



**Soi v Republic (Anti-Corruption and Economic Crimes Appeal  
E020 of 2021) [2022] KEHC 15725 (KLR) (Anti-Corruption  
and Economic Crimes) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15725 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E020 OF 2021  
EN MAINA, J  
NOVEMBER 24, 2022**

**BETWEEN**

**STEPHEN KIPTANUI SOI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrate Court at  
Milimani Anti-Corruption Court by Hon. E. Juma – Chief Magistrate  
delivered on the 15th day of September, 2021 in ACC No. 45 of 2018)*

**JUDGMENT**

1. The Appellant who was the 4<sup>th</sup> accused in the trial court was tried, found guilty and convicted on Counts 5, 9, 11, 12, 15 and 17 of the charges and subsequently sentenced as follows: -

Count 5:

- i. Under Section 48(1)(a) a fine of Kshs.300,000 in default 1 years imprisonment.
- ii. Mandatory sentence under 48(b) – Fines Kshs.19,590,000/= in default 2 years imprisonment for the loss.

Count 9:

- i. Under Section 48(1)(a) – fine of Kshs.300,000 in default 1 year imprisonment.
- ii. Under Section 48(2) (b) – Kshs.30,778,070/= or 3 years imprisonment for the loss.

Count 11:



- i. Under Section 48(1) (a) Kshs.300,000/= in default 1 year imprisonment
- ii. Under Section 48(1) (b) fine of Kshs.39,098,526 or three years imprisonment for the loss.

Count 12

- i. Under Section 48(1)(a) fine of Kshs.300,000 or 1 year imprisonment.
- ii. Under Section 48(1)(b) Kshs.9,967,620 or 1 year imprisonment for the loss to government.

Count 14

- i. Under Section 48(1)(a) a fine of Kshs.300,000 or 1 year imprisonment.
- ii. Under Section 48(1)(b) fine Kshs.10,707,064 or 1 year imprisonment for the loss.

Count 15

- i. Under Section 48(1) (a) a fine of Kshs.300,000 in default one year imprisonment.
- ii. Under Section 48(1)(b) Kshs.3,900,537 in default one year imprisonment for the loss.

Count 17

- i. No punishment is indicated but it is noted that the Appellant was not charged with that offence.

2. The charges all related to loss of public funds during the Rio Olympics in the year 2016.

“Count 5

Wilful Failure To Comply With Applicable Procedures And Guidelines Relating To Management Of Public Funds Contrary To Section 45(2) (b) As Read With Section 48 Of The *Anti Corruption And Economic Crimes Act*, No 3 Of 2003

Particulars

Stephen Kiptanui Arap SOI : Between 19th July 2016 and 25<sup>th</sup> August 2016 at the National Olympics Committee of Kenya Offices within Nairobi County being the Chef De Mission of the Kenyan team Rio 2016 Olympic Games and being a person whose functions concerned management of public funds, willfully failed to comply with the applicable laws and procedures by authorizing cancellation air tickets resulting to loss of public funds to wit, Nine Million, Seven Hundred and Ninety Five Thousand (Kshs. 9,795,000/-)

Count 9

Wilful Failure To Comply With Applicable Procedures And Guidelines Relating To Management Of Public Funds Contrary To Section 45(2) (b) As Read With Section 48(1) Of The *Anti-corruption And Economic Crimes Act*, No 3 Of 2003

Particulars

Stephen Kiptanui Arap Soi: Between 19th July 2016 and 25th August 2016 at the National Olympics Committee of Kenya Offices within Nairobi County being the Chef De Mission of the Kenyan team Rio 2016 Olympic Games and



being a person whose functions concerned the management of public property, wilfully failed to comply with the applicable law and procedures relating to the management of public funds to wit Section 68(1)(a) and (b) of the *Public Financial Management Act*, 2012 by unlawfully approving payment in excess of USD 151,500 (Kshs. 15,389,036.70) as allowances to the members of the Kenyan Team to the Rio 2016 Olympic Games .

#### Count 11

Wilful Failure To Comply With Applicable Procedures And Guidelines Relating To Management Of Public Funds Contrary To Section 45(2) (b) As Read With Section 48 Of The *Anti-corruption And Economic Crimes Act*, No 3 Of 2003

##### Particulars

Stephen Kiptanui Arap Soi: Between 19th July 2016 and 25th August 2016 at the National Olympics Committee of Kenya Offices within Nairobi County being the Chef De Mission of the Kenyan team Rio 2016 Olympic Games wilfully failed to comply with the applicable law and procedures relating to the management of public funds to wit section 68 (1) a) and b) of the Public Finance Management Act, 2012 by unlawfully authorizing the purchase of unutilized air tickets amounting to Kshs. Nineteen Million, Five Hundred and Forty Nine Thousand, Two Hundred and Sixty Three shillings (Kshs.19,549,263/=

#### Count 12

Wilful Failure To Comply With Applicable Procedures And Guidelines Relating To Management Of Public Funds Contrary To Section 45(2) (b) As Read With Section 48 of the *Anti -corruption And Economic Crimes Act*, No 3 Of 2003.

##### Particulars

2.Richard Titus Ekai 4. Stephen Kiptanui Arap Soi: On 19<sup>th</sup> day of July 2016 at the State Department of Sports within the Ministry of Sports Culture and the Arts in Nairobi County being the Principal Secretary of the said Department and Chef De Mission of the Kenyan team Rio 2016 Olympic Games respectively and being persons whose functions concerned the management of public property, wilfully failed to comply with the applicable law and procedures relating to the management of public funds to wit Section 68(1)(a)and (b) of the *Public Financial Management Act*, 2012 by unlawfully authorizing payment for air-tickets amounting to ksh. Four Million, Nine Hundred and Eighty Three Thousand, Eight hundred and Ten Shillings (ksh. 4,983,810/-) an act which resulted to the loss of public funds.

#### Count 14

Abuse of Office Contrary To Section 46 as read with Section 48 of the *Anti-corruption And Economic Crimes Act* No. 3 Of 2003.

##### Particulars

Stephen Kiptanui Arap Soi: Between 19<sup>th</sup> July 2016 and 25<sup>th</sup> August 2016 at the at the National Olympics Committee of Kenya Offices within Nairobi County being the Chef De Mission of Kenyan team in the Rio 2016 Olympic Games used



your office to improperly confer a benefit of Kshs. Five Million, Three Hundred and Fifty Three, Five Hundred and Thirty Two (Ksh. 5,353,532/=) to Vincent Kinyili Paul, Francis Kinyili Paul, Hezekiah Kipchoge keino and Ian Kipkosgei to travel to Brazil an act that resulted to loss of public funds during the Rio 2016 Olympic Games.

#### Count 15

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.

#### Particulars

Stephen Kiptanui Arap sol: Between 19<sup>th</sup> July 2016 and 25<sup>th</sup> August 2016 at the National Olympics Committee of Kenya Offices within Nairobi County being the Chef De Mission of Kenyan team in the Rio 2016 Olympic Games used your office to improperly confer a benefit of Ksh. One Million, Nine Hundred and Fifty Thousand, Two Hundred and Ninety Three and Seventy Six Cents (Ksh.1,950,293.76/-) to Hezekiah Kipchoge Keino and Francis Kinyili Paul as allowances to travel to Brazil an act that resulted to loss of public funds during the Rio 2016 Olympic Games

#### Count 17

Wilful Failure to Comply With Applicable Procedures And Guidelines Relating To Management of Public Funds Contrary To Section 45(2) (b) as read With Section 48 of the *Anti Corruption And Economic Crimes Act*, No 3 of 2003

#### Particulars

Richard Titus Ekai 3. Haron Komen Chebet: Between 19<sup>th</sup> day of July 2016 and 25<sup>th</sup> August 2016 at the State Department of Sports within the Ministry of Sports , Culture and the Arts in Nairobi County being the Principal Secretary and the Director of Administration respectively of the said Ministry and being persons whose functions concerned the management of public property, wilfully failed to comply with the applicable law and procedures relating to the management of public funds to wit Section 68(1)(a)and (b) of the *Public Financial Management Act*, 2012 by unlawfully authorizing payment of air tickets valued at Kshs. Thirty Three Million, Four Hundred and Thirty Six Thousand, Four Hundred and Eight (Kshs. 33,436,408/-) resulting to the loss of public funds.”

3. Being aggrieved by the conviction and sentences the Appellant preferred this appeal which is premised on 42 grounds, the gist of which is that the charges against the appellant were not proved beyond reasonable doubt; That the conviction went against the weight of evidence; That the trial magistrate was biased against the Appellant and that the appeal should therefore be allowed. The appeal is vehemently opposed.
4. Learned Counsel for the Appellant Mr. Kitheka and Mr. Bosek and Learned Prosecution Counsel Ms Ndombi agreed to canvass the appeal by way of written submissions which they subsequently highlighted orally.



## Analysis and Determination

5. In determining the appeal this court has taken into consideration the rival submissions but more importantly it has re-considered and evaluated the evidence adduced before the trial court so as to arrive at its own independent conclusion. It has done so while keeping in mind that it did not see or hear the witnesses as did the trial court.
6. The gravamen of the appeal is that the charges against the Appellant were not proved beyond reasonable doubt and that really is the issue that arises for determination by this court.
7. The prosecution called a total of 22 witnesses and produced several exhibits in support of its case. The sum total of their evidence was that the Appellant was the Chef De Mission of the Kenyan Team in the Rio 2016 Olympics. That he was responsible for preparing the list of the Kenyan delegation in the Olympics. The delegation included the athletes as well as officials. He was also responsible for the accreditation of the delegates and for organizing their travel to and from Rio. It was alleged that he over-procured the air ticket leading to un-utilized tickets which occasioned the Kenya Government a loss of Kshs.19,549,263. These were tickets which were not used either because the athletes used alternative means or which were issued to persons who already had their own, and which were not refunded. According to PW15 Meshack Ndagwa a tickets supervisor with Kenya Airways, and Patience Tutui PW20 the Travel Agent who had been awarded the tender to provide tickets for Team Kenya, the tickets were not refundable as they were special rates negotiated. Evidence was also led that because of poor planning the Appellant authorized cancellation of tickets for which no refunds were made hence leading to a loss of Kshs.9,830,954. Some of the team members also had their tickets changed and this attracted penalties hence leading to further loss to the government. PW15 testified that each change attracted a commission plus a no-show charge of USD 190 and because 135 tickets were changed upon instructions from NOCK the total charges amounted to USD 555,256.70. It was however PW15's evidence that the penalties accrued from changing the tickets were paid for by the un-utilized tickets and hence there was no loss. The court was told that all the tickets and penalties were paid for by the Ministry of Sports. The Court also heard that all the changes and cancellations were done upon the instructions of the Appellant; that he gave those instructions through emails which he wrote to PW2 while he was in Rio since he had to travel ahead of the delegation.
8. The court also heard that the Appellant paid allowances that were higher than those recommended by the Salaries and Remuneration Commission (SRC). According to Anne Gitau (PW16) the SRC had set allowance at USD 200 per day for athletes and USD 300 per day for officials but the Appellant instead authorized payment of USD 250 per day for athletes and USD 350 per day for officials. The court further heard that in some instances officials received an allowance of USD 400 per day. Evidence was also led that the Appellant also paid a facilitation fee of USD 1000 to journalists yet they were not part of the team and their costs were fully paid by the media houses which they represented. Michael Bowen (PW12) testified that he was one such journalist. It was also alleged that the Appellant allowed people who had no business being in the team to travel to Rio and even paid them allowances, hence improperly conferring a benefit to them of Kshs.5,353,532. Those singled out for mention in regard to the above were Vincent Kinyili Paul, Francis Kinyili Paul, Hezekiah Kipchoge Keino and Ian Kipkosgei. This is said to have occasioned a loss of the Kshs.5,353,532 to the government.
9. The court heard that whereas there was a sterling performance by the team this was overshadowed by the massive mismanagement of funds. Waihiga Mwaura (Pw19), a news anchor/Journalist with Royal Media and who also was accredited by the Appellant to travel to Rio testified that his name also made it to the list for Team Kenya. He was however not paid an allowance as the full cost of his travel was covered by Royal Media. He testified that it was him who upon return to Kenya brought the financial



mismanagement to light through a piece which he did on Citizen TV. Because of what had transpired the games on at Rio received notoriety as the Rio Fiasco.

10. In her opening statement Prosecution Counsel described the happening in Rio as an outright wastage of tax payers' money, a well-orchestrated plan by government officials and a few officers of the National Olympic Council of Kenya (NOCK). She stated that NOCK disregarded the law and because of poor planning a number of tickets remained unutilized leading to a huge loss of funds and demoralizing of the athletes. She stated that the mismanagement of the team caused a negative impact to the Country both locally and internationally; it also led to a loss of resources. Her sentiments were echoed by Inspector Mike Muya (PW22), the investigating officer in the case, who decried the massive loss of government funds. He was emphatic that it was the Appellant who sanctioned the cancellation of the air tickets and the purchase of the tickets which were not utilized. PW22 told the court that although the Appellant was in Rio he gave instructions to Anne Njambi Ng'ang'a (PW2) and one James Mukua Chacha to do so through emails. The emails were produced in evidence.
11. When he was put on his defence the Appellant elected to give sworn evidence. He gave a lengthy defence which stretched into several days in which he stated inter alia that planning for the Rio Olympics began in earnest in 2012 after the London Olympics; that the budget was discussed at various levels by a steering committee chaired by the 2<sup>nd</sup> accused (he produced minutes of the meetings); that he had nothing to do with procurement or cancellation of the tickets as the person who was in charge of that was Anne Njambi Ng'ang'a (PW2) and one James Mukua Chacha who was not called as a witness although he had recorded a statement; that it was not his role to choose the teams as that was done by the various federations that run different sports in the Country; that for instance the list of the athletics team was handed over to him by Dr. Kipchoge Keino who received it at the Eldoret Kipkeino Stadium on 1<sup>st</sup> July, 2016 in the presence of his Excellency William Ruto, then the Deputy President of the Republic. He further stated that his role as Chef De Mission was to give accreditation to the delegates so as to give them access to the games and all venues of the Olympic games. He elaborated that all accredited persons did not require a visa to go to Rio and that there were various accreditations depending on the standing or rank of the persons involved for instance for athletes, officials, members of NOCK, VVIPS (Very very important persons, government officials, Members of Parliament and so on. In regard to the allegation that the delegation was bloated the Appellant testified that he was not responsible for that, that there were for instance six police officers in the delegation who the Inspector General of Police had seconded to travel with the team for security reasons and whose allowances and tickets were catered for by the government. He stated that the presence of those officers was known to only a few officers and it had become a practice since 1972 when Israeli athletes were attacked by terrorists. He also stated that he included a judoka in team because Kenya had not been represented in that sport for 24 years. He contended that being the President of the Judo Team it behooved him to give the judoka a chance. He also stated that other persons included in the delegation were team doctors and physio-therapists. He denied that he improperly conferred a benefit to the persons in Count 5 of the charge and stated that for Hezekiah Kipchoge Keino the money spent on his ticket was refunded to the government by the International Council of Olympics (IOC) of which he was an official. The Appellant explained that for every 20 athletes there was to be one guest of honour and for every 10 athletes 8 rotational officials who could be rotated even three times. He contended that Kenya was entitled to have at least 44 team officials at any one time. He stated that NOCK was allowed 7 team officials at the cost of USD 60 per day.
12. In regard to the change of tickets the Appellant owned up to changing tickets for the two athletes one being Julius Yego the javelin thrower and the other Levi Sang the judoka. He stated that he was compelled to change Julius Yego's ticket because he had been booked to travel on 12<sup>th</sup> August 2016 the same day of his event and so his ticket had to be changed to an earlier date. As for the judoka, Levi



Sang, his ticket had to be changed when he lost his passport on the way to the airport. In regard to the cancellation of the other tickets he contended that the person responsible was James Mukua Chacha.

13. The accused further stated that all decisions concerning the team were made by a steering committee which was chaired by the Permanent Secretary Ministry of Sports. He produced minutes of several meetings held by the committee. He also stated that there was a central management committee which was chaired by one Dr. Kipchoge Keino the chairman of NOCK. The Appellant stated that he was a member of both committees. He stated that the central management committee prepared the budget and passed it to the steering committee for consideration, and that the budget was approved at a meeting held on 15<sup>th</sup> July, 2016. He stated that NOCK is not a government entity although it works closely with the Ministry of Sports. He produced a judgment of the High Court in which a determination was made that the CS Ministry of Sports could not disband NOCK as it was an autonomous body. He contended that he was not the AIE holder, that they did not exceed the budget for the Olympics but that they instead saved a lot of money.
14. In regard to the allegation that he defied the recommendation of the Salaries and Remuneration Committee (SRC) it was his evidence that it was difficult to explain to the athletes that the allowances paid to them in the 2012 Olympics would be slashed by USD 50 hence the reason they retained USD 250. He also stated that those allowances were paid by Sports Kenya through the Ministry of Sports. He stated that the allowances for the athletes was standardized to avoid them downing their tools and them being demotivated. He also stated that about 90% of the athletes were police officers, prison warders and KWS offices whose SRC allowances rate was USD 297 per day yet only USD 250 was paid to them. He produced an SRC circular dated 10<sup>th</sup> December, 2014 in regard to the rates. He stated that the rates paid also matched those paid during the Glasgow Commonwealth Games held in 2014. He pointed out that an athlete like Eliud Kipchoge is paid an allowance of USD 50,000 to appear in a single event and that Dr. Kipchoge Keino and Francis Kinyili Paul being NOCK officials were entitled to USD 400 per day for 22 days. He contended that they both received the allowances as members of the steering committee; that PW1, PW3 and PW10 who were also members of the steering committee were present when the rates were set and they never raised any issue. He emphasized that the decision concerning the allowances was a unanimous decision of the steering committee. He disputed that he authorized joy riders to go to Rio and stated that some of the people who were referred to as joy riders were authorized by the Permanent Secretary in their Ministry; that some went to Rio to monitor the use of funds. He explained that one James Singh an Advocate of the High Court travelled to Rio in his capacity as Counsel.
15. As to his role as Chef de Mission the Appellant stated that the same was:-
  - i. To be answerable to NOCK in all matters pertaining to Olympic games.
  - ii. To chair both the central and management committee meetings.
  - iii. To be in charge of all disciplinary matters regarding the team
  - iv. Presentation of the list of selected competitors and who had attained the set standards to both NOCK and he steering committee for endorsement.
  - v. To be the spokesperson of the team.
  - vi. To be responsible for documentation in relation to the team entries, eligibility and accreditation for the entire accreditation including dignitaries.
  - vii. Take and surrender possession of the assigned accommodation, vehicles at the village on behalf of NOCK.



- viii. Attendance of all meeting and functions in respect of all team's participation at the games.
  - ix. In liaison with the NOCK security games.
  - x. Any other duties that may be assigned by NOCK Kenya.
16. The Appellant was emphatic that he was not entrusted to manage public funds. He maintained that he was not the AIE holder at NOCK, that by the time he left for Rio no tickets had been procured and that he was not responsible for cancellation of the tickets. He decried the reception he received upon return to the Country yet he had presided over the most successful Olympics for Kenya.
  17. As correctly submitted by Counsel for the Appellant the Learned Trial Magistrate convicted the Appellant on Count 17 although he was not charged with that offence. I have noted however that she did not impose any punishment on that count and in my view that indicates that the "conviction" may have arisen from an inadvertent error. Nothing therefore turns on that issue.
  18. On Counts 5, 9, 11 and 12 the Appellant was charged with willful failure to comply with applicable procedures and guidelines relating to management of public funds contrary to Section 45(2)(b) as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act*. It was alleged that the Appellant willfully failed to comply with Section 68(1)(a) and (b) of the *Public Financial Management Act* hence occasioning a loss of public funds. Section 68(1)(a) and (b) of the *Financial Management Act* places a duty on accounting officers in state organs and public entities entrusted with public funds to ensure lawful and prudent use of the same. Section 45(2)(b) of the *Anti-Corruption and Economic Crimes Act* makes it an offence for such officers or other persons entrusted with public funds to willfully or carelessly fail to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures. From the evidence on record it is apparent that there was in fact a huge loss of public funds arising from cancelled unutilized and last minute changes in tickets. There is also evidence that a lot of people who were not initially destined to travel to Rio ended up doing so. I also find it a fact that the allowance paid to the athletes and officials were higher than those recommended by the SRC.
  19. In this case it is alleged that firstly the appellant willfully failed to comply with the applicable law and procedures by authorizing cancellation of air tickets. I find it a fact that there was a loss of Kshs.9,795,000/= arising from cancellation of tickets. This was confirmed by two prosecution witnesses John Meshack Ndagwa (PW5) a ticketing officer at Kenya Airways and Patience Tutui (PW20) of Green Bay Travel Agency which had been awarded the tender for provision of the tickets. The Appellant himself also conceded that tickets were cancelled but blamed it on Anne Njambi (PW2) and one James Chacha Mukua. He exonerated himself by stating that he had already left for Rio at the time and so he could not have committed the offence which was alleged to have been committed in Nairobi. There was evidence however that the tickets were cancelled upon instructions given to PW2 and the said James Chacha through emails which he himself conceded that he wrote. It is my finding therefore that he was indeed responsible for cancellation of the tickets. However, it was not in respect of all the cancelled tickets. It is my finding that in respect of the cancelled tickets for which he was responsible he gave a plausible explanation of what necessitated the cancellation. For one the ticket had to be changed so that the sportsman one Julius Yego would travel earlier rather than the date of his event. The other was a judoka, Levi Sang, who lost his passport on the date he was to travel. Such cancellation was in my view inevitable and beyond the Appellant's control. Other tickets were cancelled at the behest of James Mukui Chacha who owned up to it is a statement which was produced in evidence by the Appellant. Duncan Vincent Ashubwa (PW10), a Supply Chain Manager at the Ministry of Sports, whose responsibility it was to procure tickets, gave evidence which in my view



also exonerated the Appellant. It was his evidence that once he received the lists of those who were to travel (a separate list for athletes and officials) from NOCK and once the lists were approved by the Permanent Secretary in the Ministry (Accused 2) and after he procured a provider for the tickets and Green Bay won the tender he embarked on procuring the tickets. He testified that the tickets were procured on need basis. He conceded that he procured tickets for people who were not in the lists, that among those persons were one Muturi Njee – the Solicitor General and Okello Evans, an officer from the Ministry of Sports, State Department of Culture. He also stated that he also purchased tickets for six other persons who were not on the list. He did this on the instructions of PW6. On the cancellation of tickets PW10 testified that some people changed travel dates and routes and used tickets other than those that he had procured for them. It was his evidence that such people did not notify him and that he only became aware of the unutilized tickets when he was paying Green Bay. Further that he too changed his ticket but it was upon being instructed by the 3<sup>rd</sup> accused to postpone his travel so that he could accompany some senior officers using the Angola route. He did not know that his ticket was not rescheduled. He was categorical that the 4<sup>th</sup> accused did not deal with Green Bay concerning purchase of the tickets or at all. It is my finding that for the few tickets that were cancelled at the behest of the Appellant a plausible explanation was given and the same entitled him to the benefit of doubt. I have perused the judgment of the trial court and noted that nowhere in its analysis of the evidence did the court consider the Appellant's defence. Had it taken the defence and the prosecution's case in its entirety into consideration it most certainly would have arrived at a different finding.

20. Similarly, for the unutilized tickets PW10 and also PW15 gave evidence that this resulted from quite a number of people not turning up while others decided to use alternative means to travel hence abandoning the tickets that had been procured for them. PW15 testified that Kenya Airways was not operating flights to Rio and so the service was provided by Air Angola. He stated that he got the lists of those he was to issue tickets to from Anne Njambi Ng'ang'a (PW2) but not from the Appellant. He also received lists through email from Green Bay but the same were not copied to NOCK. He also testified that each ticket which was changed attracted a commission plus a no-show charge and that because 135 tickets were changed a loss of USD 555,256.70 was occasioned to the government. Patience Tutui (PW20) confirmed that quite a number of people did not turn up although tickets had been procured for them. She stated that no-show tickets were not refundable; that all the tickets were paid for by the Ministry of Sports. On his part the Appellant stated that he was aware that some athletes used alternative tickets and routes although tickets had been procured for them. He explained that some of those who did not travel but who already had tickets were alternative athletes who were on standby to replace any athlete on the event of an injury. That it was necessary to include them because after the conclusion of the DRM they could not be included. He gave the names of the two such athletes as Hilary and Janet. According to him it was necessary to procure the tickets so that they could be booked in Rio as after close of the DRM they would not be allowed to attend yet they might have been required to replace athletes who sustained injuries. This too in my view was a plausible explanation that ought to have been taken into account by the trial court.
21. Patience Tutui (PW20) told the court that for some of the people she received instructions to book them from PW10 but not the Appellant. She confirmed that she got a list of six people from PW10 and one from the 3<sup>rd</sup> accused. She also stated that she obtained tickets for two others athletes who were to travel from the USA to Rio. Further that the requisition in regard to the two athletes came from the 1<sup>st</sup> accused but not the Appellant. It is clear from the evidence therefore that the Appellant was not solely responsible for the manner in which the tickets were requisitioned, utilized, or changed or cancelled.
22. Moreover, it was not demonstrated that he had pRior knowledge that some of the athletes or other delegates would not turn up or that they would use alternative means. It cannot therefor be said that he deliberately or willfully failed to comply with the applicable laws and procedures. The Appellant raised



the issue of the venue of the offence invalidating the charge is an error curable by Section 382 of the *Criminal Procedure Code* as it was not demonstrated that it prejudiced the Appellant. To the contrary the Appellant was very ably represented at the trial and understood very well the charges facing him. Besides cancellation of a ticket can be done by someone anywhere and in this case it was demonstrated that the Appellant gave instructions for cancellation of the tickets through emails which he sent to PW2. It is therefore immaterial that he was in Rio but not in Nairobi. The Evidence of PW20 that in that matter she dealt with PW2 is also immaterial. This court however finds that for the reasons aforesaid his culpability for the loss was not proved to the standard required.

23. In regard to the allegation that the Appellant authorized joyriders to go to Rio this was discounted by the prosecution witnesses themselves. As aforesaid and as was confirmed by Gordon Oluoch (PW17) who was a member of the steering committee where the Appellant was also a member, the issue of who was to travel to Rio was to be discussed by the committee. This was after the lists were presented to the committee by the Appellant. The steering committee was required to vet the lists but he (PW7) could not remember if they did that. On his part the Appellant gave evidence that the lists of the athletes were determined by the various sports federations; that he merely received the lists from the heads of those delegations and handed them to the steering committee. In regard to the other delegates made up of officials, doctors, Counsels and so on he gave an account of how their number was arrived at. I must say that his explanation dispelled the prosecution's allegation that the delegation of athletes and officials was bloated. His evidence was also supported by PW10 who stated that he purchased tickets of people not on the initial lists upon instructions of persons other than the Appellant. The Appellant's explanation that apart from the athletes, members of NOCK, the steering committee officials from the ministry and medical teams were necessary members of the delegation was not rebutted.
24. As for the allowances it is my finding that it was not fair to heap blame on the Appellant when there was evidence from Gordon Oluoch (PW17) that air travel to Rio and the allowances were discussed and approved by the steering committee. The Appellant produced minutes of some of the meetings which confirmed that position. The allegation by the prosecution that the Appellant ignored the SRC's circular on the allowances payable was also dispelled by PW17 who stated that whatever was paid was based on allowances paid in previous games. This lends credence to the Appellant's testimony that the athletes and officials received exactly what they had been paid in the 2012 London Olympics. He also stated that in any event the majority of the athletes being from the police, prison and KWS were entitled to USD 297 per day but not the USD 250 paid for Rio hence they were underpaid. I am in agreement with PW10 and the Appellant that it would have been unreasonable and demoralizing to reduce the allowances to USD 200 for persons who five years earlier had been paid USD 250.
25. In regard to the allowances paid to the four persons named in count 14 there was evidence by PW17 that they were members of NOCK and the steering committee hence their travel and allowances had been approved by the Committee. That they received allowances therefore cannot be blamed on the Appellant who was but a member of the committee. As regards the allowances paid to members of the media the Appellant testified and there was no rebuttal, that there was a budget for that purpose. Indeed, there was evidence from one such journalist Michael Bowen (PW12) that he had received a similar allowance during the London Olympics. He also clarified that he also got a ticket although he was going there on behalf of his employer.
26. In regard to money paid to Green Bay Travel Agents there was evidence from Patience Tutui (PW20) that the company tendered and was awarded a tender by the Ministry of Sports for provision of air tickets and travel arrangements, that upon being awarded they signed a contract whereupon they proceeded to provide the services. This was corroborated by PW10 the Supply Chain Manager in the ministry. It cannot therefore be correct to say that a benefit was improperly conferred on Green Bay



by the Appellant. If any benefit was improperly conferred to Green Bay Travel Agents, then it was not by the Appellant but the person who procured their services.

27. In the upshot, upon evaluating the evidence as a whole, I find that the prosecution did not prove its case beyond reasonable doubt, that the defence proffered by the Appellant, which the Trial Magistrate clearly ignored, watered down the prosecution's case and further that the defence finds support in the evidence of some of the prosecution witnesses for instance that of PW10 and PW17 hence creating reasonable doubt in the mind of the court.
28. The adage that it is better to acquit 99 guilty persons rather than convict one innocent person applies to cases such as these and accordingly and for the aforesaid reasons I find that the conviction of the Appellant is not safe. The appeal is allowed and the conviction on all the counts is quashed: The sentences are set aside and it is ordered that the Appellant shall be set at liberty forthwith unless otherwise lawfully held.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**E N MAINA**

**JUDGE**

In the presence of:-

Mr. Anjichi for Bosek and Kitheka for the Appellant

Ms Ndombi for the Respondent

Joe/Christine Court Assistant

The Appellant appearing from Kamiti Prisons.

