



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E033 OF 2021

ERICK OTIENO OYARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from both conviction and sentence of Hon. Gicheru M.N. C.M.

delivered on 02.06.2021 in Anti -Corruption Case No. 1 of 2013

at the Chief Magistrate's Court at Embu.)

JUDGMENT

1. The appellant herein filed the instant appeal having been dissatisfied with the conviction and sentence by Hon. Gicheru M.N. in his judgment delivered on 2.06.2021 in Embu Anti-Corruption Case No. 1 of 2013 with 15 counts under the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and the Penal Code. The counts were:

i. COUNT 1: *Fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On the dates between 02.12.2011 and 20.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, fraudulently acquired a sum of Kshs.117,000 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Gachoka Constituency in the Embu County which took place between 05.12.2011 and 06.12.2011.*

ii. COUNT 2: *Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On or about 10.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, improperly used his office to confer a benefit on himself to wit, Kshs.117,000 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Gachoka Constituency in the Embu County which took place between 02.12.2011 and 20.01.2012.*

iii. COUNT 3: *False accounting by a public officer contrary to section 331(1) as read with section 331(2) of the Penal Code and particulars being: on or about 10.01.2012 at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund and being charged with the management of public revenue to wit Kshs.117,000 money intended to cater for training for the Youth on Enterprise Development in Gachoka Constituency in the Embu County which took place between 02.12.2011 and 20.01.2012 knowingly furnished a false return of money by him for that purpose.*

iv. COUNT 4: *Fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On the dates between 02.12.2011 and 20.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, fraudulently acquired a sum of Kshs.91,300 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Runyenjes Constituency in the Embu County which took place between 07.12.2011 and 08.12.2011.*

v. COUNT 5: *Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On or about 10.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, improperly used his office to confer a benefit on himself to wit, Kshs.91,300 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Runyenjes Constituency in the Embu County which took place between 02.12.2011 and 20.01.2012.*

vi. COUNT 6: False accounting by a public officer contrary to section 331(1) as read with section 331(2) of the Penal Code and particulars being: on or about 10.01.2012 at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund and being charged with the management of public revenue to wit Kshs.91,300 money intended to cater for training for the Youth on Enterprise Development in Runyenjes Constituency in the Embu County which took place between 02.12.2011 and 20.01.2012 knowingly furnished a false return of money by him for that purpose.

vii. COUNT 7: Fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On the dates between 02.12.2011 and 20.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, fraudulently acquired a sum of Kshs.82,400 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Manyatta Constituency in the Embu County which took place between 09.12.2011 and 10.12.2011.

viii. COUNT 8: Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On or about 10.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, improperly used his office to confer a benefit on himself to wit, Kshs.82,400 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Manyatta Constituency in the Embu County which took place between 02.12.2011 and 20.01.2012.

ix. COUNT 9: False accounting by a public officer contrary to section 331(1) as read with section 331(2) of the Penal Code and particulars being: on or about 10.01.2012 at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund and being charged with the management of public revenue to wit Kshs.82,400 money intended to cater for training for the Youth on Enterprise Development in Manyatta Constituency in the Embu County which took place between 02.12.2011 and 20.01.2012 knowingly furnished a false return of money by him for that purpose.

x. COUNT 10: Fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On the dates between 02.12.2011 and 20.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, fraudulently acquired a sum of Kshs.164,500 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Imenti North Constituency in the Meru County which took place between 13.12.2011 and 14.12.2011.

xi. COUNT 11: Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On or about 10.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, improperly used his office to confer a benefit on himself to wit, Kshs.164,500 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Imenti North Constituency in the Meru County which took place between 02.12.2011 and 20.01.2012.

xii. COUNT 12: False accounting by a public officer contrary to section 331(1) as read with section 331(2) of the Penal Code and particulars being: on or about 10.01.2012 at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund and being charged with the management of public revenue to wit Kshs.164,500 money intended to cater for training for the Youth on Enterprise Development in Imenti North Constituency in Meru County which took place between 02.12.2011 and 20.01.2012 knowingly furnished a false return of money by him for that purpose.

xiii. COUNTY 13: Fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On the dates between 02.12.2011 and 20.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, fraudulently acquired a sum of Kshs.180,100 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Imenti South Constituency in the Meru County which took place between 15.12.2011 and 16.12.2011.

xiv. COUNT 14: Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and particulars being: On or about 10.01.2012, at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund, improperly used his office to confer a benefit on himself to wit, Kshs.180,100 from the Youth Enterprise Development Fund, which money was intended to cater for training of Youth on Enterprise Development in Imenti South Constituency in the Meru County which took place between 02.12.2011 and 20.01.2012.

xv. COUNT 15: False accounting by a public officer contrary to section 331(1) as read with section 331(2) of the Penal Code and particulars being: on or about 10.01.2012 at the Youth Enterprise Development Fund Office, Nairobi, being a Senior Research and Policy officer, Youth Enterprise Development Fund and being charged with the management of public revenue to wit Kshs.180,100 money intended to cater for training for the Youth on Enterprise Development in Imenti South Constituency in Meru County which took place between 02.12.2011 and 20.01.2012 knowingly furnished a false return of money by him for that purpose.

2. The appellant herein preferred the following grounds of appeal in his petition of appeal dated 15.07.2021.

i. That the learned trial magistrate erred both in law and in fact by convicting the Appellant on counts 1-15 when there was no sufficient evidence.

ii. That the learned trial magistrate erred both in law and in fact by convicting the Appellant on counts 1-15 without sufficient evidence to prove the specific amounts alleged to have been fraudulently acquired or amounting to specific amounts indicated in the respective counts.

iii. That the learned trial magistrate erred both in law and in fact by convicting the Appellant on documentary evidence without subjecting the same and handwriting to forensic examination by a document examiner.

iv. That the learned trial magistrate erred both in law and in fact by considering the evidence adduced by the 42 prosecution witnesses generally without relating the specific evidence to the specific counts as preferred against the Appellant.

v. That the learned trial magistrate erred both in law and in fact by disregarding the numerous inconsistencies and unexplained questions which created serious doubts on the viability of the prosecution case.

vi. That the learned trial magistrate erred both in law and in fact by generally disregarding the defence given on oath and defence submissions without giving reasons and which defence and submissions pointed out gaps and doubts in the prosecution case which should have been resolved in favour of the Appellant.

vii. That the learned trial magistrate who meted out the sentence on the Appellant erred both in law and in fact by disregarding the mitigation presented on behalf of the Appellant and imposing excessive and unreasonable fines of over Kshs. 3.3 million and default sentences of 15 years imprisonment despite the fact that the Appellant was unemployed, sickly and a first offender.

3. The appellant herein pleaded not guilty to all the charges and wherein the prosecution availed a total of 42 witnesses to support the charges and the court vide a ruling delivered on 06.01.2021, found the appellant has a case to answer and put him on his defence. The appellant gave a sworn statement in his defence and thereafter the parties filed their submissions and upon the court considering the same, found the appellant herein guilty and sentenced him to pay a fine of Kshs. 3,309,000.00 and in default, to serve a period of 14 years imprisonment.

4. It is this conviction and sentence by the trial court that has necessitated the appeal herein.

5. PW3, Serah Wanjiru Mwangi a youth Officer at Runyenjes stated that her duty included youth mobilization and training on drug abuse, employment and environment. That in December 2010, there was a training organized by Youth Enterprise Development Fund at Runyenjes and that the training was to precede the disbursement of funds. It was her case that she mobilized 100 youths and that 45 and 38 youths attended on the first and 2nd day respectively. She stated that the appellant was to facilitate and further pay transport and buy lunch for the attendees. Upon being presented with the Youth Enterprises Development Fund Pre disbursement Training Schedule for MOYAS, she confirmed that the youths were never given Kshs. 500.00 and Kshs. 1000.00 for lunch and transport respectively though she stated that she was not present when the money was being paid other than what the youths told her.

6. PW4, Colley Muthera Gerald, a civil servant working with the Ministry of Youth and Youth Officer stated that his duties included youth mobilization, coordination of youth programmes on entrepreneurship, HIV AID's, Drugs and Substance abuse. That in December, 2011, there was a programme dealing with Youth and Entrepreneurship at Nkubu Polytechnic where he mobilized 57 youths. That they were given Kshs. 200 for transport and an amount Kshs.500 for lunch. He further confirmed that the training lasted for one day only and not two days as indicated.

7. PW5, Vincent Githuku Iragu testified that on the 5th and 6th day of December, 2011, he attended training at Gachoka and wherein he was facilitated by being given Kshs.200 per day for transport and lunch was provided. That he signed for the money and further confirmed his signature. It was his case that the schedule indicated that he was paid an amount of Kshs.800 and 200 for lunch and fare respectively. He confirmed that the lunch column was blank when he signed it but reiterated that he did not get Kshs. 2000 but only received Kshs 200.00.

8. PW6, Hosea Mukhama Munyanganyi testified that on the 5th and 6th day of December, 2011 he attended training at the Youth Fund Office where he had been invited. That he attended both meetings and was paid Kshs.300 for fare each day he attended and further that, food was provided. He stated that he signed the attendance sheet and another list which was blank. He confirmed entry number 2 to be his but denied that he was paid the amount indicated as Kshs. 800 and 2000.00.

9. PW7, Diana Kawira Riungu, stated that she is based in South Imenti Office and that her role was to mobilize Youths to attend the training and that she mobilized 57 youths. That the youths were to be facilitated by the officer from the headquarters who turned out to be the appellant herein. It was her evidence that the youths were given Kshs. 200 for lunch and Kshs.500 for transport. That each youth went home with an amount of Kshs. 700; she proceeded to state that the appellant was the person in charge and that the youths were made to sign blank forms which later indicated that they each received Kshs. 1200 and 1500 for lunch and fare respectively, which was not the correct amount. On cross examination, he confirmed having registered 44 to 57 youths and that they were made to sign blank forms.

10. PW9, Ruth Mwendu Musyoka testified that she works with the Ministry of Youth in North Imenti constituency. That in the year 2011, she was working with the Youth Fund at Manyatta constituency and her role was to mobilize youths for the 8th and 9th December, 2011 training sessions. It was her evidence that she mobilized 49 and 50 youths on the first day and second day respectively. She proceeded to state that the youths were paid fare and this was done by the officers from Nairobi. She confirmed that the actual payment and the payment in the document were not the same in that, in the register, the indication was that the youths were paid an amount of Kshs.1200 for lunch and equally Kshs.1200 for transport while in the real sense, they were paid Kshs. 200 for lunch and Kshs. 200 for transport.

11. PW24, Weldon Rotich testified that he was the investigating officer in the matter and that he used to work for EACC as a police investigator. It was his evidence that the appellant herein was the director of the Youth Enterprise Development Fund and had been assigned a role to coordinate training of youths in Upper Eastern region during the period in question. He was specifically to conduct training in five (5) constituencies namely Runyenjes, Gachoka, Manyatta, North Imenti and Imenti South. That the investigations pointed out that indeed, the appellant had conducted the said training in the said constituencies from December 2011 to January 2012; the trainings had been assigned a budget of Kshs. 870,000.00 for the purpose of facilitation and Kshs. 263,500.00 for per diems; totaling to Kshs. 1,133,500.00. He stated that the budget statement produced as Exhibit 11B shows that Mr. Oyare was issued with facilitation amount of Kshs. 870,000.00 - vide imprest warrant No. 0748 marked Exhibit - 8. The per diem of Kshs. 263,500.00 was equally issued to him vide imprest warrant No. 0771 marked

Exhibit -10. That upon completion of the training, the appellant accounted for the whole amount vide surrender voucher marked - Exhibit 13 - whereby an amount of Kshs. 256,922.00 was in excess of the total amount. It was his further evidence that, indeed the training took place but the amounts indicated in the payment schedule as reimbursements were false and fraudulent. He proceeded to state that he interviewed a good number of the youths who attended the trainings and showed them the schedules and the payments against their names but they denied the amounts for lunch and transport as against the schedule. As a result, he came to the conclusion that the amount was not utilized for the intended purpose. That though the appellant claimed more than the budgeted amount, he had not fully utilized the amount budgeted.

12. PW 33, Kennedy Ileri Kinyua, stated that on 7th and 8th December, he was invited for a seminar by the District Youth Officer at Runyenjes which he attended for a whole day and at the end of the day, each of the attendee including himself was given Kshs.200.00 contrary to what was indicated on the list as having been paid as Kshs. 500.00 for lunch and Kshs.1000.00 for transport. On cross examination, he confirmed that he wrote his name and signed for an amount of Kshs. 200.00 only.

13. PW35, Eugene Kivuti Njeru stated that he attended the training whose topic was on loans and business management and after training, he was paid a total of Kshs. 400 for transport and lunch but in the schedule, it was indicated that he was paid Kshs. 800 for lunch and Kshs.2000.00 for transport. On cross examination, he reiterated that they were never given food during the training period.

14. In his defence, the appellant confirmed that indeed he was working for the Youth Enterprise Development as a Senior Research and Resource Mobilization Officer based at the headquarters in Nairobi. He simply denied the accusations but did not deny having taken the imprest of an amount of Kshs. 1,133,500.00 and upon being cross examined, he confirmed that he was the sole custodian of the money and the total was Kshs. 1,133,500. He proceeded to state that PW1 was a driver and that he would assign him other duties. The duties included: reaching the venues on time, working with youths on preparation of venues, overseeing youth registration, transferring the names from the registration forms to the payment schedules and conducting the actual payments but he equally confirmed that in cases where there are discrepancies in the payments, he was responsible since he was the custodian of the records of money. That he surrendered the imprest which included over expenditure of Kshs. 263,422. Further that, he admitted the fault as indicated in the memo exhibit number 21 since he had overspent and so, he apologized and was not paid the amount in question.

15. Directions were taken that the appeal be disposed off by way of written submissions wherein the appellant submitted that the learned magistrate erred in both law and fact by convicting the appellant when there was no sufficient evidence in that, the prosecution did not adduce any evidence to exclude the possibility of the offences having been committed by other persons. This being so because the documents were not presented for forensic examination by a document examiner; it was his case that, a document examiner would have ascertained the owners of the signatures and handwriting accordingly. It was his defence that in conducting payments for the youth participants, he handed the total budgeted money to one Mr. Simon Kavoi to effect disbursements using the reimbursement schedule and to ensure that every youth participant signed against the amounts issued and received.

16. It was further submitted that there was no evidence to show that the appellant knowingly and fraudulently altered the reimbursement schedules and authored false documents and as such, that was fatal to the prosecution's case. Further, it was his case that the trial court disregarded the numerous inconsistencies and unexplained questions which created serious doubts on the viability of the prosecution's case in that, there was no sufficient evidence in regard to the count of false accounting. That the sentence meted out on the appellant was severe despite the mitigation presented on behalf of the appellant in that, he is sickly, unemployed and further, a first offender. The appellant thus urged this court to quash the conviction, set aside the sentence and allow the appeal herein.

17. The respondent on the other hand submitted that the appellant's conviction was proper in that, the ingredients of the offences of which the appellant was charged with were proved beyond reasonable doubt. Further that, the appellant herein being a senior research officer, performed functions that are conferred and governed by the law and further underpinned in article 10 of the constitution relating to good governance, integrity, transparency and accountability. As such, the charge of abuse of office was therefore proved to the required standard since the prosecution adduced evidence to prove how the appellant used his position to confer a benefit on himself on three different occasions. That similarly, the charges of false accounting and fraudulent acquisition of public property were equally proved to the required standards.

18. It was submitted that the grounds surrounding the sufficiency of the evidence are not merited since evidence on misappropriation of funds were proved and the appellant upon being placed on his defence could neither explain nor account for the funds that he had signed for. Further, the respondent submitted that, Section 77 of the Evidence Act allows the court to admit in evidence a report by a government analyst, medical practitioner, document examiner as evidence as long as the authenticity of the documents is not disputed. Reliance was made on the case of **Joseph Kakei Kaswili v Republic in Criminal Appeal No. 102 of 2015**. It was further submitted that the defence of the appellant in the lower court was considered whereby the court gave reasons for disregarding the same before convicting the appellant. The respondent refuted the allegation that the sentence meted out on the appellant was harsh and excessive in that the sentence for the offences that the appellant herein was charged with, in regard to Counts 1, 2, 4, 5, 7, 8, 10, 11, 13 and 14 had two limbs which are crafted in mandatory terms and as such, the hands of the court were tied and further, there was nothing illegal or improper in the sentence. Reliance was made on the case of **Farah Abdi v Republic (CA 430/2006)**. The respondent urged the court to dismiss the appeal as it lacks merit.

19. I have considered the grounds of appeal herein, the evidence adduced by the prosecution and the appellant before the trial court and further, the submissions by both parties in support of their respective cases. I will proceed and determine whether the prosecution proved their case beyond any reasonable doubt.

20. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in **Okeno v Republic [1972] E.A. 32** and re-stated in **Kiilu and another v R (2005) 1 KLR 174** and is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, this court is alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See **Gunga Baya & another v Republic [2015] eKLR**).

21. It must be appreciated that this being a criminal case, the burden of proof is on the prosecution to establish every element in all the

charges beyond any reasonable doubt. This principle was well buttressed in the cases of **Woolmington v DPP 1935 AC 462** and **Miller v Minister of Pensions 2 ALL 372-273**.

22. The appellant herein was charged with five counts of Fraudulent Acquisition of Public Property contrary to section 45 (1) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003; five counts of Abuse of office contrary to Section 46 as read with Section 48(1) and equally, five counts of False Accounting by a Public Officer contrary to Section 331(1) as read with Section 331(2) of the Penal Code.

23. The appellant herein preferred to collapse grounds 1, 2, 3 and 4 of his appeal and thus argued the same under one head. I will therefore proceed and analyze the evidence as herein below:

24. On whether the learned trial magistrate erred both in law and in fact by convicting the appellant on all counts, it is not disputed that the appellant herein prior to his sacking, was a senior research and policy officer at the Youth Enterprise Development Fund which is a state corporation within the Ministry of Public Service, Gender and Youth Affairs. The issue that gave rise to the various counts facing the appellant is an imprest received from his employer for purposes of conducting trainings within the various regions in the Upper Eastern region. As an imprest holder, the appellant was entrusted with money for the assignment to train the youth in the various constituencies within the said region. From the evidence on record, there is no dispute that the imprest was received by the appellant since the same is confirmed by the evidence of the witnesses herein and further by the appellant himself. In deed the trainings took place but not in the way that was expected in that, there were instances where the amounts paid were inflated and further that, names of persons who did not attend the workshop included and figures of paid up cash indicated against their names.

25. In regard to the offence of Fraudulent Acquisition by a Public Officer contrary to section 45(1) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, the law provides that in Protection of public property and revenue, etc.

(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully –

(a) Acquires public property or a public service or benefit; while a “public officer” means an officer, employee or member of a public body, including one that is unpaid, part time or temporary.

26. Section 41 of ACECA provides that:

1). An agent who, to the detriment of his principal, makes a statement to his principal that he knows is false or misleading in any material respect is guilty of an offence.

2). An agent who, to the detriment of his principal, uses or gives to the principal a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence.

27. The evidence by the prosecution and defence has established that indeed there were trainings that were held by the Youth Enterprise Development under the patronage of the appellant herein. That the appellant was the supervisor in all the trainings in specific constituencies within Embu County between the 05th December, 2011 and 20th January, 2012 in the Upper Eastern region. It is also not disputed that the appellant received an amount Kshs. 870,000.00 in form of an imprest for purposes of these trainings; further, it's not contested or controverted that the appellant after paying all the expenditure incurred during the trainings, surrendered documents reflecting an over expenditure of Kshs. 256,922. [See P.Exh 21 – surrender documents]. In the same breadth, it is of equal importance to note that there were participants in the trainings whose particulars appeared in the attendance register, payment schedule but denied either attending or being paid the amount of money indicated against their names. PW2, PW3, PW25, PW26 who were some of the prosecution's witnesses testified that they were paid Kshs.200.00 for lunch and another Kshs. 200 for transport; that they were never paid an amount of Kshs. 500.00 and Kshs 1000.00 as was indicated in P.Exh 4. In summary, the documents submitted by the appellant herein had anomalies that included: inflated figures, inflated number of alleged participants and alleged signatures belonging to alleged participants.

28. According to the appellant, he handed the total budgeted amounts for youths fare and meal allowances to Mr. Kavoi to effect the disbursements using the reimbursements schedule and ensure that every youth participant signed against the amounts issued and received. He further claimed that the prosecution's burden of proof was never dislodged since the prosecution never adduced enough evidence to prove the specific amounts alleged to have been fraudulently acquired or amounting to specific amounts indicated in the respective counts. It is of importance to note however that, what the prosecution needed to prove was that the appellant herein fraudulently acquired public property notwithstanding the amounts involved therein.

29. Having tendered imprest surrender documents inter alia attendance register, containing forged signatures, false ID numbers; the prosecution was able to prove the case against the appellant. In his defence, the appellant attempted to shift the blame to his driver, PW1 whom he said he had given the responsibility of *inter alia* transferring the names from the registration forms to the payment schedules and conducting the actual payments. It was the duty and responsibility of the imprest holder (appellant) to take full charge in authenticating the people rightfully entitled to receive payment by taking their identification details or documents among them an ID card to verify the actual participants and the correct payments paid to each of them.

30. He was under obligation to pay participants of the workshop which he does not deny paying, but, who are these other people who allegedly got paid using other participants' identities and details? Further, the amounts indicated against the names of some of the participants as having been received by them have been controverted and the appellant has failed to offer cogent reasons for the discrepancies. The appellant was accountable to the employer as the principal by supplying accurate and correct supporting documents while surrendering the imprest, as an agent [See **Elizabeth Kaloki v R (2017) eKLR**].

31. It has been averred by the appellant that the trial magistrate erred in that no handwriting expert was called for forensic examination or

comparison of either the handwriting or the signatures; the appellant during cross examination could not explain why two different participants namely Edward Muriithi and Amos Kibaara had same ID numbers being 223559299. Further, the appellant could not explain why in P.Exh 21, it was indicated that the venue (Nkubu Youth Polytechnic) was hired for Kshs. 6,000.00 while the exhibit memo number 15 indicated that the venue was hired for Kshs.1500. In P.Exh Number 3 for example, the name of the participant number 22 is indicated as Mwenda Maganju of ID Number 23960538 which is the same as participant number 65, and bearing the same ID Number 23960538 but of course with a different hand writing. It is of importance to note that the said handwritings in the exhibits above were glaringly different to an extent that upon being questioned by the prosecution, the appellant himself conceded that he did not know where the mix up arose and further the trial court noted in its record that the documents were out rightly doctored.

32. Further, the appellant still in cross examination upon being shown P.Exh No. 21, conceded that the fault was his in that, he had overspent and proceeded to apologize for the over expenditure; only that, he justified the same by stating that he was never paid for it. In this case, there is adequate evidence even without calling an expert to verify the handwritings since in the end, the documents submitted by the appellant in surrendering the imprest were false thus misleading the principal. As a result, even if the handwriting expert were to be called, the evidence would not have watered down the prosecution's case.

33. On the charge of Abuse of Office contrary to section 46 as read with section 48(1) of Anti-Corruption and Economic Crimes Act, **Section 46**, which creates the offence reads as follows:

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

34. The Act does not define the term “office” but it defines “public officer” in section 3 to mean:

“an officer, employee or member of a public body, including one that is unpaid, part-time or temporary.”

35. The same section defines “public body” to mean:

a) *the Government, including Cabinet, or any department, service or undertaking of the Government;*

b) *the National Assembly or the Parliamentary Service;*

c) *a local authority;*

d) *any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or*

e) *a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition.”*

36. From the foregoing, it can be deduced that the “person” referred to in section 46 means a public officer and “office” in the same section means a “public office”. On the other hand, the Act defines “benefit” to mean:

“any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage.”

37. The offence of abuse of office, which under section 3 of the Act constitutes corruption, if therefore committed by a public officer who uses a public office to improperly confer on himself or on another person a gift, loan, fee, favour, advantage etc which he or that other person was not otherwise entitled to. [See *Philomena Mbete Mwilu v DPP & Others [2018] eKLR and Uganda v Odech Ensio High Court Criminal Appeal Case 28 of 2004*].

38. In my view, the above provision sufficiently covers the *mens rea* (improper use of public office) and the *actus reus* (conferment of a benefit to self or another person); improper use of public office would include conscious violation or non-adherence to prescribed procedures and regulations with the aim of conferring a benefit on the public officer himself or on another person. In this instance, the appellant herein was a senior research and policy officer at the Youth Enterprise Development Fund and wherein, he claimed more than the budgeted amount even though he had not fully utilized the amount budgeted. To prove that the approval of payment was improper, the prosecution adduced evidence to show that the appellant demanded an extra amount of (Kshs. 256,922 as an over expenditure) to the already budgeted amount. [See P.Exh 21]. In his own statement, he was the sole custodian of the imprest and that in case of any discrepancies in the payments, he was responsible since he was the custodian of the records of money. In his own words, he did apologize for the wrong he had done and further offered an apology reasoning that he was not given the extra amount as he had demanded. [See Court of Appeal decision on *John Simiyu Khaemba & Another v Republic [2020]*].

39. On **ground 5**, the appellant faulted the trial magistrate for having disregarded the numerous inconsistencies and unexplained questions which created serious doubts on the viability of the prosecution's case. It was submitted that the prosecution's evidence was barely adequate on the charge of false accounting by a public officer. Section 331(1) as read with section 331(2) of the Penal Code provides;

“331 (1) Any person who being an officer charged with the receipt custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of any money or property received by him or entrusted to his care or of any balance of money or property in his possession or under his control is guilty of a felony.”

2. A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both”.

40. In regard to this charge, PW 24, Weldon Korir testified that, he was the investigating officer in the matter and that the appellant herein was the trainer who was supposed to run trainings in various constituencies in the upper region of the Eastern province. That there was an imprest requisition warrant No. 0748 for Kshs. 870,000 dated 30.11.2011 and a similar warrant No.0771 for Kshs. 263,500 dated 09.11.2011. He referred to P.Exh 17 where there was a schedule for payment and particulars which showed how the youths were reimbursed. The problem was that the figures indicated on the schedules were not correct in that, some of the participants that were called to testify corroborated the findings of the investigations in that, there were discrepancies in the amounts allegedly paid and that received by the participants. In total, the evidence of the investigating officer was supported by that of the other prosecution witnesses.

41. The prosecution successfully proved that the appellant had deceived his principal by tendering false documents. The documents tendered were meant to account for the imprest obtained by the appellant to conduct the activities referred to herein. In an attempt to account for the money received, the appellant tendered false accounting documents demanding more money than what was initially budgeted for. In that regard, I do not see any basis to differ with the finding of the trial court. [See **Dorothy Ndia & Another v Republic [2017] eKLR**].

42. On ground 6, the **learned magistrate was faulted for having failed to consider the appellant’s defence and submissions without giving reasons and which defence and submissions pointed out gaps and doubts in the prosecution case which should have been found in favour of the appellant.** I have perused the judgment of the trial court at page 6, the trial court explained why the appellant herein could not pass the buck to his driver in that, in the court’s view, the driver never signed for the imprest but instead, it was the appellant herein. The court further explained that a senior officer could not be heard to blame a junior officer in accounting for funds especially when the junior officer did not sign for the money. The same has appropriately captured what the appellant had stated in his statement and submissions. It is therefore not true that the trial magistrate did not take into account the appellant’s defence and submissions.

43. On sentence, the appellant faulted the trial magistrate for meting out the sentence by disregarding the mitigation presented and imposing excessive and unreasonable fines despite the fact that the appellant was unemployed, sickly and a first offender. It is of importance to note that the severity of sentence is a matter of fact. There is nothing which can prevent the trial court from imposing a sentence as long as the same is within the law and therefore, the sentence imposed despite being harsh according to the appellant, was within the law and within the discretionary powers of the court. This court cannot interfere with the exercise of the said discretion as the appellant did not justify the interference. He did not prove that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. I am guided by the general principles the court adopted in appeal relating to sentence as stated by Nicholas J in the South African case of **R v Rabie (1999) 126 BCAC 309 (CA)** where the court was of the view that,

“In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal-

i) Should be guided by the principle that punishment is “pre-eminently a matter for the discretion of the trial court;” and

ii) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judiciously and properly exercised”

iii) The test for (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

44. The appellant was sentenced to pay a fine of Kshs. 3,309,000.00 in default, to serve a period of 13 years imprisonment.

45. On punishment of an offence, ACECA Sec 48. Provides for the following Penalty

(1) A person convicted of an offence under this Part shall be liable to—

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

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

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

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

b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

46. I have carefully considered the above section and the sentence imposed and I am persuaded that the sentence is not only lawful but also appropriate. In conclusion, I dismiss the appeal and uphold both the conviction and sentence by the trial court.

47. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent