base Chemicals. It was her submission that PW4's testimony about the 1st appellant's frustration and complaint that he had already paid for the materials was hearsay as the witness was never privy to the transaction between the 1st and 2nd appellants, if ever there was any, which involved the former paying the latter.

Mrs. Nawa also submitted that the evidence of DW1 mostly related to a receipt (exhibit D66) which merely stated "additional payment" but said nothing about any alleged purchase made by the 1st appellant. She contended that there were a number of Base Chemicals receipts on the record and they were specific about what the payments related to but as for exhibit D66, not even DW3 who issued with the receipt knew what the 1st appellant's wife was paying for. The court was referred to the following evidence of DW3 at page 482 of the record of appeal:

> ***"The secretary directed her to my office, she came with her and Mrs. Musengule told me she wanted to pay some money as additional payment for building materials and she asked me to prepare a receipt for our records. I did prepare the receipt as she told me as additional payment for building materials. I gave her a copy and I remained with one. I did not know what building materials she was paying for…"***

With reference to DW1's evidence, she submitted that it mostly related to a receipt that had nothing to do with the case since the receipt (exhibit D66) merely stated "additional payment" without indicating what it was an additional payment was for as it was receipted on a petty cash voucher. The learned acting principal state advocate submitted further that there were a number of Base Chemicals receipts on the record that were specific about what the payments related to, whereas in the case of exhibit D66 not even DW3 knew what DW1 was paying for because of what she said in her verbatim evidence at page 482 quoted above.

Mrs. Nawa's argument was that exhibit D66 was of no assistance to the Court below as the Court was in fact called upon to speculate as to what was purchased. She submitted that the Court did give the reasons for its verdict on counts eight and nine and she referred Court to pages 46 to 48 of the judgment. She contended therefore that the Court below was on firm ground and that this ground lacks merit.

We have considered the arguments on ground eight. It was contended by the learned state counsel that there was no positive identification of the steel structures brought in by the 2nd appellant as being the ones that PW4 allegedly erected at the 1st appellant's farm. At page 51 of the record of appeal the evidence of PW4 states as follows:

> ***"In my earlier job with accused 2 we were to put up four similar structures which came in the same consignment, 5 of them. The 4 were to go to earlier and 5th to Gen. Musengule's job. That is how I knew they had come from Base Chemicals. I inspected them before they were off-loaded from [the] truck and took inventory in presence of accused 2, his store man and my foreman. At that time, accused 2 informed me that one structure was to be erected at Gen. Musengule's home. The***

truck was what is commonly referred as flatbed. I have already erected steel frame at time I left project. When steel frame was needed I told accused 2 that we needed to erect steel frame. Accused 2 undertook to arrange for transportation for the frame. This was done following day. We then proceeded to erect frame at the site. During the whole period, I was dealing with Mr. Sibande. I recall exact location where job was done, I am in position to direct court to site where it was done."

And on page 52 his evidence at the site reads:

"This was the first structure I worked on. It has four of these blue frames. We put foundation and structure itself… We also did the roofing. This is what was to be the milking parlour. The frames came from Base Chemicals. Accused 2 supplied them to me…"

Although the evidence of PW13 and PW15 captured at page 43 of the judgment relates to steel purchased by the Zambia Air Force, PW4 testified that he took one steel structure to the 1st appellant's farm which was supplied by the 2nd appellant. It is alleged in ground eight that the evidence of the prosecution witnesses was that the 1st appellant duly made payment of the steel structures and therefore gained no pecuniary advantage. We went through the evidence of the prosecution in the record of appeal but did not find such evidence. Contrary to the 1st appellant's submission, our firm view is that the Court made findings of fact which were not contrary to the *viva voce* evidence on record.

We do not accept the contention that the 1st appellant paid Base Chemicals for building materials including steel structures and in our view the trial magistrate properly discounted the evidence and explanations of

the defence. First, there is no evidence from the prosecution witnesses supporting this view. Second, the trial magistrate after analyzing the evidence on record made the following finding at page 48 of her judgment:

> ***"The defence failed to produce the receipt for the prior payments; this was a big oversight as D62/D63 clearly indicates 'additional payment'. When exhibit P21, P23 and P24 are read together with page 1 of exhibit P36 it becomes clear that Base Chemicals made payments to purchase steel structures for A1."***

As the passage quoted by Mrs. Nawa at page 482 of the record of appeal clearly shows, not even DW3 who issued the receipt to the 1st appellant's wife knew what the latter was paying for. Given this evidence, the court could not be said to have proceeded without reason that it did not believe DW3. For the same reason, we also believe that the trial magistrate adequately dealt with the issues of demeanour and credibility of DW1 and DW3. We are satisfied that she properly discounted the evidence of DW3.

Further, although the allegation in count seven related to three steel structures which were allegedly not found at the 1st appellant's farm, we note from the record that the prosecution through PW4 proved that he built one steel structure at the 1st appellant's farm. Having examined the evidence on record, we fully agree with the finding of the trial magistrate that Base Chemicals purchased the steel structures for the 1st appellant. For the foregoing reasons, ground eight equally fails.

We have also analysed and evaluated the arguments relating to ground nine. Whilst we accept that the provisions of section 169 of the Criminal Procedure Code are guiding provisions, what we have to resolve is whether failure to strictly adhere to those provisions would be fatal so as to disqualify the judgment even if it addressed the issues raised from the

evidence. It was contended that the Court below misdirected itself by not isolating the evidence or points of law for each count for it to reach a verdict. It was argued by the learned state counsel for the 1st appellant that the Court was duty bound to link the receipt of the steel structures to the award of the contracts but this was not discussed in the judgment.

Upon perusal of the judgment of the Court below, we observed that apart from summarizing the evidence, the learned trial magistrate made specific reference to provisions of the law. With respect to count 7 she observed that the 1st appellant was charged under section 29 (1) and section 41 of the ACC Act and she went on to quote the provisions and examined the definitions of "corrupt" and "gratification" as defined in section 3 of the ACC Act. In her finding, the learned trial magistrate analyzed and evaluated the evidence and at page 47 of the judgment with regard to counts seven and eight, she stated that ***"it is not plausible that structures bought by Base Chemicals on behalf of General Kayumba should be sold to A1 again by Base Chemicals."*** She observed that there was no evidence from the defence showing that Lt. Gen. Kayumba paid for the structures and that he was refunded for the extra that he did not collect according to the 2nd appellant. We also noted that the court below rightly observed that although the 2nd appellant claimed that Lt. Gen. Kayumba paid for the structures through his company Magnavolt using ABSA, a bank in South Africa in May 2001, she was not convinced because the said Magnavolt was only incorporated on 24th August 2001, three months after the payment was purportedly made. As regards the 1st appellant's claim that he paid for the structures and additional building materials to Base Chemicals through his wife, DW1, the trial magistrate observed the inconsistencies in the claim as the 1st appellant could not initially recall having received a receipt for the said payment. She further observed the discrepancy in the figures claimed to have been paid and the learned trial magistrate also noted that although the

defence through DW1 and DW3 produced D62 and D66 as evidence of payment for the structures and additional building materials to Base Chemicals and D63/D64 as payments to Handyman's Paradise for purchase of building materials, they failed to produce the receipt for the prior payments. The trial magistrate also observed that when exhibits P21, P23 and P24 are read together with page 1 of P36 it becomes clear that Base Chemicals made payments to purchase steel structures for the 1st appellant, in the absence of a reasonable explanation for those transactions being made by the defence and in the face of the overwhelming prosecution evidence.

Therefore, with this evaluation of the evidence and the clear reasoning of the Court below, it cannot be said that she did not give reasons for her findings. Perhaps, the only omission or oversight on her part could be the final pronouncements on the convictions as she did not specify or restate the offence under which the accused was convicted. Counsel for the 1st appellant alleged that the trial Court did not explain why she discounted the defence by the 1st appellant that he paid for the steel structures but in the judgment at page 47, she clearly stated that there were inconsistencies in his claim as she pointed out at pages 47 and 48. We are, therefore, of the considered view that the allegations are just the 1st appellant's attempt to find fault with the judgment of the Court below. Further, the omission by the Court below to specify the offence on conviction of the 1st appellant is not fatal in our considered opinion as the Court had stated earlier in the judgment what the 1st appellant was charged with in count seven. In the circumstances, we also find no merit in this ground of appeal and accordingly dismiss it.

Grounds ten and eleven were argued jointly that the allegation in count nine of the charge sheet was that the 1st appellant received building materials worth K14,561,000.00 from the 2nd appellant as a way of

inducement for the grant of contracts to Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army. It was argued by Mr. Silwamba, SC that the record clearly shows that both the prosecution and defence witnesses confirmed that the 1st appellant paid for the building materials and that this can be found in PW4, Richard Nyoni's evidence at page 65 of the record of appeal. It was further submitted that the evidence of the 1st appellant, 2nd appellant, DW1 and DW3 corroborates PW4's testimony and confirms that the 1st appellant paid for the building materials using his personal resources and reference was made to the receipt "D66" produced by DW3 whose testimony the court below disbelieved. Mr. Silwamba, SC invited the Court to consider the case of ***Maseka v The People(19)*** where the Court observed that the magistrate rejected the appellant's explanation because of the discrepancies to which he referred, as a result of which she disbelieved the appellant. However, the Court was of the view that an explanation which might reasonably be true entitles an accused to an acquittal even if the Court does not believe it, and that an accused is not required to satisfy the Court as to his innocence but simply to raise a reasonable doubt as to his guilt.

It was further contended that the fact that there was unchallenged evidence on record showing that the 1st appellant paid for the building materials was in itself a ground for an acquittal as there was no evidence to challenge what was produced. It was submitted that it was wrong for the trial Court to simply ignore evidence of witnesses from both sides and documents before it. The learned state counsel argued that there was no basis to accept the evidence of PW13 and PW15 while ignoring that of PW4, the 1st appellant, the 2nd appellant, DW1 and DW3 without explanation and he relied on the case of ***Mushemi Mushemi v The People(20)*** where it was held that the judgment of any trial Court faced with conflicting evidence

should show on the face of it the reasons why a witness who has been seriously contradicted by others is believed in preference to those others.

It was Mr. Silwamba's submission, therefore, that from the foregoing, the trial Court fell into error in convicting the 1st appellant on count nine despite the fact that the prosecution failed to prove the case beyond reasonable doubt. He added that what is interesting is that the trial Court did not take time to consider whether the criminal intent was established by the prosecution and they relied on the case of ***Kalaluka Musole v The People(21)*** where the Court of Appeal held, *inter alia,* that it is always for the crown to prove that the accused actually had the intent necessary to constitute the crime, and that that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances. From the foregoing, the learned state counsel humbly prayed that the conviction be set aside.

With respect to ground ten Mrs. Nawa submitted that the prosecution adduced overwhelming evidence which proved each of the ingredients of offences charged and that the respondent supports the conviction of the 1st appellant. She argued that the learned trial magistrate was on firm ground in convicting the appellant. She submitted that they observed that the 1st appellant raised a number of issues with regard to the evidence tendered by the prosecution and the procedure adopted by the Court below but it was her contention that this ground of appeal lacks merit.

Regarding ground eleven, the learned acting principal state advocate referred the Court to the respondent's submissions in relation to the evidence of PW4, 1st appellant, 2nd appellant, DW1 and DW3 in ground nine and the receipt (exhibit D66). Mrs. Nawa submitted that PW5, Lt. Colonel Joe

Hanzuki testified about the payments by the Army to Base Chemicals and he referred to photocopies of exhibits but the defence objected to their production, citing the best evidence rule and the matter was adjourned to enable the prosecution to present the original documents. PW5 later produced the originals of the documents referred to and those original documents were admitted as exhibits (P85) as this witness was the custodian of the documents that he produced in court by virtue of his office.

We have carefully considered the submissions on grounds ten and eleven. The two grounds of appeal relate to count nine on a charge of corrupt practices by public officer contrary to Section 29 (1) as read with section 41 of the Act, where the 1st appellant being a public officer, namely, Zambia Army Commander is alleged to have corruptly received some building materials valued at K14,561,000.00 gratification from the 2nd appellant as an inducement or reward for himself. Learned state counsel for the 1st appellant argued that the record clearly shows that both the prosecution and defence witnesses confirmed that the 1st appellant paid for the building materials and that this can be found in PW4, Richard Nyoni's evidence at page 65 of the record of appeal and that his evidence is corroborated by the 1st and 2nd appellants, DW1 and DW3. Reliance was placed on exhibit "D66", a receipt produced by DW3 whose testimony the Court below disbelieved but what we found interesting about this argument is that PW4 is the one whose evidence the 1st appellant denounced at pages 343 and 344 of the record of appeal when he said:

> ***" - Nyoni did not erect any of structures at my farm, not even structure I bought from accused 2.***
>
> - ***I completed putting up structure using Army and ZNS personnel***

- ***In short, Mr. Nyoni was telling lies in court when he said he put***

up structures at my farm."

At page 344, the 1st appellant went on to state:

" - Your Hon. Mr. Nyoni left farm at foundation level and he did

not even complete foundation- structure was still unassembled

when he disappeared

- ***Mr. Nyoni was at my farm for barely a week, he was not there***

when I constructed servant's quarters in 2002

- ***He was lying in court."***

The question we pause is how then can the 1st appellant now seek to rely on the evidence of someone he considered a liar to support his claim that he paid for the building materials. On the allegation that the 1st appellant paid for the building materials using his personal resources, the defence relied on exhibit "D66", a receipt produced by DW3 whose testimony the Court below disbelieved. We also noted that the receipt dated 5th June, 2001 in the sum of K7,300,000.00 merely stated that it was additional payment from Mrs. Musengule but it did not state that it was additional payment for building materials contrary to DW3's assertion at page 483 of the record of appeal. This witness also informed the Court below that there was no other document showing that Mrs. Musengule had paid. The Court below observed that the other documents exhibited by the defence specified what the payments were for, for example, "D62", "D63"

and “D64” and hence, her reluctance to believe DW3’s evidence in respect of exhibit “D66” in preference to that of PW13 and PW15.

From the foregoing, it is clear that the trial Court did not fall into error by convicting the 1st appellant under count nine as alleged in grounds ten and eleven. We are satisfied that there was sufficient evidence upon which to convict him on the said count as the prosecution proved its case beyond reasonable doubt against him contrary to the 1st appellant’s contention. We accept the respondent’s submissions as being sound in response to the allegations in these two grounds of appeal relating to count nine. We, therefore, find that these grounds of appeal lack merit and are accordingly dismissed.

On grounds twelve and fourteen, it was argued by Mr. Silwamba, SC that the

allegation in count eleven of the charge sheet was that the 1st appellant received various milking equipment from the 2nd appellant as an inducement or reward for engaging Base Chemicals to supply fuel and provide construction works to the Zambia Army. It was submitted that the trial Court faced difficulties when the prosecution witnesses were called upon to identify the items and that there was evidence on record that the 1st appellant had procured milking equipment directly from Kirk Wentworth which equipment the prosecution failed to isolate presenting a plea of ignorance. The learned state counsel submitted that on page 195 of the record of appeal, PW13 told the Court that he was not an expert in milk equipment and was unable to state which of the equipment was called mini milkers, which was called pasteuriser or 6 point milking equipment. Counsel argued that the prosecution lamentably failed to show that the equipment at the 1st appellant’s farm was not bought directly from Kirk Wentworth. He

relied on the case of ***Mutale and Richard Phiri v The People(22)*** where the

Supreme Court stated that:

> ***"the case rested on the drawing of inferences and that where two or***
> ***more inferences are possible it has always been a cardinal principle of the criminal law that the court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference."***

It was further argued that in the case of ***Yotam Manda v The people(23),*** it was held that:

> ***"A court can only draw an inference of guilt if that is the only irresistible inference that can be drawn on the facts."***

The learned state counsel therefore submitted that the conviction of the 1st appellant was not an irresistible inference given the fact that there were lingering doubts as to the description of the equipment in issue and whether it was paid for by the 2nd appellant given that the prosecution witnesses confirmed that the 1st appellant paid Kirk Wentworth directly. It was argued that the court's difficulties were summed
at page 37 of its judgment as follows:

> ***"Nonetheless with the resources that the Taskforce is availed efforts***

should be made to engage people with relevant knowledge. I point this out because I noted that PW13 had difficulties in naming of the equipment in P65 and P66."

It was therefore submitted that given this gross misdirection the 1st appellant must be acquitted.

For the respondent, Mrs. Nawa submitted that a perusal of the record indicates that the lower Court gave reasons why it convicted the 1st appellant on pages 30 to 36 of the judgment. It was argued that the trial magistrate tabulated the evidence adduced by the prosecution on page 37 of its judgment. It was further submitted that the Court below relied on the evidence presented through exhibit P74 which contained a copy of a document entitled ***"Nedbank"*** which confirmed evidence by PW10 that a payment through Barclays bank was made by the 2nd appellant for the purchase of milking equipment to Greenwood Enterprises to the Army Commander, Zambia Army. It was submitted that this invoice showed that a deposit of US$5,000 United States dollars had been paid for the same goods. The Court was urged to note that the amount and the currencies used on both documents were the same, namely, US$18,875.00. The learned acting principal state advocate submitted that the aforestated was the evidence that the prosecution adduced to support the charge in count eleven and that the trial magistrate was on firm ground when she convicted the 1st appellant on this count. It was therefore submitted that the 1st appellant's argument had no merit and should be dismissed accordingly.

We have considered the submissions of both parties and evaluated the evidence on the record. We find that the prosecution adduced overwhelming evidence to support the charge in count eleven as evidenced by exhibit P74. The learned trial magistrate was on firm ground in relying on exhibit P74 to

convict the 1st appellant who did not produce relevant evidence to the investigating officer at the time he was being questioned prior to the matter coming to court. In fact, the 1st appellant opted to remain silent although the offence that he was charged with under section 29 (2) as read with section 41 of the ACC Act, required him to give an explanation. We note from her judgment that the trial magistrate warned herself at the onset regarding the burden of proof on the prosecution. She also drew her attention to the presumptions of corrupt intention as stipulated under section 49 (2) of the ACC Act on which the State made a submission to the effect that the ACC Act requires a satisfactory explanation from a person charged with an offence under Part IV of the ACC Act where it is proved that he/she solicited, accepted or obtained or agreed to accept or attempted to receive or obtain any payment and that in the absence of such an explanation, the presumption was that the said payment was solicited, accepted or obtained or agreed to be accepted, received or obtained corruptly.

We agree with the learned trial magistrate's finding that on the basis of exhibit P74 when read together with exhibits P22, P38 and page 7 of exhibit P64, there is no doubt that the 2nd appellant bought milking equipment for the 1st appellant through Base Chemicals. We are, therefore, satisfied that the learned trial magistrate was on firm ground in convicting the 1st appellant on count eleven based on the evidence adduced before the Court.

In the case of ***Attorney-General v Marcus Kampumba Achiume(24)*** the Supreme Court held that:

> ***"before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any***

relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."

It is also our view that although PW13 and PW15 were not able to describe the equipment by name or distinguish one from the other, the evidence on record shows that they identified the equipment they saw as milking machinery. At page 199 of the record of appeal, for example, PW13 stated as follows:

"As to whether equipment described by exporter, I found something
similar at accused 1's farm such as milking machinery."

We do not find that the trial magistrate's findings of fact were perverse or made in the absence of any relevant evidence. We believe that there was overwhelming evidence against the 1st appellant which the prosecution produced as indicated above and we accordingly dismiss grounds twelve and fourteen for lack merit.

On ground thirteen the learned state counsel submitted that the evidence that was tendered by the prosecution witnesses before the Court below in particular PW4, PW13 and PW15 was mainly concerned with transactions by Lt. Gen. Kayumba who was not an accused before the Court below. He submitted that pages 42 to 62 were all based on the evidence pertaining to the Zambia Air Force Commander Lt. Gen. Kayumba, in relation to his acquisition of steel structures from the 2nd appellant. The learned state counsel argued that this evidence was prejudicial to the accused as it was tending to be used to prove allegations that were unrelated. It was also Mr.

Silwamba's contention that the defence raised the objection in the Court below but the Court proceeded to overrule the same on grounds that it was relevant. It was submitted that this ruling was a gross misdirection. The learned state counsel cited the case of ***Esther Mwiimbe v The people (25)*** where it was held that:

> ***"… the admission of similar facts evidence is in the discretion of the trial court which will no doubt, among other things, consider whether its evidential value outweighs its prejudicial effect…"***

It was submitted that from the evidence of PW13 at page 71 of the record of appeal it was manifest that the witness was being led to talk about payments made by the 2nd appellant to Zambia Air Force (ZAF) officers and that the Court should not have taken the evidence on grounds that it was being used to prove an allegation on the limb of being similar facts. It was contended that at page 176 of the record of appeal the state witness testified as follows:

> ***"I was investigating alleged corruption involving Air Force Commander and Senior Officers in relation to the business transactions the Zambia Air Force had with Base Chemicals (Z) Limited. I observed that Zambia Army had also business dealings with Base Chemicals (Z) Limited in relation to supply of fuel and civil works."***

Mr. Silwamba, SC argued that this was a clear misdirection by the lower Court to accept such evidence. The learned state counsel cited the

case of ***Makin v Attorney-General for New South Wales (26)*** where it was held that:

> "***it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."***

He submitted that the trial Court fell into error when it brought evidence suggesting that Lt. Gen. Kayumba's acquisition of milking equipment may have been related to the transactions of the 1st appellant. The learned state counsel contended that this evidence was prejudicial and irrelevant. The case of ***R v Kilbourne (27)*** was cited in support of this contention where it was held that:

> ***"…relevant, i.e. logically or probative evidence is evidence which makes the matter which requires proof more or less probable."***

It was submitted that the evidence of Lt. Gen. Kayumba's equipment and transaction did not satisfy the test of relevance at all.

The respondent on the other hand submitted that the prosecution proved overwhelmingly that business between the Army and the 2nd appellant was as a result of the 1st appellant. It was submitted that in his defence at pages 326 to 327 the 1st appellant states as follows:

"because of this situation I was in, because of lack of fuel and I got news of my colleagues getting cheap fuel in bulk from RSA. I confirmed information and ZAF Commander agreed we could get fuel through them I made decision to do so."

We have considered the submissions of the 1st appellant. We did not receive any submissions from the respondent on this ground. We note that the trial magistrate in her ruling allowed the evidence of the prosecution witnesses, especially PW4 in relation to the steel structures in that when he worked at the project he was to put up steel structures which came in a consignment of five. PW4 told the court that he was to use the steel structures at Ibex Hill project and at the 1st appellant's farm in Makeni. PW4 told the Court that the steel structures were from Base Chemicals because he inspected them before they were off loaded from the truck. The trial Magistrate stated that from that evidence, it was clear that the witness was making a link between the materials used at the Makeni project and that used at Ibex Hill. The trial Magistrate went on to state that it was on that basis that the prosecution applied for a scene visit at Ibex Hill project.

We find that the trial magistrate was on firm ground in arriving at the conclusion that the evidence was relevant as the evidence in question was connected to that which had already been adduced in relation to one of the charges made out against the 2nd appellant. The learned magistrate then proceeded to use her discretion to grant the application by the State to visit the site in Ibex Hill.

We agree with the finding of the learned magistrate on pages 46 to 47 where she stated that the testimony of PW4 was very overwhelming as it supported exhibit P36, a record of payment from Base Chemicals for various projects which indicates that this witness was given money for building

materials plus exhibit P75. For the foregoing reasons, we dismiss this ground of appeal as it lacks merit.

On ground sixteen Mr. Silwamba, SC submitted that it is a basic principle of law that for one to be adjudged as having committed a crime there must exist the *actus reas* and *mens rea*. He argued that in counts one and two it was imperative for the State to show that the 1st appellant did in fact abuse his authority and also had the intention to obtain advantage or wealth as the basis of the abuse. The learned state counsel contended that as submitted in ground seven there is no evidence to suggest that the 1st appellant abused his authority. According to him, the evidence on record simply suggests that the 1st appellant had private dealings with an individual who had dealings with the Zambia Army and that in itself is not an offence.

It was also Mr. Silwamba's submission that with respect to counts three, five, seven, nine and eleven the State had to demonstrate that indeed the 1st appellant received the items in the indictment as gratification. He argued that the 1st appellant clearly showed the trial Court that he had procured the goods directly from the supplier in South Africa. Therefore, the act of receiving these items was not proved beyond reasonable doubt and invariably the intention was not demonstrated.

It was the learned state counsel's submission that the offences the 1st appellant was charged with do not consist solely of breach of procedures but that such breaches or lapses, if any, were deliberate with specific intention or purpose of obtaining a personal benefit for self or another. Mr. Silwamba, SC contended that the transactions were fully documented and recorded and that there was neither stealth nor was anything clandestine. The Court was referred to the learned authors of ARCHIBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE, 1969 EDITION where they state at paragraph 3491 as follows:

"It must be proved that he was distorting the cause of justice and that he made the order with intent to obtain benefit himself and in the circumstances in which there were no grounds for supposing that he would have made the order but for his personal interest and expectation…"

Mr. Silwamba, SC submitted that adapting the foregoing to the present case would have been the correct way of approaching the trial by the lower Court and since this was not done there was an obvious failure of justice. He prayed that given the fundamental flaws and inadequacies, the conviction should be set aside and the 1st appellant acquitted.

For the respondent, Mrs. Nawa submitted that the 1st appellant's argument that the prosecution did not prove the *actus reus* and *mens rea* has no merit as there is evidence on record that the two elements were present. She contended that these were proved by the fact that the 1st appellant unilaterally awarded the 2nd appellant contracts using his authority as a public office holder and that this evidence was given by PW1 and PW2. It was her argument that the 1st appellant not only awarded contracts but he also ensured that the Army made payments to the 2nd appellant and in turn he received and accepted benefits from the 2nd appellant. Mrs. Nawa submitted that an example of such benefits is provided by the evidence of PW4 who was contracted by the 2nd appellant to do some construction work at the 1st appellant's farm. She contended that this witness was paid by the 2nd appellant and according to his testimony, the 2nd appellant was purchasing building materials for the 1st appellant. Mrs. Nawa submitted that this evidence was not challenged by the defence. The learned acting principal state advocate submitted that it was overwhelming evidence to show that the 1st appellant was aware and participated fully in the execution of these crimes, thus proving the requisite *mens rea* and *actus reus*.

We have considered the arguments in this ground of appeal. We concluded earlier in this judgment that the trial magistrate was on firm ground in finding that the 1st appellant abused his authority in the manner he engaged the 2nd appellant through Base Chemicals to supply fuel to the Zambia Army and to carry out construction works at Kaoma barracks. According to the evidence of PW1 and PW2, not only did the 1st appellant award the said contracts but he also ensured that payments were made to the 2nd appellant. We are also satisfied with the evidence on record that the 1st appellant in turn received and accepted benefits from the 2nd appellant. For instance, the unchallenged evidence of PW4 was that he was contracted by the 2nd appellant to undertake construction works at the 1st appellant's farm in Makeni; that the 2nd appellant was purchasing building materials for the 1st appellant; and that his labour was paid for by the 2nd appellant.

We therefore agree with Mrs. Nawa that there is overwhelming evidence that the 1st appellant was aware and participated fully in the execution of these crimes, thus proving the requisite *mens rea* and *actus reus*. In our view this ground must also be dismissed for lack of merit.

On ground seventeen, Mr. Silwamba, SC referred the Court to the evidence of PW13, Vincent Machila, senior investigations Officer (Anti-Corruption Commission) at pages 145 to 147 of the record of appeal, the ruling at pages 157 to 158 of the record of appeal and the evidence of PW14, Violet Hamweemba Nyumba No. 32332, Detective Woman Sub/Inspector (Forensic) questioned document examiner at pages 227 to 228 of the record of appeal. He contended that the defence objected in the Court below as shown at page 145 of the record of appeal at the manner the prosecution were introducing expert evidence without producing the materials that were used to reach conclusions but the Court proceeded to deliver its ruling at pages 157 to 158 with a vague attempt at distinguishing the case of ***Chuba v The People(28)***. It was submitted that the ruling was a gross

misdirection and that this Court should correct the injustice. The learned state counsel for the 1st appellant restated what the Supreme Court laid down as the correct procedure of admitting expert evidence when they held in the above cited case, *inter alia,* that:

> ***"…the evidence of a handwriting expert is an opinion only and the matter is one on which the court has to make a finding. It is for this reason that in addition to his opinion, the expert should place before the court all the materials used by him in arriving at his opinion so that the court may weigh their relative significance."***

It was argued that this principle of law was outlined in the earlier case of ***Sithole v The State Lotteries Board(29)*** where Mr. Dumbushena submitted that an expert's opinion is not to be accepted blindly by the Court and that the function of the expert is to give the Court the benefit of his special training and skill, and assist the Court in coming to a conclusion.

With respect to the instant case, it was submitted on behalf of the 1st appellant that the learned trial magistrate misdirected herself by allowing the prosecution to proceed with expert evidence without materials being placed before the Court and further, by proceeding to rely on this inadmissible evidence. Mr. Silwamba, SC submitted that this misdirection was a gross injustice and he prayed that the conviction be quashed as the Court wrongfully admitted the evidence.

No submissions were made by the respondent on this ground. We have considered the 1st appellant's submissions on ground seventeen. In our view, the necessity of placing all materials used by the expert in arriving at an opinion should be determined according to the circumstances of each case. For instance, in the case of a forensic pathologist or a ballistics expert, the

question is whether it would be realistic to place all materials used to perform the post-mortem examination on the body of the deceased before the court or all tools, powders and chemicals used to clean and test fire the firearm which is the subject of criminal investigations. Admittedly in the latter example, there are a few items such as spent ammunition that are usually placed before the Court but it is not every pin, needle, powder or chemical that is brought to court. Therefore, even in this case, we are of the considered view that it would be unrealistic to require the prosecution to place all the materials that were used by the handwriting expert in arriving at her opinion, although it would be better for the expert to appear before court and to testify so that any lingering questions can be posed. However, the absence of such expert to testify is not always fatal as there are some circumstances where the calling of such expert witness is sometimes dispensed with where he/she is unable to attend court for what ever reason. We also took into account the objection by defence counsel in the Court below about the manner in which the prosecution were introducing expert evidence. However, we examined and evaluated the testimony of PW14, Detective Woman Sub/Inspector Violet Hamweemba Nyumba at pages 227 to 228 of the record of appeal, where she ably explained that the purpose of taking the documents to the laboratory was to ascertain whether the documents were executed by one hand and she examined the said documents and observed that the documents were executed by one hand. She also explained that she could not carry out photographic examinations because she was not given samples to
examine and compare with but she explained the procedure at page 228 of the record of appeal as follows:

> ***"We have a procedure when examining documents and that is process I was referring to. We use visual examination and microscope examination. I make comparison from one***

document to another to find out whether one person made all documents. I compare strokes, letter connection, loops alignments, etc I cannot satisfy court at this moment as I have no chart to show court that documents were written by one person. That is all.

I effected examination. I satisfied myself with comparison and I found that documents were produced by one person. I could produce chart if given specimen samples which I was not given."

We observed from the record that the defence neither challenged by way of cross-examination nor objected to the evidence of this witness. Therefore, we are of the considered view that it is too late to challenge the evidence at this stage and we think that this is a mere attempt by the 1st appellant to ensure that his appeal succeeds at whatever cost. We, therefore, find that this ground also lacks merit and it is accordingly dismissed.

On ground eighteen the learned state counsel submitted that for a witness to be allowed to give his opinion, it is imperative that a firm foundation is led clearly establishing his peritus. It was submitted that in the case of ***R v Silverlock(30)*** it was held that a Court must only receive what is termed expert opinion evidence if the witness has satisfied the Court that she or he is skilled, qualified and experienced in the area of evidence he is volunteering an opinion Mr. Silwamba, SC contended that it was a misdirection for the learned trial magistrate to admit the evidence of PW3 and the ruling of the lower Court at pages 48 and 49 of the record of appeal was contradictory to itself as in one limb the trial Court was stating the *sine qua non* for admitting expert evidence and then proceeded to admit the testimony of PW3 as expert evidence. It was argued that it was the duty of

the prosecution to lay the necessary foundation in the introductory phase of the testimony of this witness as presented by the defence at page 34 of the record of appeal when PW3 was made to answer to his qualifications.

The learned state counsel argued that there was a clear lapse in the Court below in accepting the evidence of PW3 as an expert witness without having been presented with evidence of his peritus. It was submitted that the witness did not even state the institution where he obtained his academic qualification, namely the Masters degree in Architecture, although he stated that he was a fully registered member of the Zambia Institute of Architects. It was argued that the witness did not indicate if he had any professional qualifications and that the record was devoid of this evidence.

On behalf of the respondent, Mrs. Nawa contended that the prosecution had established peritus in relation to PW3. She submitted that the prosecution had established that the said witness was an expert in his field as he had worked as an architect in the Buildings Department since 1992, which accounted for more than 14 years in the same capacity. The learned acting principal state advocate argued that PW3 was also a holder of a Master of Science in Architecture. She contended that not only was PW3 experienced but he was also professionally qualified as such. It was submitted that PW3's evidence was relevant to the issue the Court was inquiring into. Mrs. Nawa also referred the Court to the case of ***R v Silverlock*** in which the Court of Appeal stated *inter alia*, that:

> ***"he must become peritus in the way of the business or in any definite***
> ***way. The question is, is he peritus? Is he skilled? Has he got adequate***

knowledge? It was submitted that there is no decision which requires that the evidence of a man who is skilled in comparing handwriting and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business."

We have considered the submissions made on behalf of the 1st appellant and the respondent. In her ruling at page 49 of the record of appeal, the trial magistrate stated

as follows:

"An expert witness is said to be one by reason of his study or experience of a particular subject is especially skilled in that subject…
Going by the material before me I am satisfied that PW3 is an expert witness.
The issue I must now determine is whether or not the State has laid enough foundation to enable the Court allow PW3 to give his opinion on the basis that he is an expert witness. It is my considered view that the State, by asking questions whose answers have established the witness' educational background; areas in his field where he took extra courses as well as his own work experience, places and lengths of experience, they have laid a satisfactory foundation for an expert witness.
I, therefore, rule that PW3 may give his opinion to the Court as he is an expert in his field of work. The Court will thereafter

determine if his opinion is useful, material and relevant. Defence counsel's objection is therefore overruled."

In his testimony, PW3 told the lower Court that he was an architect with the

Buildings Department with 14 years experience and that he was registered with the Zambia Institute of Architects. He also told the Court that he was a holder of a Master of Science in Architecture. We find that on the basis of that evidence, the trial Court was on firm ground in allowing the expert evidence of PW3 as enough foundation had been laid before the Court to qualify him as an expert witness. We accordingly dismiss this ground of appeal as it lacks merit.

On grounds nineteen and twenty the learned state counsel referred the Court to Section 5 of the Commissioners for Oaths Act Cap 33 of the Laws of Zambia which

reads:

"5. A Commissioner for Oaths may administer any oath or take any affidavit or declaration for the purpose of any court or matter in Zambia, including any matter required to be sworn, declared or attested under any law relating to the registration of instruments or documents or under any law relating to passports:

Provided that a Commissioner for Oaths shall not exercise any of the powers given to him by this section in any proceedings in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested."

Mr. Silwamba, SC submitted that from the foregoing provisions of the law it is not competent for a Commissioner for Oaths to attest documents where he or she is an interested party. He argued that a perusal of the record of appeal at pages 74 to 106 shows that PW5 was producing documents attested as true copies of originals by the Zambia Army and that the documents also produced by PW10 when he testified were certified by a Commissioner for Oaths from within Barclays Bank Zambia Limited. According to the learned state counsel, this is contrary to Section 5 of the aforementioned ACC Act as both the Zambia Army and Barclays Bank Zambia Limited had an interest in the matter and the certification and authentication should have been done by a neutral person not interested in the matter for the Court to hold that the documents were properly certified and authenticated as copies. He submitted that given these inadequacies the trial Court in effect admitted questionable and unauthenticated evidence which is inadmissible.

It was also Mr. Silwamba's contention that proceeding to admit copies without proper explanation as to where the original copies were was a misdirection on the part of the lower Court. He contended that at page 85 of the record of appeal, the witness submitted that he only managed to find an original copy of a letter and the rest were photocopies. The learned state counsel submitted that this evidence is inadmissible and he relied on the case of ***George Bienga v The People(31)*** where it was held that:

"(i) The secondary evidence of the original document is admissible provided it can be established that the original is lost or cannot be produced. Secondary evidence may either be in the form of a copy of the original or by oral evidence.

(ii) When the original document is in the possession of a stranger, the proper course for the party desiring to

prove the contents of the documents is to serve the stranger with a witness summons to produce the original.

(iii) Before secondary evidence of a lost document can be admitted, the court must be satisfied that the document cannot be found and an adequate search has been made.

(iv) It is difficult to lay down any general rule as to the degree of diligence necessary in searching for the original document to entitle the party to give secondary evidence of the contents. If document be of considerable value, or if there be reason to

suspect that the party not producing it has a strong interest which he would induce him to withhold it, a very strict examination would be required; but if a document is useless, and the party could not have an interest in keeping it back, a much less strict search would be necessary."

Mr. Silwamba, SC submitted that the conviction in these circumstances cannot stand.

We have considered the 1st appellant's submissions. There were no submissions from the respondent on this ground. We agree with the learned state counsel that in accordance with Section 5 of the Commissioners for Oaths Act, it is not competent for a Commissioner for Oaths to attest documents where he or she is an interested party. Black's Law Dictionary, 6th edition defines "Interested Party" in the following terms:

"For purpose of administrative hearing, are those who have a legally recognized private interest, and not simply a possible pecuniary benefit."

The question, therefore, is whether the Commissioner for Oaths at the Zambia Army headquarters who attested exhibit P4 and the one at Barclays Bank Plc who attested exhibit P5C are interested parties. We note that the Commissioners for Oaths who attested these exhibits were employees of the Zambia Army and Barclays Bank Plc respectively. These are criminal proceedings to which neither the two Commissioners for Oaths nor their respective employers are parties. The parties to these proceedings are the State and the two appellants. The two exhibits were attested for the sole purpose of indicating that they were true copies of the originals and produced in furtherance of these criminal proceedings. In our view, the circumstances stated above are not the kind envisaged in Section 5 of the Commissioner for Oaths Act. We therefore do not find any impropriety in the admission of exhibits P4 and P5C by the trial magistrate.

Mr. Silwamba, SC also submitted that it was a misdirection on the part of the Court to admit copies without a proper explanation as to where the original copies were. According to the principle enunciated in the case of ***George Bienga v The People*** cited by the learned state counsel secondary evidence of the original document can be admitted as long as it is established that the original is lost or cannot be produced. At page 85 of the record of appeal it is stated as follows:

"PC: I am showing originals together with certified copies of

ID7 documents. IDS AI only managed to bring letter of authority for payment <u>but I did not manage to find the</u>

originals for the rest. ***I wish to tender documents as part of evidence.*** (underline our emphasis).

Court: Application granted documents marked P5, A, B, C, D."

It is quite clear to us from the above except of the evidence of PW5 that he gave a proper explanation that he was producing certified copies because he did not manage to find the originals. We are therefore satisfied that the learned trial magistrate was on firm ground in admitting the photocopies as a proper explanation had been given by PW5 on his inability to produce originals of the documents. For the foregoing reasons, this ground of appeal is dismissed for lack of merit.

On ground twenty-one, Mr. Silwamba, SC submitted that the trial magistrate took a simplistic approach when dealing with admissibility of foreign documents. The Court was referred to pages 56 and 57 of the judgment where the trial magistrate stated as follows:

"Legalities surrounding P74 being obtained outside jurisdiction were resolved in earlier cases such as The People v Lt General Wilford Joseph Funjika (SCZ [Judgment] No. 18 of 2005). Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act, Cap 98 of the Laws of Zambia under which this document was produced provides as follows "A record or a copy and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record sent to the Attorney-General by a foreign state in accordance with a Zambian request, shall not be inadmissible in evidence in a proceeding with respect to which the Court has jurisdiction by reason only that a statement contained in the record, copy, affidavit, certificate or other statement is hearsay or a statement of opinion. "The

Supreme Court held that "Section 38(1) deals only with the mode of gathering evidence, but does not take away the trial court's discretion in deciding whether conditions for obtaining the evidence were met and what weight to attach to the evidence."

In this case I find no reason to discredit the manner in which the prosecution obtained P74 which I find to be crucial evidence."

He submitted that the provisions of the Mutual Legal Assistance in Criminal Matters, Chapter 98 of the Laws of Zambia must be read in consonance with the provisions of the Authentication of Documents Act Chapter 75 of the Laws of Zambia and in particular, Section 3 which provides as follows:

"3. Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if –

(a) in the case of a document executed in Great Britain or Ireland it be duly authenticated by a notary public under his signature and seal of officer;

(b) in the case of a document executed in any part of Her Britannic Majesty's dominions outside the United Kingdom it be duly authenticated by the signature and seal of office of the mayor of any town or of a notary public or of the permanent head of any Government Department in any such part of Her Britannic Majesty's dominions;

(c) in the case of a document executed in any of Her Britannic Majesty's territories or protectorates in Africa it be duly authenticated by the signature and seal of office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner in or of any such territory or protectorate;

(d) in the case of a document executed in any place outside Her Britannic Majesty's dominions (hereinafter referred to as a "foreign place") it be duly authenticated by the signature and seal of office-

(i) of a British Consul-General, Consul or Vice-Consul in such foreign place; or

(ii) of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be duly authorized under the law of such foreign place to authenticate such document."

The learned state counsel also cited the case of ***Lumus Agricultural Services Limited, Lumus Agricultural Services Company (Z) Limited v Gwembe Valley Development Company Limited (In receivership) (32)*** where it was held that:

"If a document is executed outside Zambia there is need for it to be authenticated in accordance with the Authentication of Documents Act, and it is such authentication that makes it valid for use in this country and if not authenticated then the

converse is true, that it is deemed not valid and cannot be used in this country."

He submitted that the documents were obtained from South Africa which acceded to The Hague Convention Abolishing the Requirement of Legislation for Foreign Documents on 5th October 1961. The learned state counsel argued that accordingly, the documents obtained by PW13 and PW15 were governed by the Apostille Convention which legalizes official documents executed within South Africa for use outside South Africa by means of Apostille certificate (where countries are party to The Hague Convention of 1961) or a certificate of Authentication (where countries are not party to The Hague Convention). Mr. Silwamba, SC submitted that the documents admitted by the trial magistrate were devoid of this cardinal condition precedent and that the Task Force on corruption did not tender any evidence that the documents were examined by the relevant authorities. He submitted that the trial Court admitted evidence that was not properly authenticated and placed so much weight on this inadmissible evidence in reaching its conviction. He accordingly urged this Court to quash the conviction.

For the respondent, Mrs. Nawa submitted that the Authentication of Documents Act and the Mutual Legal Assistance in Criminal Matters Act are very clear as to their intended use. She argued that the purpose of the former Act is for the authentication of documents which is a condition precedent for their validity as against third parties and that this can be overridden by the latter Act as provided by Section 3 thereof which reads:

"In the event of any inconsistency between this Act and any other Act of Parliament, other than the provisions of an Act prohibiting the disclosure of information or prohibiting its disclosure except under certain conditions, this Act shall prevail to the extent of the 'inconsistency'."

The learned acting principal state advocate submitted that since the Authentication of Documents Act relates to the authentication of documents and not to their disclosure, the Mutual Legal Assistance in Criminal Matters Act takes precedence over the former Act. She accordingly contended that the trial magistrate was on firm ground when she allowed the admission of documents in evidence.

We have considered the submissions of the 1st appellant and the respondent. The gist of the 1st appellant's contention on this ground is that the trial magistrate admitted inadmissible evidence that was not properly authenticated. The evidence in question is exhibit P74, comprising documents obtained by PW13 and PW15 from Kirk Wentworth of Greenwood Enterprises in South Africa.

We have examined the two pieces of legislation alleged to have been offended by exhibit P74. Our understanding of the Authentication of Documents Act is that it deals with the authentication of documents executed outside Zambia but intended to be used in Zambia. According to this Act such documents to be valid for use in this country require prior authentication. This is the basis of the decision in the ***Lumus Agricultural Services Limited*** case. However, we note that apart from two documents, namely, a witness statement of Kirk Wentworth and an affidavit statement of Liora Bamberger, the other documents comprising exhibit P74 are not executed documents requiring authentication as envisaged in the Authentication of Documents Act.

Further, the Authentication of Documents Act deals with authentication of documents while the Mutual Legal Assistance in Criminal Matters Act deals with disclosure of documents. According to the Supreme Court decision in the ***Funjika*** case, the Court under Section 38(1) of the Mutual Legal Assistance in Criminal Matters Act is given discretion in deciding whether conditions for obtaining the evidence outside jurisdiction were met and what

weight to attach to such evidence. In the present case, the trial magistrate in exercising her discretion held that she found no reason to discredit the manner in which the prosecution obtained exhibit P74 which she found to be crucial evidence. On the facts of this case we have no reason to fault the trial magistrate's exercise of her discretion in admitting exhibit P74. We also agree with Mrs. Nawa that in terms of Section 3 of the Mutual Legal Assistance in Criminal Matters Act, the said Act would prevail over the Authentication of Documents Act to the extent of the inconsistency; if any, as in the present case and Section 38(1) of the former Act must therefore take effect. Consequently, this ground cannot succeed and it is also dismissed.

On ground twenty-two, the learned state counsel for the 1st appellant made reference to the provisions of Section 46 of the ACC Act and particularly subsections (1), (2) and (3) which provide as follows:

> ***"46 (1) No prosecution for an offence under Part IV shall be instituted***
> ***except by or with the written consent of the Director of Public Prosecutions…***
> ***(2) Notwithstanding the provisions of subsection (1), a person may be charged with an offence under Part IV and may be arrested there for his arrest may be issued and executed and any such person may be remanded by the Court in custody or on bail not withstanding that the written consent of the Director of Public Prosecutions to the institution of a prosecution for the offence with which he is charged has not been obtained, but no such person shall be remanded in custody or on bail for a period longer than fourteen days on such charge unless in the meantime the written consent of the Director of Public Prosecutions aforesaid has been obtained.***

(3) When a person is brought before a court before the written consent of the Director of Public Prosecutions to the institution of a prosecution against him is obtained, the charge shall be explained to the person accused but he shall not be called upon to plead."

It was submitted that the requisite consent to prosecute the 1st appellant, was given by the Acting Director of Public Prosecutions, Mrs. Caroline Zulu Sokoni, on 21st September, 2004, and that the 1st appellant took plea before the learned trial magistrate on 21st June, 2005. Reference was also made to the evidence of PW9, Anna Mwitwa, Legal Officer at the Ministry of Lands on 10th March, 2006, PW10, Mbewe Mbewe, Banker Barclays Bank (Z) PLC on 10th March, 2006 and PW11, Lt Col Edwin Kasoma, Assistant Adjutant General, Manpower and Personnel Administration on 14th July 2006 and it was submitted that from the record, it is abundantly manifest that the Task Force continued with the investigation of the 1st appellant long after he was arrested, granting of a Fiat by the Acting Director of Public Prosecutions and long after the 1st appellant had taken plea and these proceedings. It was therefore, submitted by Mr. Silwamba, SC that the prosecution was conducting investigations *ex post facto* hence offending against the provisions of section 46 of the ACC Act as read with sections 84 and 85 of the Criminal Procedure Code which place a condition precedent or *sine qua non*. He relied on the cases of ***Clarke v The People(33) Mwanza (AB) v The People(34)*** and ***Liyongile Muzwanolo v The People (35)***. He also contended that in the case of ***Clarke v The People***, it was held that where the consent of the Director of Public Prosecutions is required before a prosecution, the obtaining of such consent is mandatory and the matter goes to jurisdiction and if there is no such consent, the trial is a nullity. It was submitted on behalf of the 1st appellant that the Task Force surreptitiously

obtained the learned Director of Public Prosecution's consent to prosecute the 1st appellant and that the Task Force was obliged to present the additional evidence for the Director of Public Prosecution's review as the 1st appellant was charged with offences under Part IV of the ACC Act.

With respect to this ground, the respondent inadvertently responded to ground twenty-one as ground twenty-two. As such they did not present their arguments and so it is left for the court to address the issues raised by the 1st appellant only.

We have considered the 1st appellant's submissions on this ground. There were no submissions from the respondent. Counsel for the 1st appellant argued that the prosecution's conducting of investigations *ex post facto* was offensive to the provisions of Section 46 of the ACC Act as read with sections 84 and 85 of the Criminal Procedure Code which place a condition precedent or *sine qua non.* From the provisions cited, it is clear that the requirement of the Director of Public Prosecution's consent to prosecute is a condition precedent which is mandatory but a close examination of the provisions of Section 46 of the ACC Act reveals that the ACC Act is silent on whether investigations are subject to approval by the Director of Public Prosecutions so as to require revisions by him. We must point out that the provisions of the ACC Act refer to consent to prosecute and not revision of whatever investigations are made because if this was the position, it would not only take long to prosecute matters where the Director of Public Prosecutions is required to issue a Fiat but the wheels of justice would move very slowly to the detriment of the accused. We have also noted that even the authorities cited make reference to consent of the Director of Public Prosecutions in cases where it is required, being a condition precedent and mandatory and going to the jurisdiction of the

matter so much that if there is no such consent, the trial is rendered a nullity.

Therefore, in view of the foregoing we are of the considered view that there is no basis upon which the learned trial Court should have excluded the evidence of PW9, PW10, and PW11 and we find that the trial Court's consideration of the said evidence was in order. The learned trial Court therefore did not err in law and in fact as alleged and we accordingly dismiss this ground of appeal for lack of merit.

On ground twenty-three, it was submitted that on pages 67 to 68 of the record
of appeal, prosecuting counsel was suggesting that DW3 had become hostile. It was also submitted that it was at that point that the court became aware that prosecuting counsel was involved in the investigations. Mr. Silwamba, SC submitted that the trial Court should have cautioned itself from proceeding any further or at least requesting the Prosecutor to recuse himself. It was contended that the fact that this was not done in the light of glowing evidence that the prosecutor was part of the investigating team renders the proceedings in the court below *coram non judice*. He referred this Court to the case of ***F/SGT John Ezekiel Mumba v The People (36)*** where it was held, inter alia, that the Court Martial which tried the appellant and others was not properly constituted in that the Director of Public Prosecutions has no locus standi in proceedings before a Court Martial and Mr. Nchito did not qualify to be a member of a Court Martial pursuant to the provisions of Sections 88 of the Defence Act; and that the Court Martial which tried and convicted the appellant was not properly constituted and the proceedings before it were irregular and a nullity.

There were no submissions from the respondent on this ground. We have considered the 1st appellant's submissions and the evidence on record. From the proceedings on pages 67 to 68 and 490 of the record of appeal it is clear that the State initially wanted DW3 to be a state witness but the defence intervened by stopping DW3 from testifying on behalf of the State. In fact the prosecution counsel, Mr. Nchito told the Court that the State was not going to produce DW3 as a state witness as the possibility of her being declared a hostile witness on the stand were quite high. Mr. Nchito explained to the learned trial magistrate in chambers that DW3, when she went for pre-trial discussions with her lawyer, a Mr. Mosha, she told the prosecution that she was not comfortable testifying for the State but that she was going to be a defence witness. Mr. Mosha actually confirmed before the learned Magistrate that the above was the position and Mr. Nchito felt vindicated by his statement.

We do not see how this issue makes Mr. Nchito part of the investigating team rendering the proceedings in the Court below *coram non judice*, to extent of being a nullity. The prosecution counsel did not even call DW3 as a state witness as Mr. Nchito found it inappropriate and unprofessional to do so in view of her conduct of recanting her statement and turning away from matters stated in her previous statement. The view we take is that under these circumstances, the argument that the proceedings in the Court below were *coram non judice* can not hold. We also believe that the facts of this case are easily distinguished from the ***John Ezekiel Mumba*** case where Mr. Nchito did not qualify to be a member of the Court Marshal where as in the present case he was a prosecuting counsel. We therefore find that there is no merit in this ground of appeal and we accordingly dismiss it.

On ground twenty-four it was submitted that this is an alternative ground in the event that the Honourable Court upholds the convictions. The

Court's attention was drawn to pages 494 and 495 where the 1st appellant forwarded his mitigation and that at page 495 of the record, the reasons for meting out a custodial sentence by the trial court was unjustified.

Mr. Silwamba, SC argued that the harshness of the sentences is not encouraged by the entrenched principles of sentencing and he supported his submission by relying on the cases of ***Mulwanda v The People(37)*** and ***The People v Silva & Freitas(38)*** where it was held that mitigation should be taken into consideration when assessing sentence.

The learned state counsel submitted further that the receipt of each alleged gift arising from the same award of contract should not have been laid as separate offences as this is wrong and oppressive. He argued that another way to look at it, is that a wrongful act (*actus reus*) with multiple consequences is one thing. Conversely, to split a single consequence into multiple counts goes against the provisions of section 135 of the Criminal Procedure Code and he relied on the case of ***Fluckson Mwandila v The People(39)*** where the Supreme Court cited with approval the English case of ***R v Harris(40)*** and per Gardener Ag DCJ (as he then was) stated as follows:

> ***"…It does not seem to this court right or desirable that one and the***
> ***same incident should be made the subject matter of distinct charges so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed."***

It was further stated that it had been frequently said by the Court of Appeal in England, and by the Supreme Court of Zambia, that it is oppressive

to an accused person and onerous to the courts, to include too many counts in one indictment but the question of a charge being bad for duplicating and the question of oppression are two different issues. It was argued further that it would be improper to lay separate or different counts as the multiple acts constitute one offence.

In conclusion, the learned state counsel urged the court to sustain all the grounds of appeal and accordingly prayed that the convictions of the 1st appellant on all
counts be quashed.

The respondent, however, did not address the Court on this ground. In the absence of any submissions by the respondent, we can assume that it has been left to the Court's discretion in the event that this court upholds the convictions.

We have considered the 1st appellant's submissions on this ground. Section 41 of the ACC Act deals with penalties and provides that:

"41 Any person who is guilty of an offence under this Part shall be liable -

(a) upon conviction to imprisonment for a term not exceeding twelve years; and

(b) upon a second or subsequent such conviction, to imprisonment for a term of not less than five years but not exceeding twelve years; and

(c) in addition to any other penalty under this Act, to forfeit to the State of any pecuniary resource,

property, advantage, profit or gratification received in the commission of the offence under this Act."

Considering the foregoing statutory provisions, the arguments by the learned state counsel and the authorities cited, we must state that while we are alive to the Supreme Court decisions on principles of sentencing of first offenders, we must point out that the imposition of a fine as opposed to a custodial sentence is not mandatory but depends on the circumstances of each case and also as long as there are no aggravating factors. Further, this court can only interfere with the sentence meted out by the Court below if the same comes to us with a sense of shock. In the instant case, we are of the considered view that the learned trial magistrate considered the circumstances of the case and the mitigating factors before arriving at the sentence imposed and since the sentence of four (4) years does not come to us with a sense of shock, we do not consider it to be harsh and excessive. We, therefore, find that the learned trial magistrate did not err in law and in fact by sentencing the 1st appellant to a custodial sentence of four (4) years to run concurrently. We accordingly uphold the conviction and sentences and dismiss the 1st appellant's alternative ground of appeal. In the final analysis, we conclude that all the 1st appellant's grounds of appeal lack merit and are accordingly dismissed.

We now turn to the 2nd appellant. On behalf of the 2nd appellant, Messrs Mainza and Sianondo submitted on ground one that the 2nd appellant was charged under Section 29(2) that falls under Part IV of the ACC Act which requires an accused person to offer a satisfactory explanation to the charges. The Court was referred to Section 49(2) of the ACC Act which reads:

"Where, in any proceedings for an offence under Part IV, it is proved that any person solicited, accepted or obtained or agreed to accept or attempted to receive or obtain any payment in any of the circumstances set out in the relevant section under which he is charged, then such payment shall, in the absence of a satisfactory explanation be presumed to have been solicited, accepted, or obtained or agreed to be accepted, received or obtained corruptly."

They cited Article 18(1) of the Constitution which provides that:

"A person who is tried for a criminal offence shall not be compelled to give evidence at the trial."

It was submitted that Section 49(2) which requires an accused to give a satisfactory explanation is in conflict with Article 18 of the Constitution that upholds the accused's right to remain silent and the Court was referred to the case of ***In re Thomas Mumba*** where the Court considered the effect of the above section vis-à-vis the Constitution. The Court was also referred to Article 18(2) of the Constitution which reads:

"Every person who is charged with a criminal offence –

Shall be presumed to be innocent until he is proved or has pleaded guilty."

Messrs Mainza and Sianondo submitted that the aspect of the law which puts the burden on the accused to give a satisfactory explanation or be presumed corrupt suggests that the accused has to prove his innocence. They contended that this makes the provisions of the ACC Act to be inconsistent with the Constitution thereby making such provisions null and void. They accordingly prayed that since all the charges were based on

unconstitutional provisions, the appeal should be allowed and the 2nd appellant set at liberty.

The respondent did not file any submissions on this ground of appeal. We have carefully considered the submissions on behalf of the 2nd appellant and the authorities cited. We are of the considered view that although Section 18 (2) (a) of the Constitution states that ***"every person who is charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty,"*** an accused does not lose his constitutional right to remain silent. Section 49 (2) of the ACC Act merely gives an opportunity to the accused person to give a satisfactory explanation if the accused person is charged with an offence under Part IV of the ACC Act.

In the case of ***Zyambo v The people (41)***, the Supreme Court, *inter alia*, held that Section 319 of the Penal Code Chapter 87 of the Laws of Zambia does not impose any greater obligation on an accused person than to give an explanation which might reasonably be true, when he has satisfied the Court that the case has not been proved beyond reasonable doubt and has discharged the obligation imposed on him by the section. The Supreme Court held that:

> ***"(iii) Reading the judgment as a whole, the Magistrate in using the words 'satisfied' was simply using the word which the section itself used."***

Section 319 of the Penal Code reads:

> ***"Any person who shall be brought before a court charged with:***
>
> ***a) Having in his possession anything which may be reasonably suspected of having been stolen or unlawfully obtained;***

b) Conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained; and who shall not give an account to the satisfaction of such court of how he came by the same, is guilty of a misdemeanor."

What this section entails therefore is that a person suspected of having or conveying stolen property must give an account or explanation to the satisfaction of the court. Similarly Section 49 (2) of the ACC Act requires a satisfactory explanation from a person charged with an offence under Part IV of the ACC Act where it is alleged that he/she solicited, accepted or obtained or agreed to accept or attempted to receive or obtain any payment. In the absence of such an explanation, the presumption is that the said payment was solicited, accepted or obtained or agreed to be accepted, or obtained corruptly.

Based on the above we find that Section 49 (2) under Part IV of the ACC Act which requires an explanation from the accused person is not in contravention of Article 18 (2) of the Constitution. We accordingly dismiss this ground of appeal as it lacks merit.

On ground two, Messrs Mainza and Sianondo submitted that a detailed explanation was given by the 1st appellant on how he acquired the garage doors at pages 331 to 335 of the record of appeal and that exhibits D33 and D34 show the evidence of payment by the 1st appellant. The Court was referred to the case of ***Musole v The People(42)*** where the Court of Appeal observed at page 180 that:

"… a defence may arise by itself or as a result of the evidence adduced before the court. In either event it becomes an issue which the court must decide and the burden of proof in regard to it is upon the prosecution to satisfy the court beyond

reasonable doubt that the defence so raised cannot be maintained."

It was submitted that the above authority is instructive in the present case because it deals with issues where the evidential burden shifts to the prosecution when a certain defence is raised by the accused as the presumption of corruption operates in similar ways. They contended that in the instant case the 1st appellant did not just raise a doubt in his defence but he fully explained beyond reasonable doubt how the garage doors were purchased but also provided receipts as evidence of the said purchase. It was submitted that at page 415 of the record of appeal, the 2nd appellant showed the garage doors and motors admitted as D49 which were at his place and were admitted in evidence without any objection from the State and that they are independent of those purchased by the 1st appellant. They contended that the trial court convicted the appellants not because they did not rebut the presumption but due to the fact that the documents were not shown to the investigator albeit there was no obligation on the 2nd appellant to say anything to the investigator. It was submitted that the trial court seriously misdirected itself and the Court was urged to acquit the 2nd appellant.

For the respondent, Mrs. Nawa submitted that PW15 gave evidence at page 252 of the record of appeal to the effect that he warned and cautioned the 1st and 2nd appellants and that they both elected to remain silent; subsequent to which he arrested them for the subject offences. She contended that there is no legal requirement that in criminal matters the arresting officer must produce the warn and caution statement of the accused. She also argued that PW15 was cross-examined at length but this issue was not raised at all. It was her submission that this argument is a total afterthought; an innovative argument which is devoid of merit.

We have considered the submissions of the 2nd appellant and the respondent on this ground. It was contended that a detailed explanation was given by the 1st appellant on how he acquired the garage doors and that documents D33 and D34 show evidence of payment by the 1st appellant. In relation to the 1st appellant's sixth ground of appeal, we found at pages J58 and J59 above that the trial magistrate did not accept the 1st appellant's defence because the garage doors were addressed to him in his official position of Army Commander and that he did not give convincing reasons why they were so addressed to him. For these reasons, we finally concluded that the trial magistrate was on firm ground in convicting the 1st appellant on counts three and four of the charge sheet. All we can say is that for the same reasons, the 2nd appellant's second ground of appeal can also not succeed.

On ground three the learned counsel for the 2nd appellant submitted that the law is that the burden of proof lies on the State and they referred to the case of ***Mwewa***

Murono v The People where the Supreme Court restated the principle that:

> ***"In criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently, the guilt of the accused lies from beginning to end on the prosecution. The standard of proof is high."***

It was contended on behalf of the 2nd appellant that the theme of allegation under count six is that one milking tank valued at US$2,500.00 was corruptly given to the 1st appellant by the 2nd appellant. It was further observed that the milking tank under this charge is different from those

reflected under charges 11 and 12 as the milking tank of which the 2nd appellant is charged is reflected as exhibit P68. Counsel submitted that the only evidence adduced under this charge is that of PW13, Vincent Machila as no other witness was called to testify against the appellants regarding the said milking tank. They referred to the evidence of PW13 as reflected on page 201 of the record of appeal where he stated that:

> "***I did not establish that "P68" was imported by accused 2 for accused 1. I established my case circumstantially***."

Counsel for the 2nd appellant submitted that as admitted by PW13, the investigating officer, there was no shred of evidence to have necessitated the court below to put the 2nd appellant on his defence and later convict him on the charge. They argued that the 1st appellant's testimony is very unambiguous in that he categorically attested to how he obtained the milking tank and that he never received any milking tank from the 2nd appellant and this can be found at page 340 of the record of appeal. They also pointed out that even from the finding of the Court below, there was no mention that exhibit P68 was bought by the 2nd appellant for 1st appellant. They therefore, submitted that the burden of proof, which is high had not been discharged by the prosecution and they prayed that the 2nd appellant be acquitted.

For the respondent, Mrs. Nawa submitted that in criminal matters the burden of proving a matter beyond all reasonable doubt lies with the prosecution and that the burden never shifts and even in respect of the provisions of the ACC Act, the burden still lies with the prosecution to prove the case beyond any reasonable doubt. She reiterated her submissions in grounds one and two of the 1st appellant's grounds of appeal which are the same as the 2nd appellant's ground three. She submitted that the

prosecution adduced overwhelming evidence which proved each of the ingredients of the offences charged. With respect to the 2nd appellant's arguments advanced in ground three, Mrs. Nawa argued that the 2nd appellant's allegations that the prosecution had failed to prove the said allegations beyond reasonable doubt has no merit. She submitted that the State produced P74 as evidence of the 2nd appellant giving the 1st appellant milking equipment and that P74 at page 2 contains a copy of inward payment flows report from Nedbank stating that Greenwood Enterprises in South Africa had received US$18,875.00 from Base Chemicals of Lusaka, Zambia. The learned acting principal state advocate submitted that the 2nd appellant denied having given the 1st appellant a milk tank (exhibit P68) valued at US$2,500.00 or any other amount; and he denied having supplied him with milking equipment but it is the respondent's contention that the evidence against the 2nd appellant is overwhelming and the Court did not err in law and in fact at all.

In reply, Messrs Mainza and Sianondo observed that the respondent's advocate instead of responding specifically to the appellant's grounds of appeal and the arguments by counsel simply grouped all the responses together and in some instances mixed up the grounds. He pointed out in relation to the 2nd appellant's ground three, that counts six and twelve are totally different though all have to do with the milking equipment. They submitted that the exhibit that deals with count six is P68 and the only witness who attempted to talk about it is PW13 at page 201 of the record of appeal when he stated that he did not establish that exhibit P68 was imported by the 2nd appellant for the 1st appellant and that he established his case circumstantially and he could not state for certain that the exhibit was bought by the 2nd appellant for the 1st appellant. Counsel for the 2nd appellant submitted that the Court below did not in fact thoroughly deal with the said exhibit and they reiterated that there was no basis upon which the

2nd appellant should have been put on his defence on this charge and let alone be convicted. They prayed that he be acquitted forthwith.

We have carefully considered the 2nd appellant's third ground of appeal, the arguments in support of the said ground of appeal, the respondent's submissions and the 2nd appellant's submissions in reply. We have also considered the evidence relating to this ground of appeal on the record of appeal. In ground three the 2nd appellant alleges that the prosecution failed to prove the charge beyond reasonable doubt. Under count six of the charge sheet, the 2nd appellant was alleged to have corruptly given one milking tank valued at US$2,500.00 as gratification to the 1st appellant, a public officer, namely Zambia Army Commander as an inducement or reward for himself for having engaged Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army. This allegation is supported by evidence from PW4 (Richard Nyoni), PW13 (Vincent Machila) who both testified about the 2nd appellant's involvement. PW4 had testified in the Court below that the 2nd appellant supplied steel for both projects and that he was also supplying money for the project at Lt. Gen. Kayumba's Farm. PW4 claimed that in the earlier project at Ibex Hill he did a dairy project for the 2nd appellant which was similar to the 1st appellant's and that the steel frames for Ibex project came from Base Chemicals. PW13 testified that according to documents milking machines were imported by Zambia Air Force and the consignee is Army Commander. He also referred to exhibit P74 which showed items exported by Greenwood Enterprises in South Africa, using exhibit P64 to the Zambia Air Force Commander and the Zambia Army Commander. According to Kirk Wentworth's written and signed statement obtained by PW13, the exports were made to the 2nd appellant for the benefit of the 1st appellant. The evidence from documents on record is overwhelming. We therefore, find that the 2nd appellant has not successfully convinced this Court that the

allegations against him are unfounded. For the reasons earlier stated as these grounds tend to overlap, we find no merit in this ground of appeal and accordingly dismiss it.

We shall deal with grounds four and seven together as the issues are related. On ground four, the learned counsel for the 2nd appellant submitted that the 2nd appellant was charged with the offence of ***"corrupt practices with public officer contrary to Section 29 (2) as read with section 41 of the ACC Act. The particulars allege that Amon Sibande on dates unknown but between 1st January, 2001 and 30th June 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia corruptly gave milking equipment comprising of (2) mini milkers, two (2) header and heat sealer, 2 pasteurisers, 30,001 litre sachets, printed 30.5 sachets … all valued at US$23,875.00 gratification to Lt. General Geojago Robert Chaswe Musengule."***

It was submitted that in count six, the 2nd appellant was charged with the offence of ***"corrupt practices with a public officer contrary to section 29 (2) as read with section 41 of the ACC Act. The particulars of offence allege that Amon Sibande on dates unknown but between 1st January, 2001 and 30th June 2001 at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, corruptly gave one (1) milking tank valued at Two Thousand Five Hundred United States Dollars (US$2,500.00) gratification to Lt. Gen Geojago Robert Chaswe Musengule, a Public Officer namely Zambia Army Commander as an inducement or reward for himself for having engaged the said Base Chemicals to supply fuel and do repairs and construction works to the Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of defence, a public body."***

The learned counsel for the 2nd appellant in their written submissions stated that the law on delivery of judgment in criminal matters is set out in section 169 (1) of the Criminal Procedure Code, quoted earlier in this judgment.

It was submitted that the evidence in support of count six, as summarized by the trial magistrate appears at pages 30 to 34 of the judgment while the 2nd appellant's evidence in rebuttal appears at page 36 of the judgment. They argued that the said evidence was at variance with the indictment in that the 2nd appellant is alleged to have corruptly given one milking tank valued at US$2,500.00 gratification to the 1st appellant but PW13 and PW15 gave evidence to the effect that they collected documents from Kirk Wentworth of Greenwood Enterprises to the acquisition of milking equipment valued at US$23,875.00 and that a deposit of US$5,000.00 was paid leaving a balance of US$18,875.00 which according to the said witnesses was subsequently paid from Base Chemicals account. It was submitted that none of the said witnesses gave evidence to the effect that they collected documents from the said Kirk Wentworth of Greenwood Enterprises pertaining to the acquisition of a milking tank valued at US$2,500.00 which the 2nd appellant subsequently gave to the 1st appellant as alleged in the indictment. It was also submitted that from the evidence of PW13 and PW15 that documents they collected from South Africa in the course of their investigations, namely exhibit P74 and exhibit P64 (ZRA bill of entry) as well as exhibit P22 (Bank draft) in the sum of US$18,875.00 in favour of Greenwood marketing do not relate to the milking tank valued at US$2,5000.00 which is subject of court proceedings.

Messrs Mainza and Sianondo further submitted that in his defence the 1st appellant gave evidence to the effect that all the dairy equipment marked exhibits P65 and P66 were purchased by him from one Kirk Wentworth of Greenwood Enterprises at a consideration of US$10,700.00 and in support of

his testimony he produced exhibits D34 and D35 while the 2nd appellant denied in his evidence in defence to have given the 1st appellant a milking tank valued at US$2,500.00. It was contended that according to the 2nd appellant exhibit P22 which the prosecution relied upon as proof of payment for the milking tank in question was in fact a bank draft in respect of Lt. Gen. Kayumba and not the 1st appellant. Counsel relied on the case of ***Saluwena v The People(43)*** where the Court of Appeal held that:

> ***"If the accused's case is reasonably possible although not probable, then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof."***

The Court was referred to page 37 of the judgment wherein the trial magistrate made the findings of fact in relation to counts five, six, eleven and twelve. They argued that the manner in which the learned trial magistrate went about determining whether or not the 2nd appellant was guilty of corruptly giving one milking tank valued at US$2,500.00 gratification to the 1st appellant left much to be desired in that the Court below did not state the points for determination and did not give any reasons in its judgment for not accepting the evidence of the 1st and 2nd appellants in rebuttal to the allegation contained in count six as required by section 169 (1) of the Criminal Procedure Code.

On ground seven Messrs Mainza and Sianondo referred the Court to page 37 of the judgment and submitted that the trial magistrate misdirected herself in law when she convicted the 2nd appellant of the subject offence on the basis of documents which have no bearing to the present proceedings namely cheque number 00022927 in the sum of US$18,875.00 appearing at page 2 of exhibit P74 , bank draft in the sum of US$18,875.00 marked P22, Customs Road Manifest (P64), Form 20 (P64), ZRA Forms (P64), Nedbank draft (P74) which documents relate to Lt. Gen. Kayumba and not the 1st appellant. It was also contended that had the trial magistrate properly

evaluated the evidence in favour of the 2nd appellant she would have acquitted him. The Court was accordingly urged to quash the judgment of the Court below and acquit the 2nd appellant.

Messrs Mainza and Sianondo also filed supplementary submissions on behalf of

the 2nd appellant in which they referred the Court to the following evidence-in-chief of the 2nd appellant at pages 431, 432, 434, 440 and 442 of the record of appeal in response to allegations in counts eight and ten of the indictment:

Pages 431 & 432: ***"The way Gen. Kayumba paid is through my company Magna Volt in RSA. If I remember correctly it was on 9th September, 2002 this date is long before the Task Force confiscated documents from Base Chemicals on 30th October."***

Page 434: ***"I am the shareholder of the company Magna Volt as indicated on the page marked CK2 of D57. I incorporated the company in 2001, document bears date 18th September, 2001. D58: this statement is in respect of account belonging to Magna Volt. Your Honour I wanted to refer to entry on 11th September, 2002. This entry is in bank statement. There was a forex transfer amounting to R230,000.00. The transfer was from a company in Europe on behalf of Gen. Kayumba.***

Page 442: ***"He did pay us through a transfer from a company in UK***

called Granville Holdings. He paid Magna Volt Traders 488c the sum of more than $23,000.00 which at exchange rate it was R230,000.00. There is a letter from Granville Holdings to Gen. Kayumba that an amount of more than $23,000.00 was transferred to him."

They submitted that it was clear from the 2nd appellant's testimony that the defence adduced sufficient evidence to prove that Lt. Gen. Kayumba paid for the steel structures and building materials contrary to the holding by the trial magistrate that the defence offered no reasonable explanation for the transactions in question. It was also contended that the holding by the trial magistrate that ***"There is no evidence from the defence, apart from word of mouth, showing that Gen. Kayumba paid for the structures"*** is clearly misconceived.

It was further submitted that the finding by the trial magistrate that payment was made long before the incorporation of the company (Magnavolt) is against the weight of evidence. They contended that from exhibit D57, it could be noted that the 2nd appellant incorporated the said company on 18th September, 2001 while payment was effected on 11th September, 2002 as evidenced by exhibit D58, almost a year later contrary to the holding by the trial magistrate that the company was incorporated three months after payment. It was also their submission that the prosecution had failed to adduce evidence to negative the 2nd appellant's testimony.

For the respondent, Mrs. Nawa submitted that the State produced exhibit P74 as evidence of the 2nd appellant giving the 1st appellant milking equipment. According to the learned acting principal state advocate, exhibit P74 on page 2 contains a copy of an inward payment flows report from Nedbank stating that Greenwood Enterprises of 1036 Terrace Road, Sebenza

in South Africa had received US$18,875.00 from Base Chemicals of P. O. Box 37326, Lusaka, Zambia. It was submitted that on this document is a copy of the cheque indicating the sum of US$18,875.00 being paid to Greenwood Enterprises by Base Chemicals. She contended that in the same exhibit P74 on page 11 is a proforma invoice from Greenwood Enterprises to the Army Commander, Zambia Army in Lusaka dated 7th may, 2001 for milking equipment in the sum of US$18,875.00.

It was further submitted that PW10, Mbewe Mbewe told the Court that he works for Barclays bank PLC as a corporate manager's assistant and that he had been requested to submit documents submitted to the bank by a client, Base Chemicals. It was submitted that Base Chemicals provided a letter of instructions (exhibit P22) to issue a bank draft for US$18,875.00 payable to Greenwood Marketing for purchase of milking machines dated 18th May, 2001 by order of Base Chemicals and signed by the chief executive officer, Amon Sibande, the 2nd appellant herein. It was further submitted that in addition page 7 of exhibit P64 is a bill of entry from Zambia Revenue Authority (ZRA) dated 26th June, 2001 indicating that Greenwood Enterprises was exporting a milking machine to the Army Commander, Zambia Army in Lusaka, valued at R20,000.00.

Mrs. Nawa also submitted that as the trial magistrate in the Court below found, this evidence was supplemented by the testimonies of PW13, a senior investigation officer from the Anti-Corruption Commission (ACC) attached to the Task Force, one Vincent Machila and PW15, Friday Tembo, a police officer with the Task Force and the investigation and dealing officer in the matter. She argued that the two officers carried out investigations in this case against the Zambia Air Force Commander and the Army Commander with regard to these institutions' business dealings with a company called Base Chemicals. It was her submission that the learned magistrate in the Court below analyzed the prosecution evidence very well at pages 30 to 37

as earlier mentioned above. She submitted that PW15 and PW13 collected documents from Kirk Wentworth who is the owner of a company called Greenwood Enterprises pertaining to the acquisition of milking machines such as an invoice dated 7th May, 2001 addressed to the Zambia Army Commander. Mrs. Nawa argued that the evidence of PW10, PW13, and PW15 is very detailed and the learned Magistrate in the Court below summarized and analysed it very well at pages 30 to 37 of the Judgment.

In reply Messrs Mainza and Sianondo submitted that the exhibit which deals with count six is exhibit P68 and the only witness who attempted to talk about it is PW13 at page 201 of the record of appeal in the following words:

> ***"I did not establish that P68 was imported by accused 2 for accused 1. I established my case circumstantially. Wentworth spoke of consigning milk tank for benefit of accused 1. I cannot state for certainty that P68 was bought by accused 2 for accused 1."***

They contended that the Court below did not in fact thoroughly deal with exhibit P68 and there was no basis upon which the 2nd appellant should have been put on his defence and later convicted.

They also submitted that the State in supporting the conviction of the 2nd appellant based their submission on documents in exhibit P74 to be that by invoices dated 25th June, 2001 and 21st May, 2001, Greenwood Enterprises were to supply identical equipment to both the Air Commander and Army commander, namely equipment listed in count twelve in the charge sheet; the equipment supplied was identical to the one PW13 produced as P69, said to have been recovered from Lt. Gen. Kayumba; and the equipment was cleared by Redline Carriers with the documents produced by PW13 marked P64. They argued that the State's case was both presumptive and

speculative as they failed to prove that the equipment at the 1st appellant's farm was in fact the one the 2nd appellant imported in July 2001. It was their contention that the evidence before this Court and the Court below supports the 2nd appellant's position that the equipment at Ambrosia Dairy World (the 1st appellant's farm) is different from the equipment listed in the invoices in exhibit P74 cleared by Redline Carriers on exhibit P64. They submitted that the 1st appellant paid for the supplied equipment as indicated on D33 and D24 and its installation by Greenwood Enterprises and that the dairy equipment purchased by the 2nd appellant and listed in the charge sheet was never supplied to the 1st appellant.

Messrs Mainza and Sianondo further submitted that it is clear from the record that the 1st appellant bought equipment different from those produced as P69 at Lt. Gen. Kayumba's farm. They contended that further evidence from the State showing that the milking equipment brought by the 1st appellant and those in exhibit P64 are different as shown on page 261 of the record of appeal where it is stated as follows:

> ***"May I refer witnesses to P64, I looked at these documents and scrutinized them. Zambia Revenue Authority documents: Yes I have seen the receipt. Witness shown documents. Yes I recognize documents as clearing documents. First one is dated 20th August, 2002. Clearing agent is Sazam Forwarding and Clearing. Yes I have seen that # of items are being cleared and one is a milking machine being imported by Ambrosia Milking World. According to documents we got from Registrar of Companies accused 1 is one [the] of directors of this company. Farm in Makeni is owned by accused 1 as per document from Ministry of Lands. … This is not [the] same machinery being imported on P64. The dates are different on documents, we are looking at two different machines."***

It was their submission that this clearly indicates that the 1st appellant was importing different machines from those in exhibit P64 which were imported by the 2nd appellant.

We have considered the submissions of the 2nd appellant and the respondent. We note that exhibit P64 includes a Zambia Revenue Authority Form 20 Customs and Excise Entry and Declaration (CED) document which indicates milking machinery under description of goods and the addressee was the Army Commander. The freight forwarder was Njati International in South Africa and the exporter of the goods is Greenwood Enterprises. The invoice number and date is 1727 and 25th June, 2001 respectively. So although the 1st appellant denies any knowledge of the milking equipment addressed to him and worth R20,000.00, exhibit P64 has a document referred above which points to that fact.

We find that the learned magistrate's findings in the Court below were not perverse as she gave reasons on how she arrived at her decision on page 37 of the judgment where she stated that:

> ***"Had A1 bought milking equipment from Kirk Wentworth in 2001, he should have made this clear by producing relevant evidence to the investigating officers and at the time he was being questioned prior to the matter coming to court. As such I am not convinced that all the equipment (P65 – P66) found at A1's farm were bought by him from Kirk Wentworth the owner of Greenwood Enterprises."***

Further down on page 37 of the record of appeal the learned magistrate summarized her findings as follows:

> ***"I find that when page 11 and page 2 of exhibit P74 are read together with P22, P38 and page 7 of P64 there is no doubt that A 2 bought equipment for A1 through Base Chemicals.***

Upon consideration of the prosecution's evidence and having not provided with a reasonable explanation from the defence, I am satisfied that the charges under counts 5, 6, 11 and 12 have been established against A1 and A2 beyond reasonable doubt."

As regards the evidence of the 2nd appellant that Lt. Gen. Kayumba paid US$23,000.00 through a company in Europe, Granville Holdings to his company, Magnavolt, as per exhibit D58, we note that exhibit D58, a bank statement, does not show that the payment of R230,000.00 (US$23,000.00 equivalent) was made by Granville Holdings on behalf of Lt. Gen. Kayumba. We also note from the record that the alleged letter from Granville Holdings to Lt. Gen. Kayumba in respect of the said payment was not produced by the 2nd respondent in evidence.

It was also contended that according to exhibit D58 Magnavolt was incorporated on 18th September, 2001 while payment was made on 11th September, 2002 as evidenced by exhibit D58, almost a year later contrary to the trial magistrate's finding that the company was incorporated three months after payment. According to the indictment, the charges in question related to the period between 1st January, 2001 and 30th June, 2001. The payment on exhibit D58 was effected in September 2002. It was quite obvious to us that that payment in no way relates to the milking equipment found by the trial magistrate to have been procured by the 2nd appellant on behalf of the 1st appellant between 1st January, 2001 and 30th June, 2001. In the premises we cannot fault the finding by the trial magistrate that Magnavolt was incorporated after the alleged payment.

We are therefore satisfied with the findings of fact of the learned Magistrate as they are not perverse and we cannot therefore interfere. We accordingly dismiss these grounds of appeal for lack of merit.

Grounds five and six were argued together. We will similarly consider them together. Messrs Mainza and Sianondo contended that the Court below summarized the points for determination in counts eight and ten at page 13 of the judgment as follows:

> ***"With regard to the second accused who stands charged under counts 4, 6, 8, 10 and 12 the prosecution must establish each and every ingredient of the offences charged. All the counts charge the second accused with corrupt practices with public officer (arising from different facts) contrary to Section 29(2) and section 41 of the Act. The former Section provides that:***
>
> ***"29(2) Any person who by himself, or by or in conjunction with any other persons, corruptly gives, promises or offers any gratification to any public officer, whether for the benefit of that public officer or of any other public officer, as an inducement or reward for doing or forbearing to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, shall be guilty of an offence."***
>
> ***To prove this offence the prosecution must prove each and every ingredient and as such establish that:***
>
> ***(1) A2 by himself or by or in conjunction with any other person***
>
> ***(2) Corruptly gave, promised or offered***
>
> ***(3) Any gratification to***
>
> ***(4) Any public officer – A1 in this case***
>
> ***(5) Whether for the benefit of A1 or any other public officer***

(6) As an inducement or reward for doing or forbearing to do, anything in relation to any matter or transaction, actual or proposed.

(7) With which any public body is or may be concerned."

It was submitted that in convicting the 2nd appellant the Court below had the following to say at pages 47 to 48 of the judgment:

"With regard to counts 7 and 8 it is not plausible that structures

bought by Base Chemicals on behalf of Gen. Kayumba should be sold to A1 again by Base Chemicals. There is no evidence from the defence, apart from word of mouth, showing that Gen. Kayumba paid for the structures and that he was refunded for the extra that he did not collect as per A2. I state this because the claim by A2 that Gen. Kayumba paid for the structures through his company Magnavolt using ABSA, a bank in South Africa in May 2001 is not convincing because the said Magna Volt was incorporated on 24th August, 2001. This is obviously 3 months after payment is said to have been made. I find this impossible to believe. A1 said he paid for the structures/additional building materials to Base Chemicals through his wife, DW1. Again there are inconsistencies in this claim, firstly in that A1 could not initially recall having received a receipt for the said payment but later said his wife showed him a receipt. Secondly he said one structure cost K3.6m but he told the court that he initially paid K3.5m and later paid K7.3m through his wife, this amounts to K10.8m. Further the defence through DW1 and DW3 produced D62 and D66 as evidence of payment for the structures/additional building

materials to Base Chemicals and D63/D64 are payments to Handyman's Paradise for purchase of building materials. The defence failed to produce the receipt for the prior payments; this was a big oversight as D62/D63 indicates "additional payment." When exhibits P21, P23 and P24 are read together with page 1 of P36 it becomes clear that Base Chemicals made payment to purchase steel structures for A1. Given that defence have not offered a reasonable explanation for these transactions and also that the evidence of the prosecution leaves no doubts in my mind with regard to the guilt of the two accused persons, I find that counts 7, 8, 9 and 10 have been proved beyond all reasonable doubt."

Messrs Mainza and Sianondo submitted that contrary to the trial magistrate's holding that the defence offered no reasonable explanation for the transactions in question and that the prosecution proved the allegations in counts eight and ten beyond all reasonable doubt, the defence did in fact adduce evidence through the 1st and 2nd appellants, DW1 and DW3 to the effect that the steel structures and building materials were paid for by the 1st appellant and Lt. Gen. Kayumba but the prosecution adduced no evidence to negative the same. Citing the case of ***Ticky v The People(44)*** where this Court held that it was the duty of the trial magistrate to consider in his judgment the accused's defence, they contended that a perusal of the judgment at page 45 shows that the trial magistrate did not consider all the evidence adduced by the 2nd appellant pertaining to counts eight and ten appearing at pages 419 to 428 of the record of appeal and that this failure is fatal.

It was also submitted that contrary to the holding by the Court below that counts eight and ten were proved beyond reasonable doubt by the prosecution, PW4 whose evidence the Court appears to have relied upon in

convicting the 2nd appellant conceded under cross-examination that the 1st appellant confirmed to him that he had paid the 2nd appellant for steel structures and building materials. The Court was referred to the following testimony of PW4 at page 65 of the record of appeal:

> ***"… I do not know whether accused A2 was getting money for supplies from Gen. Kayumba… The only time I discussed something with accused 1 was when works at his farm were going on slowly and he was concerned. He complained and said accused 2 should bring materials as he had paid for them… I do not know whether structures put up at Gen. Kayumba's farm were paid for. I do not know whether structures at accused 1's farm was paid for. I recall accused 1 being frustrated at pace of work even though accused 2 had been paid."***

Messrs Mainza and Sianondo submitted that it was clear from the evidence of PW4 that the steel structures and building materials were not given to the 1st appellant by the 2nd appellant for free as alleged in counts eight and ten as an inducement or reward. They contended that the finding by the Court below at page 47 of the judgment that it was not plausible that structures bought by Base Chemicals on behalf of Lt. Gen. Kayumba should be sold to the 1st appellant by Base Chemicals is not supported by evidence. They further submitted that the finding by the Court below at page 48 of the judgment that when exhibits P21, P23 and P24 are read together with page 1 of exhibit P36, it becomes clear that Base Chemicals made payments to purchase steel structures for the 1st appellant is misconceived in that none of the said exhibits discloses that Base Chemicals made payments to purchase steel structures for the 1st appellant. The Court was accordingly urged to set aside the conviction in both counts and acquit the 2nd appellant.

It was further submitted that in count eight, the 2nd appellant was charged with the offence of ***"corrupt practices with a public officer contrary to section 29 (2) as read with section 41 of the Anti-Corruption Commission Act, No. 42 of 1996. The particulars of the allegation are that Amon Sibande, the 2nd appellant on dates unknown but between 1st January 2001 and 30th June 2001 at Lusaka corruptly gave three (3) steel structures valued at US$13,500-00 as gratification to Lt. General Geojago Robert Chaswe Musengule, a public officer, namely the Zambia Army Commander as an inducement or reward for himself for having engaged Base Chemicals Zambia Limited to supply fuel and do repairs and construction works at Zambia Army, a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body."***

It was also submitted that in count ten, the 2nd appellant was charged with the offence of ***"corrupt practices with a public officer contrary to Section 29(2) as read with section 41 of the Anti-Corruption Commission Act, No. 42 of 1996. The particulars of offence being that Amon Sibande on dates unknown but between 1st January, 2001 and 30th June 2001 at Lusaka, corruptly gave some building materials valued at K14,561,000-00 as gratification to Lt. General Geojago Robert Chaswe Musengule, a public officer, namely Zambia Army Commander as an inducement or reward for himself for having engaged Base Chemicals Zambia Limited to supply fuel and do repairs and construction works to the Zambia Army a matter or transaction which concerned the Zambia Army of the Ministry of Defence, a public body".***

Counsel for the 2nd appellant noted how the Court below summarized the points for determination in counts eight and ten at page 13 of the judgment and they observed that the learned trial magistrate made no mention in her judgment that one of the points or ingredients the prosecution needed to establish was that the 2nd appellant ***"on dates unknown but between 1st January 2001 and 30th June 2001 at Lusaka corruptly gave three (3) steel structures valued at US$13,500-00 as gratification to the 1st appellant".***

Messrs Mainza and Sianondo contended further that in convicting the 2nd appellant on counts eight and ten, the Court below expressed disbelief of some evidence by the 1st appellant, the 2nd appellant, DW1 and DW3, stating that there were inconsistencies in the evidence and that the defence failed to produce the receipt for prior payments for the structures and additional building materials; and proceeded to conclude that in the absence of a reasonable explanation for the transactions, it was clear that Base Chemicals paid for the steel structures for the 1st appellant. They argued that contrary to the learned trial magistrate's holding that the defence offered no reasonable explanation for the transaction in question and that the prosecution proved the allegations in counts eight and ten beyond all reasonable doubt, the defence did in fact adduce evidence through the 1st appellant and the 2nd appellant, DW1 and DW3 to the effect that the steel structures and building materials were paid for by the 1st appellant and Lt. Gen. Kayumba. It was also the 2nd appellant's contention through counsel that an observation of the prosecution evidence on record indicates that the prosecution adduced no evidence to negate the defence evidence despite the fact that they were aware that the burden of proving the offences against the 2nd appellant beyond reasonable doubt rested on the prosecution. They relied on the decision in the case of ***Ticky v The People*** where the Court of Appeal held that it is the magistrate's duty to consider in

his judgment each defence made and it must be evident from his judgment that he did so. In the present case, Counsel submitted that a perusal of the judgment appealed against at page 45 clearly shows that the trial magistrate did not consider all the evidence adduced by the 1st and 2nd appellants, DW1, and DW3 pertaining to counts eight and ten and that such failure is quite fatal. Counsel for the 2nd appellant proceeded to scrutinize PW4's evidence at page 65 of the record of appeal and argued that it was quite clear from his evidence under cross-examination that the steel structures and building materials were not given to the 1st appellant by the 2nd appellant for free as alleged in counts eight and ten as an inducement or reward. They contended that on the contrary, the same were paid for as demonstrated by the 1st and 2nd appellants, DW1 and DW3. They submitted that it is, therefore, amazing how the learned trial magistrate could have held that the prosecution had proved counts eight and ten beyond all reasonable doubt when the record clearly indicates that PW4 conceded that he recalled that the 1st appellant was frustrated at the pace of work even though the 2nd appellant had been paid.

Messrs Mainza and Sianondo further attacked the finding by the court below at page 48 of judgment as being misconceived, in stating that it became clear that Base Chemicals made payments to purchase structures for the 1st appellant when none of the said exhibits disclosed so. Counsel argued that the correct position is as stated by DW4, the 1st and 2nd appellants, DW1 and DW3 to the effect that the 1st appellant purchased steel structures from Base Chemicals. They submitted that in the premises the allegations against the 2nd appellant as contained in counts eight and ten of the charge sheet, were not proved beyond all reasonable doubt by the prosecution as required by law. They, therefore, urged this Honourable Court to set aside the convictions in both counts and acquit the 2nd appellant forthwith.

For the respondent, Mrs. Nawa, submitted that the 2nd appellant's explanation was not at all satisfactory because if Lt. Gen. Kayumba sold the steel structures to Base Chemicals which in turn sold the same to the 1st appellant, then it would have been prudent for him to call Lt. Gen. Kayumba to testify to that effect. She argued that the 2nd appellant said that there was a letter from Granville Holdings to Lt. Gen. Kayumba but this letter was not written to the 2nd appellant and so she wondered about the reasonableness of that explanation. She submitted that the trial Court was therefore left to make assumptions as to the truth or possible truth of the said correspondence. Mrs. Nawa submitted further that there is no truth in the allegation that the 2nd appellant availed the trial Court with documentary evidence to support his explanation as D58 did not indicate any name on it, especially that of Lt. Gen. Kayumba nor did it show what transaction it related to in relation to anything under the Court's inquiry. She submitted that the trial Court was being asked to speculate in order to fill in the blanks in the 2nd appellant's explanation.

With respect to DW1's evidence, Mrs. Nawa submitted that all she came to show the Court was an improvised receipt showing "additional payment". She further argued that a number of Base Chemicals receipts were exhibited on record and they all state what the payment was unlike the one DW1 exhibited. She contended that it would have been reasonable if the receipt had referred to past receipt numbers on which the balance was being paid. She, therefore, urged the Court to dismiss the appeal for lack of merit and to uphold the conviction of the Court below.

We have considered the submissions of the 2nd appellant and the respondent on grounds five and six and have evaluated the evidence on the record in relation to these two grounds. The 2nd appellant's arguments are

based on the fact that the learned trial magistrate did not attach much credibility to the defence witnesses' evidence and preferred to rely on the evidence of PW4 and PW13 as well as other prosecution witnesses. Count eight relates to the charge against the 2nd appellant, of corruptly giving three steel structures valued at US$13,500-00 as gratification to the 1st appellant, a public officer. Count ten relates to the charge against the 2nd appellant of corruptly giving building materials valued at K14,561,000.00 as gratification to the 1st appellant, a public officer as an inducement or reward for himself for having engaged Base Chemicals to supply fuel to and do repairs and construction works for the Zambia Army. The 2nd appellant's contention is that the Court below erred both in law and in fact when it convicted him on count ten against the weight of the evidence and in the face of evidence that the prosecution witness (PW4) readily admitted that 1st appellant complained of delays in the execution of the project and that he had paid the 2nd appellant for building materials. However, a close examination and analysis of PW4's evidence at pages 63 to 66 of the record of appeal indicates that the alleged payment to the 2nd appellant by the 1st appellant appears to us to have been construed in a different context and subject to misconstruction or misinterpretation in order to suit the 2nd appellant's situation. In addition to the excerpts of the evidence of PW4 quoted by the 2nd appellant on page J125 above, the following except also appears at pages 65 to 66 of the record of appeal:

> ***"I recall accused 1 being frustrated at pace of work even though***
> ***accused had been paid. That is all. Yes I was asked about accused 2 being paid but I do not know what money was paid. I do not know what money accused 1 was referring to. I first saw steel structures at Base Chemicals. I do not know how they were paid for."***

From the above, it is clear that this evidence should not be taken or considered at face value. Although so much premium has been placed on the testimony of PW4 by the 2nd appellant, the view we take is that the sum total of these excepts fall far short of suggesting that the 1st appellant paid the 2nd appellant for steel structures and building materials.

A further examination of PW13, Vincent Machila's evidence at pages 197, 198 and 199 of the record of appeal shows that it corroborates PW4's evidence as to payment of building materials by the 2nd appellant for the 1st appellant. Excerpts of the same are quoted hereunder:

"Yes, items on I.D 74 were exported using P64…

Yes, I took a written and signed statement from Mr. Wentworth… Yes, he runs Greenwood Enterprises… He told me exports he made to accused for benefit of accused 1… Focus was document trail I was doing, he said he had sent equipment to Gen. Musengule by order of accused 2."

"He said he supplied one garage gate to accused 1 which was paid for by accused 2."

From the foregoing, it is clear that there is evidence on record which connects the 1st and 2nd appellants to the charges and allegations made against them.

As earlier stated, count eight relates to the allegation of the 2nd appellant having corruptly given the 1st appellant three steel structures valued at US$13,500-00 as gratification. PW4, Richard Nyoni had testified in

the Court below that the steel structures came from Base Chemicals and before that he explained how he met the clients he did work for and at page 46 of the record of appeal he stated as follows:

> ***"To my recollection, accused 2 connected me to 2 clients. The other***
> ***client was Gen. Musengule. I had been doing similar works for one client, accused 2 called me to introduce me to Gen. Musengule who wanted similar buildings. He asked me to build a milking parlour, 3 calf panes and a servants' quarter at gen. Musengule's farm in Makeni. Accused 2 asked me to do these works."***

At page 51, PW4 stated:

> ***"Foundation for structure was done and we erected frames … The steel frame came from Base Chemicals to the best of my knowledge… In my earlier job with accused 2 we were to put up four similar structures which came in same consignment, 5 of them… That is how I knew they had come from Base Chemicals. I inspected them before they were off loaded from truck and took inventory in presence of accused 2, his storeman and my foreman. At that time accused 2 informed me that one structure was to be erected at Gen. Musengule's home… Accused 2 undertook to arrange for transportation for the frame. This was done following day… During the whole period I was dealing with Mr. Sibande."***

Further at page 54, PW4 stated that:

"Accused 2 supplied steel for both projects. Accused 2 was supplying money for project. I did not collect money from accused 1 nor Gen Kayumba. My employer for both jobs was accused 2."

In relation to the steel structures, PW15 testified that the steel structures went to Livingstone and after they were moved to Base Chemicals, he found three of the structures there. He testified further that the three structures were used to erect milking parlour, milking shade and the chicken run by Richard Nyoni (PW4) of Zebrix Investment.

From the evidence on the record of appeal, we are satisfied that there was overwhelming evidence of the 2nd appellant's involvement in the supply of steel structures to the 1st appellant. In the circumstances, therefore, we are of the considered view that the learned trial Court did not err in law and in fact by convicting the 2nd appellant on counts eight and ten as alleged since the evidence against him was overwhelming. We, therefore, find no merit in these two grounds of appeal and accordingly dismiss them. We also conclude that all the 2nd appellant's grounds of appeal are unsuccessful.

On the whole of the evidence, we are satisfied that the trial magistrate dealt with this case properly and none of the grounds of appeal can succeed. The convictions of the 1st and 2nd appellants must therefore stand. This appeal is accordingly dismissed.

Leave to appeal to the Supreme Court is granted.

DELIVERED THIS 16TH DAY OF MARCH, 2012

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C. KAJIMANGA
JUDGE

_____
F. LENGALENGA
JUDGE

_____
E. P. MWIKISA
JUDGE