



**Odhiambo v Republic (Anti-Corruption and Economic Crimes
Appeal 30 of 2019) [2022] KEHC 15541 (KLR) (Anti-Corruption
and Economic Crimes) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL 30 OF 2019
EN MAINA, J
NOVEMBER 21, 2022**

BETWEEN

GEORGE OTIENO ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment, conviction, and sentence in Nairobi Chief Magistrates Court ACC No. 33 of 2011, delivered on 5th November 2019 Hon. Felix Kombo S.P.M)

JUDGMENT

Background

1. The Appellant was charged with the following offences one under the [Anti-Corruption and Economic Crimes Act](#) and the other under the [Penal Code](#):-

' Count 1: Knowingly giving a false statement to one's principal contrary to Section 41(2) as read with Section 48(1) of the Anticorruption and Economic Crimes Act, 2003:

Particulars: George Otieno Odhiambo, on or about the June 30, 2009 at Jogoo House in Nairobi Province, being a Quality Assurance Officer charged with the management of public revenue to the detriment of the Ministry of Education, gave false payment schedules and receipts to the said Ministry of Education purporting that he had spent Kshs 2,934,600/- in facilitating capacity building workshops on the management of instructional materials for secondary schools at the Rift Valley Institute of Science and Technology, documents he knew to be materially false.



Count 2: False accounting by a public officer contrary to Section 331(1) as read with Section 331(2) of the Penal Code.

Particulars: George Otieno Odhiambo, on or about the June 30, 2009 at Jogoo House in Nairobi Province, being a Quality Assurance Officer being charged with the management of public revenue to wit Kshs 2,934,600/- money intended to cater for a workshop on management of instructional materials for secondary schools in the South Rift knowingly furnished a false return of money received by you for that purpose.'

2. After hearing and evaluating the evidence by the prosecution witnesses and the Appellant the Learned Trial Magistrate convicted the Appellant on Count 1 and acquitted him on Count 2. The court then sentenced the Appellant as follows: -

Under Section 48(1)(a) to a fine of Kshs 500,000/= in default imprisonment for twelve months. Section 48(2)(a) mandatory sentence of twice the benefit being Kshs 5,869,200/- or 12 months imprisonment.

3. Being aggrieved by the conviction and sentence the Appellant preferred this appeal. The appeal is premised on the following grounds:-

- a) That the Learned Trial Magistrate erred both in law and fact by convicting the Appellant under Section 215 of the *Criminal Procedure Code* against the weight of evidence.
- b. The Learned Trial Magistrate erred both in law and fact in failing to properly analyze the evidence hence making wrong conclusions that the Appellant had not made out a defense against the charge facing him.
- c. That the Learned Trial Magistrate erred both in law and fact in alluding that the evidence by the Appellant and his witnesses was not tenable.
- d. That the Learned Trial Magistrate erred in law in shifting the burden of proof to the Appellant.
- e. That the Learned Trial Magistrate misdirected itself on the applicable principles in convicting the Appellant.
- f. That the Learned Trial Magistrate erred both in law and fact in concluding that the Appellant is linked to the imprest for Kshs 2,936,000/= and the accounting that was done in relation to it.
- g. That the Learned Trial Magistrate erred in finding that the Appellant produced no evidence to support his defence.
- h. That the Learned Trial Magistrate erred in its expectations that the Accused will be in possession of evidence that is in the custody of the accusers.
- i. That the Learned Trial Magistrate erred in law in relying on evidence of possession of the Appellant's details to convict him.
- j. That the Learned Trial Magistrate erred in law in its conclusion that the alleged date of payment was immaterial.



- k. That the Learned Trial Magistrate erred in law and fact in concluding that the Appellant had knowledge of the falseness of the documents relied on by the prosecution.
 - l. The Learned Trial Magistrate erred in law and fact by basing its decision on a Document Examiners Report which was not only inaccurate but also inconclusive.
 - m. The Learned Trial Magistrate erred in law in failing to consider the submissions made on behalf of the Appellant.'
4. This court notes that the Appellant filed an application for revision of the judgment the subject of this appeal in [George Otieno Odhiambo v Republic \[2020\] eKLR](#). The Revision was heard and dismissed by a Ruling delivered by Mumbi J, as she then was on January 27, 2020.
 5. This appeal, which is vehemently opposed, was canvassed by way of written submissions. The Appellant was represented by Mr Ondabu of Ondabu & Co Advocates while the State/Respondent appeared through Prosecution Counsel Miss Ndombi.

Submissions of the Appellant

6. Learned Counsel for the Appellant submitted that the trial court convicted the Appellant on account of the number of witnesses who testified, being 93 witnesses, as opposed to the quality of the evidence tendered; that the court overlooked the inconsistencies in the evidence, particularly on the date of payment of the funds, whether it was May 18, 2009, May 19, 2009 or May 20, 2009.
7. Further, that PW1 testified that the sum of Kshs 2,934,600/- which is the subject of the charge was collected by Andrew Limo and given to the Appellant while PW5 testified that it is the Appellant who received the money. Counsel also singled out the evidence of PW 51, PW60, PW79, PW80, PW82 and PW 44 having confirmed attendance at the seminar at the Rift Valley Institute of Science and Technology and also having been paid for attending. Counsel stated that other costs were incurred in securing the venue for attendance and that the court therefore erred in finding that the entire Kshs 2,934,600/- was lost. Counsel stated that the trial court ignored inconsistencies in the prosecution's evidence.
8. Counsel stated that the prosecution did not prove its case beyond reasonable doubt; that there was no proof of how the sum of Kshs 2,934,600/- was withdrawn from the bank, by whom and how the funds were taken to Jogoo House and that there was doubt as to why the public funds were handled in cash and whether or not the Appellant in fact received the sum of Kshs 2,934,600/-.
9. Counsel contended that contrary to Section 107 of the [Evidence Act](#) the trial court proceeded on the wrong premise that the Appellant was required to prove his innocence; that key witness who were responsible for the payments were not called to testify, including Prof Karega Mutahi, the then PS Ministry of Education and Concelia Aoko, the then Director in charge of the project. Counsel stated that the sum in issue would not have been paid without the knowledge of Prof. Karega Mutahi, the Accounting Officer of the Ministry and that the Appellant was just but a sacrificial lamb.
10. Counsel also argued that intention to deprive the complainant of the funds was not proved as no evidence was adduced that the Appellant participated in the fraudulent transfer of the funds. Counsel contended that the fact that the Appellant's name and identity card number were on the Imprest Warrant was not sufficient to sustain a conviction. To support this submission Counsel cited the case



of *Benjamin Cheruiyot Ngetich v Republic [2019] eKLR*. Counsel also alleged that the court ignored the Appellant's defense.

11. Further that the court erred in allowing PW 6 to produce documents that she was not the author of and that the court misapplied the principles of forgery. Counsel stated that the trial court took into account the document examiner's report without itself examining and evaluating the authenticity of the alleged signatures of the Appellant. Counsel cited the case of *Republic v George Bosire Angwenyi HC Cr Appeal No 14 of 2020* (citation not supplied) and the case of *Samson Tela Akute v Republic [2006] eKLR*.
12. On the Sentence, Counsel for the Appellant submitted that the trial court misdirected itself on the principles of sentencing under Section 354 of the Criminal Procedure Code as it did not state whether the sentences were to run concurrently or consecutively. Counsel urged this court to allow the appeal.

Submissions of the Respondent

13. The Respondent opposed the Application through its submissions dated June 10, 2022. Counsel for the Respondent submitted that the prosecution proved the case against the Appellant beyond reasonable doubt and that the court properly convicted the Appellant after analyzing the evidence before it. Counsel stated that the Appellant was a public officer working under the Ministry of Education. That the Appellant was entrusted with an imprest in the sum of Kshs 2,936,000/- paid under imprest No 040 385 for a training seminar which was to take place at South Rift but that no such training took place; that the attendance Schedules produced as PExh 8(a) to (j) were falsified records; that PW 14 to PW87 disowned the signatures appearing next to their names in the said schedules and that the said schedules were drawn by the Appellant and were submitted by him to surrender the imprest.
14. Relying on the definition of an agent in Section 38 of the *Anti-Corruption and Economic Crimes Act* Learned Prosecution Counsel submitted that the Appellant was a public officer; that the Appellant surrendered the Imprest through falsified documents, as no training took place with respect to the documents that were used by the Appellant and that the prosecution's evidence was credible and consistent and the court did not err in convicting the appellant on count 1.
15. On the number of witnesses, Counsel for the Respondent submitted that Section 143 of the *Evidence Act* grants the prosecution the liberty to determine the number of witnesses to call.
16. On the sentence, Counsel referred the court to the case of *George Otieno Odhiambo v Republic (Supra)* and submitted that the Applicant's application for revision on sentence was dismissed by this court as there was no illegality on the sentence.

Analysis and determination

17. The following issues arise for determination:
 - i. Whether the prosecution proved the Charge in Count 1 beyond reasonable doubt; and
 - ii. Whether the sentences are excessive.

Issue No. (i) Whether the prosecution proved the Charge in Count 1 beyond reasonable doubt

18. This being a first appeal, this court is expected to analyze and evaluate all the evidence adduced before the lower court afresh so as to draw its own conclusions while bearing in mind that it neither saw nor heard the witnesses. (See the case of *Okeno vs Republic [1972] EA 32*, *Pandya -vs- Republic [1957] EA 336* and *Kiilu & Another vs. Republic [2005]1 KLR 174*.)



19. On whether the Charge in Count 1 was proved beyond reasonable doubt, the prosecution called a total of 93 witnesses and due to the sheer number of witnesses, this court will only highlight the evidence of the key witnesses.
20. PW 1, an Accountant II at the Ministry of Education Jogoo House, testified that the Appellant applied for an imprest of Kshs.2, 936,000/= through imprest warrant number 0403685 dated May 18, 2009 (EXBP.1) The witnesses stated that the imprest had initially been taken by PW4-Andrew Limo but the same was surrendered and thereafter given to the Appellant. PW2, an Accountant II with the same ministry also confirmed that the Appellant applied for the imprest of the sum stated and that it was him (PW2) who committed the imprest in the vote book on May 20, 2009. PW3 an Accounts Assistant whose work was to ensure payment vouchers were recorded in the financial system confirmed that PW4 Andrew Limo who had initially been given the money surrendered the same through a miscellaneous receipt which was produced as PExh 2.
21. PW4, a Principal Accountant in the Ministry and the head of the accounts unit, testified that the Appellant applied for the imprest of Kshs 2,936,000/= and that she endorsed the payment on the May 22, 2009. It was her evidence that the money the Appellant applied for was to be used to carry out a capacity building workshop in the South Rift region. PW6 also an Accountant II within the Ministry, produced the voucher and documents used to surrender the imprest (EXB P 6). She stated that the field officer's payment schedule attached to the voucher showed that the Appellant was the paying officer. PW7, the Dean of Students at the Rift Valley Institute of Science & Technology told the Court that whereas there were four workshops hosted at the institute no participants were hosted in the institute during the dates indicated in the transport reimbursement schedules produced as EXB P 8 (a) – (j) while PW11, an Assistant Director at the office of the Provincial Director of Education, stated that he was not aware of the training that was conducted at the Rift Valley Institute of Science and Technology with respect to Exhibit 8(a) – (j). On his part PW13, a Chief Accountant at the Ministry, testified that the Appellant surrendered the imprest through the payment voucher produced as EXB P.6.
22. The investigating Officer's (PW 92) testimony was that the Appellant took the imprest and the same was approved by one Concelia Ondieki; that the document examiner formed the opinion that the signature on the imprest belonged to the Appellant; that the Appellant received the sum of Kshs 2,936,000/ from Jogoo House on May 22, 2009; that there was no training that took place at the Rift Valley Institute of Science & Technology as indicated in the schedules marked as prosecution exhibit number 8(a) to (j) and that prosecution witnesses 14 to 87 disowned the signatures appearing against the payment schedules for transport reimbursement. Further that those were the documents that were used by the Appellant to surrender the imprest.
23. When the court put the Appellant on his defence he conceded that at the material time he was the Chief Quality Assurance Officer at the Ministry of Education. He however vehemently denied that he was involved in any training in Nakuru and stated that on the material dates he was facilitating a training at the Nyeri Technical Training Institute and hence he could not have been in Nakuru. He contended that the training in Nyeri started on May 20, 2009 and ended in mid-June 2009. He was emphatic that he did not go to Nakuru during that period and contended that apart from Nyeri the only other place he went to was Nanyuki. He produced a certified copy of the Nyeri TTI visitor's book to prove that he was there on May 20, 2009. He contended that he only learnt of the training in Nakuru when he was questioned about it by officers of the Ethics and Anti-Corruption Commission. He disputed that he received any money in relation to a training in Nakuru or that he signed any imprest for the same. He stated that the documents show that the money was paid to Andrew Limo on May 15, 2009 and contended that it could not have been returned by May 18, 2009 in order for it to be given to him on



- May 20, 2009. He denied that he went to the Ministry of Education Headquarters. He explained how an imprest is issued and surrendered.
24. In support of his alibi, the Appellant called two witnesses: Linah Ayaoko (DW2) who testified that it was she who incited the Appellant to facilitate the workshop at the Nyeri TTI and that they were together throughout the workshop from May to June. She however admitted that the imprest warrant for the Nakuru Workshop bore the name of the Appellant.
 25. Susan Waruri Ngure (DW3) stated that at the time she was the District Education Officer – Laikipia District; that she knew the Appellant as he worked under her and that she is the one who released him to go for the training in Nyeri after he was identified as one of the officers. She stated that she preferred for him to go to Nyeri instead of Nakuru because he was also in-charge of the Kenya National Examination Council examinations in the District and he needed to be close to the office. She contended that she was sure he was in Nyeri because of the schedules he signed as a trainer.
 26. I have carefully evaluated the evidence adduced by both sides. The prosecution adduced evidence that on May 22, 2009 the Appellant received the sum of Kshs 2,936,000/= as imprest to conduct a training which was to take place in Nakuru in the month of May 2009. The imprest had initially been issued to Andrew Limo (PW12) but he refunded it whereupon it was issued to the Appellant. Andrew Limo (PW12) explained that he refunded the money because he was uncomfortable with conducting the training and when he explained that to his superior, one Concelia Ondieki, she instructed him to return the money. He testified that because he had received the money in cash on a Friday and had left it in her office he only waited until Monday to return it. PW1, PW2, PW3 and PW5 who were all accountants at the Ministry of Education confirmed that Andrew Limo (PW12) surrendered the imprest and that it was then issued to the Appellant after he applied for it. It was their evidence that the Appellant signed the imprest form and that he also signed that he had received the money. PW3 confirmed that the money was paid to the Appellant who signed for it. Elias Kimani (PW5) testified that he is the one who in fact paid the money to the Appellant. PW5 explained that although he paid the money to the Appellant on May 22, 2009 the paid stamp read September 18, 2005 probably because the stamp was not adjusted to show the correct date an explanation which I find plausible. The evidence of PW1 and PW3 was corroborated by that of Cornelius Makutwa Sai (PW2) who testified that he met the Appellant when he (the Appellant) went to the Ministry of Education to apply for the imprest. He even stated that the Appellant was stationed at Laikipia at the time. The evidence of PW1, PW3 and PW5 was further corroborated by that of John Lokolol (PW92) a forensics investigator at the Ethics and Anti-Corruption Commission. This witness was cross examined at length by Counsel for the Appellant but he remained steadfast that the Appellant received the imprest sum of Kshs 2,936,000.
 27. Further evidence was adduced that the training for which the imprest was taken never took place. The prosecution called a considerable number of witnesses and their evidence was that they did not attend the workshop during the period in issue. One of them (PW20) testified that he indeed attended a workshop at the Rift Valley Institute but that was between 24th – May 26, 2009 and that he was paid Kshs 500/- only but not the 2000/= he is alleged to have been paid in the impugned schedules. There is therefore proof beyond reasonable doubt that the documents that were used to surrender the imprest were all a sham as there were no participants as alleged and no trainings took place at all.
 28. The Appellant mounted an alibi that he could not have been at the Nakuru Training Institute because throughout the period in issue he was in a training in Nyeri. He even called two witnesses and produced a Nyeri TTI visitor's book which he signed on May 22, 2009 to signify that he was there. I have considered the alibi but I am not satisfied that the same did anything to weaken the prosecution's case which is that no training took place in Nakuru at the time in issue. Yes, there was evidence of other trainings at the venue and indeed some witnesses verified that they took part in those. However,



there was no training at all in respect of the imprest that was issued to the Appellant. No training took place and the people who it is alleged participated and were paid were called as witnesses and they all emphatically stated they did not attend such a training and that they were not paid. Even the service providers like the Hotel Waterbuck through their representatives were emphatic that they did not provide any services during the period in issue and that they were not paid. PW7 the Dean of the Rift Valley Technical Institute confirmed that the purported training did not take place. There was therefore proof beyond 'a shadow of doubt' that the documents that were used to surrender the imprest, to wit, the schedules of participants and the receipts were all falsified. This is an offence that could have been committed anywhere and it is immaterial that the Appellant was in Nyeri but not in Nakuru. It was proved beyond reasonable doubt that the handwriting on the false documents matched that of the Appellant. His alibi cannot therefore stand.

29. Section 41(2) of the Anti-Corruption & Economic Crimes Act states:-

' 41(2) An agent who, to the detriment of his principal, uses, or gives to his principal, a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence.'

30. Section 38 (1) of the *Anti-corruption and Economic Crimes Act* defines an agent as a person who, is in any capacity, whether in the public or private sector is employed by or acts for or on behalf of another person. For all intents and purposes therefore the Appellant was an agent of the Permanent Secretary Ministry of Education. By surrendering the imprest using falsified documents knowing very well that no training had taken place he acted to the detriment of his principal thereby committing the offence charged in count 1. In the premises I find that the charge against him was proved beyond reasonable doubt and that his appeal against conviction has no merit.

Issue (ii): whether the sentence imposed by the trial court was excessive.

31. It is my finding that as a result of the Appellant's conduct a loss of Kshs 2,936,000/= was occasioned to the Ministry of Education. The penalty for the offence for which the Appellant was convicted is provided for in Section 48(1)(a) & (b) and section 48(2)(a) of *Anti-Corruption and Economic Crimes Act* which state:

' 48. Penalty for offence under this Part

- (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.

32. In a ruling delivered in an application filed by the Appellant seeking revision of the sentence in ACEC Revision No 3 of 2020 George Otieno Odhiambo v Republic [2020] eKLR, Mumbi Ngugi J, as she then was, dismissed the application and held that the trial court properly imposed the sentence prescribed by the relevant sections of the *Anti-Corruption and Economic Crimes Act*.
33. This court reiterates that the trial court's sentence was fair and within the law. The fine of Kshs 500,000/- under Section 48(1) (a) of the *Anti-Corruption and Economic Crimes Act* and the mandatory fine of twice the sum of benefit, that is Kshs 2,934,600/- under Section 48(1) (b) as read together with Section 48(2) (a) of the *Anti-Corruption and Economic Crimes Act* are just and proportionate to the offence and I see nothing to warrant this court to disturb the sentence. It is instructive that the court should have additionally sentenced the Appellant for the loss suffered by the Ministry of Education under Section 48(2) (b) of the *Anti-Corruption and Economic Crimes Act* but because there was no cross-appeal by the Respondent this court shall not interfere.
34. For the foregoing reasons, the Appellant's appeal is dismissed in its entirety and the conviction and sentence by the trial court are upheld.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21ST OF NOVEMBER, 2022.

E N MAINA

JUDGE

