



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 67 OF 2019

SOPHINE ATIENO OJENGE.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau, Senior Resident Magistrate in Rongo Magistrate's Court Criminal Case No. 387 of 2018 delivered on 12/ 09/2019)

JUDGMENT

The Background:

1. The Appellant herein, *Sophine Atieno Ojenge*, was charged alongside one *Vivian Achieng Awiti* with four counts of *Aiding the commission of examination offences* contrary to **Section 40** of the **Kenya National Examination Council Act of 2012** as read with **Section 31(a)** of the said Act.
2. The particulars of the offences were as follows: -

Count I:

On the 30th day of October, 2018 at Sophy Best Academy Examination Centre in North Sakwa location, in Awendo Sub-County within Migori County, jointly with others not before court and being the centre manager and proprietor of the said Academy allowed one Brighton Ochieng' a standard seven pupil at Sophy Best Academy to sit for the KCPE 2018 examination papers namely Maths, English Language and English Composition on behalf of Kevin Odhiambo Index No. 44739240011 a registered candidate by the Kenya National Examination Council knowing that he was not a registered KCPE 2018 candidate.

Count II:

On the 31st day of October, 2018 at Sophy Best Academy Examination Centre in North Sakwa location, in Awendo Sub-County within Migori County, jointly with others not before court and being the centre manager and proprietor of the said Academy allowed one Brighton Ochieng' a standard seven pupil at Sophy Best Academy to sit for the KCPE 2018 examination papers namely Science, Kiswahili Lugha and on behalf of Kevin Odhiambo Index No. 44739240011 a registered candidate by the Kenya National Examination Council knowing that he was not a registered KCPE 2018 candidate.

Count III:

On the 31st day of October, 2018 at Sophy Best Academy Examination Centre in North Sakwa location, in Awendo Sub-County within Migori County, jointly with others not before court and being the centre manager and proprietor of the said Academy allowed one Vivian Achieng' a standard seven pupil at Sophy Best Academy to sit for the KCPE 2018 examination papers namely Maths, English language and English Composition on behalf of Lydia Adhiambo Index No. 44739240009 a registered candidate by the Kenya National Examination Council knowing that he was not a registered KCPE 2018 candidate.

candidate.

Count IV:

On the 31st day of October, 2018 at Sophy Best Academy Examination Centre in North Sakwa location, in Awendo Sub-County within Migori County, jointly with others not before court and being the centre manager and proprietor of the said Academy allowed one Vivian Achieng' a standard seven pupil at Sophy Best Academy to sit for the KCPE 2018 examination papers namely Science, Kiswahili Lugha and Insha on behalf of Lydia Adhiambo Index No. 44739240009 a registered candidate by the Kenya National Examination Council knowing that he was not a registered KCPE 2018 candidate.

candidate.

3. Vivian Achieng Awiti (hereinafter referred to as '**Vivian**') was charged with two other counts. They were *impersonation* contrary to **Section 31(a)** of the **Kenya National Examination Council Act** (hereinafter referred to as '**the Examinations Act**'). The particulars of the twin counts were as follows: -

Count V:

On the 30th day of October 2018 at Sophy Best Academy School examination centre in North Sakwa Location in Awendo Sub-County within Migori County, sat for Mathematics, English language and Composition impersonating a registered KCPE 2018 candidate under Index No. 44739240009 for Lydia Adhiambo a registered candidate by Kenya National Examination Council

Count VI:

On the 31st day of October 2018 at Sophy Best Academy School examination centre in North Sakwa Location in Awendo Sub-County within Migori County, sat for Science and Kiswahili Lugha impersonating a registered KCPE 2018 candidate under Index No. 44739240009 for Lydia Adhiambo a registered candidate by Kenya National Examination Council.

..... Council.

4. Vivian admitted the two offences. She was convicted on her own plea of guilty. She was eventually placed on 18-months' probation.
5. The Appellant denied all the four counts. The Appellant and Vivian were both represented by *Mr. Evans Nyakwana*, Counsel.
6. The Appellant was tried. At the end of the trial the Appellant was found guilty and convicted on all the four counts. She was sentenced to a fine of Kshs. 200,000/= and in default to serve 1-year imprisonment on each count. All sentences were to run consecutively.

The Appeal:

7. Being dissatisfied with the convictions and sentences, the Appellant preferred an appeal by filing an evenly dated Petition of Appeal on 20/09/2019. The appeal was filed by *Mr. Jura*, Counsel.
8. On 25/09/2019 the Appellant went back to the trial court and filed an evenly dated Notice of Motion. The application sought for bail pending the hearing and determination of the appeal before this Court. The application was heard and allowed. The Appellant was released on a bail/bond of Kshs. 500,000/= with a surety of the like amount.
9. The Appellant raised 9 grounds of appeal. For ease of this discussion I will reproduce them verbatim and as follows: -

1. That the learned trial magistrate erred in law and facts when he convicted the appellant based on assumptions and hearsay evidence.
2. That the learned trial magistrate erred in law and facts when he disregarded the appellants defense and instead went ahead to convict and sentenced the appellant.
3. That the learned trial magistrate erred in law and facts when he convicted the appellant merely on the ground that the 2nd accused had pleaded guilty as a primary offender yet the said 2nd accused did not testify against the appellant.
4. That the learned trial magistrate erred in law and facts when he convicted the appellant yet none of the prosecution witnesses who testified incriminated the appellant.
5. That the learned trial magistrate erred in law and facts when he failed to return a finding that the prosecution had not proved their case on a beyond reasonable doubt standard.
6. That the learned trial magistrate erred in law and facts when he failed to consider the evidence of the witnesses who told the court that it was one Mr. Kidenge who had organized the offense and not the appellant.
7. That the learned trial magistrate erred in law and facts when he sentenced the appellant to serve 1 - year imprisonment for each of the four counts and ordered that sentences to run consecutively in total disregarding to the circumstances of the case and rules of

sentencing.

8. That the learned trial magistrate erred in facts and law when he sentenced the appellant to pay a fine of Kshs. 200,000/= for each of the four counts or to serve 1 - year imprisonment for each of the four counts and ordered that sentences to run consecutively in total disregarding to the circumstances of the case, rules of sentencing and the appellant's mitigation.

9. That the learned trial magistrate was biased against the appellant.

10. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly filed her submissions through her Counsel. The State made oral submissions after the Counsel for the Appellant highlighted on the written submissions.

11. The Appellant strenuously submitted in favour of the appeal. Relying on **Sections 107 and 109 of the Evidence Act, Cap. 80** of the Laws of Kenya the Appellant submitted that the charges were not proved as required in law. It was further submitted that there was no evidence linking the Appellant with the commission of the offences save that she was the Centre Manager. This Court was reminded that the Appellant was not the Head teacher of the institution but an ECD Teacher in another school hence she could not be expected to know the physical appearances of the candidates. The Court was also asked to note that the Register of the Candidates did not have any photographs of the candidates but only the names.

12. The Appellant further contended that she was convicted solely on the basis that Vivian had admitted the offences. To her, the Court ought to have found that there was no independent and separate evidence linking the Appellant to any of the offences preferred against her. The persuasive decisions of **Morris Gitonga Njeru vs. Republic (2016) eKLR** and **Pius arap Maina vs. Republic (2013) eKLR** were referred to in support of the submissions.

13. The Appellant prayed that the appeal be allowed, all the convictions be quashed, the respective sentences set-aside and she be set at liberty.

14. The appeal was opposed. *Mr. Kimanthi*, Learned Senior Principal Prosecution Counsel submitted that since the Appellant was the Centre Manager then she had the overall responsibility over the candidates who sat for the KCPE examination in 2018. It was further submitted that the Appellant was required to allow only *bona-fide* candidates to sit for the examination, a duty she failed to discharge hence culpable. Counsel also submitted that there was independent evidence pointing to the guilt of the Appellant since Vivian did not even testify.

15. On the sentences, Counsel submitted that they were indeed legal and fair. He supported the trial court's position that the sentences must run consecutively since the offences were committed on different days. The State prayed that the appeal be dismissed in its entirety.

Analysis and Determinations:

16. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

17. To be able to effectively deal with this appeal I will revisit the prosecution's evidence. I will also look at the defence.

18. Seven witnesses testified in support of the prosecution's case. **PW1** was one *Peninah Akongo Ongayo* (hereinafter referred to as '**Peninah**'). She was a teacher at Nyakubu Primary School within Awendo Sub-County. She was the duly appointed Supervisor at Sophy Best Academy during the 2018 KCPE examination. **PW2** was *Richard Otieno Onduti* (hereinafter referred to as '**Richard**'). He was a teacher at Sare Primary School within Awendo Sub-county. He was the duly appointed invigilator at Sophy Best Academy during the 2018 KCPE examination. *Vincent Nyamburi* (hereinafter referred to as '**the Chief**') was the Assistant Chief of West Kakmasia sub-location. He testified as **PW3**. *Barnabas Owino Oduor* (hereinafter referred to as '**Barnabas**'). testified as **PW4**. He was a Curriculum Support Officer attached to Awendo Sub-county education offices. **PW5** was *Lukiri Musa Msalame* (hereinafter referred to as '**Lukiri**'). He was the in-charge of Quality Assurance in the Ministry of Education within Migori County. *No. 65695 PC Solomon Chebii* (hereinafter referred to as '**PC Solomon**') was attached at Sophy Best Academy to provide security during the 2018 KCPE examination. He was attached at Angaga Police Post under Awendo Police Station. He testified as **PW6**. The investigating officer was one *No. 66776 PC Moses Wambua* (hereinafter referred to as '**PC Wambua**') of DCI Rongo. He testified as **PW7**.

19. The prosecution's case was that the Appellant was the proprietor of Sophy Best Academy in North Sakwa Location, Awendo Sub-County within Migori County. I will hereinafter refer it to as '**the School**'.

20. The School was a registered Kenya National Examinations Council (KNEC) centre. It had registered 15 Candidates for the Kenya Certificate Primary Education examination in 2018.

21. In order to conduct the 2018 KCPE examination within the legal confines, the Appellant was appointed as the Centre Manager of the School. As said, Peninah was the Centre Supervisor, Richard was the Centre Invigilator and PC Solomon provided security during the examination period.

22. The examination ran for three days. It began on 30/10/2018 and ended on 01/11/2018.

23. At around 09:30 am on 31/10/2018 the Chief received a call from his counterpart in East Kakmasia sub-location. He was informed that

there was a boy who was caught sitting for the 2018 KCPE examination at Matagaro Primary School on behalf of another candidate. The boy's name was *Kevin Odhiambo*. He was further informed that the boy was a candidate from the School and that the boy's father was one *Ariyo Opiyo*.

24. The Chief called the boy's father whom he knew quite well. The boy's father was a subject within the Chief's geographical jurisdiction. The boy's father told the Chief that he had a son who was sitting for the 2018 KCPE examination in the School and not in Matagaro Primary School. The Chief immediately informed his superiors of the incident.

25. Shortly, the Chief was called and directed by District Officer (now referred to as the Assistant County Commissioner under the new constitutional dispensation) to go to the School, ascertain the position and update him accordingly. The Chief obliged.

26. The Chief hurried to the School. It was then around 10:00am. He met Peninah and asked her about a candidate by the name Kevin Odhiambo. Since the candidates were taking one of the examination papers the Chief and Peninah agreed to wait until the end of the examination paper and then ascertain whether Kevin Odhiambo was sitting the examination in the School as required. At the end of the session Peninah called the candidate, a boy, who was sitting the examination as Kevin Odhiambo into the staff room. Peninah and the Chief asked the boy his name. The boy disclosed that he was *Brighton Ochieng* and not Kevin Odhiambo. The boy also stated that Kevin Odhiambo was not in the School and that he was a student in the school but in Class 7. The Chief informed the District Officer of his findings. The Chief held Brighton Ochieng until the police arrived at the School. The Chief handed over the boy to the police.

27. The Chief also confirmed that the Center Manager was the Appellant whom he knew very well as the proprietor of the School.

28. The Chief went back to the School the following day. He met another Center Manager one Barnabas. He had a discussion with Barnabas. The Chief learnt that the School had three other cases of candidate impersonation. They were Molen, Vivian and Elvis Omondi. The three had also sat the examination on behalf of candidates.

29. Peninah confirmed that she was the School Supervisor. She was appointed on 18/10/2018. Peninah testified that on 22/10/2018 all the Center Managers, Supervisors and Invigilators for the 2018 KCPE examination within Awendo Sub-County were called for a briefing. Peninah recalled that the Appellant also attended the meeting as the School's Center Manager. The briefing was successfully held.

30. On 29/10/2018 Peninah went to the School for rehearsals. She was received by the Appellant whom she knew very well. The rehearsals were conducted as required. She was handed over a Register of the candidates which was referred to as a Nominal Roll (hereinafter referred to as 'the Register').

31. The register contained the candidates' details including the names, ages, sex, index numbers among others. The register however did not have the candidates' photographs. According to the register the School had 15 registered candidates.

32. Peninah testified on her role as the Supervisor. She stated that as a Supervisor she was to receive the examination papers from the Center Manager every morning and administer those examination papers to the candidates. She was also duty-bound to ensure that there was no cheating during the examination. At the end of each examination day Peninah was to hand-over all candidates' answer sheets to the Center Manager.

33. On the duty of confirming that the candidates whose details appeared in the register were the ones who sat the examination, Peninah stated that it was the Center Manager's responsibility. According to Peninah the Center Manager could not just be anyone. It was supposed to be one who knew and would identify the candidates physically to the Supervisor in the morning of each examination day. The Center Manager would then hand-over the candidates to the Supervisor. The Supervisor would later administer the day's examination papers. The duty on the Center Manager was continuous throughout the entire examination period.

34. Peninah administered the day's examination papers on 30/10/2018 to all the 15 candidates who had been introduced to her by the Appellant. In the morning of 31/10/2018 again the candidates were handed-over to the Supervisor by the Center Manager. They were 15 candidates. All the candidates sat the morning examination papers. In the afternoon Peninah noted that there were instead 14 candidates. The candidate who was introduced to her as Kevin Odhiambo was not in the examination room. Kevin Odhiambo was index number 11. Peninah had witnessed earlier in the morning how the boy whom she was made to believe that he was Kevin Odhiambo was indeed another person namely Brighton Ochieng. The said Brighton Ochieng had been arrested by the police.

35. Peninah informed the Awendo Education office of the missing candidate. Officials from the Ministry visited the School and so confirmed.

36. The mandatory procedures were again conducted in the morning of 01/11/2018. By then the Appellant had been replaced as the Center Manager. The new Center Manager was Barnabas.

37. There were 14 candidates. Kevin Odhiambo was absent. The first examination paper of the day was Social studies and Christian Religious Education. As the candidates took their seats and before the writing of the examination paper began Peninah was approached by one female candidate. The candidate had been introduced to her by the Appellant for the past two days as Lydia Adhiambo. She was index number 9. The candidate instead informed Peninah that she was not Lydia Adhiambo but Vivian and that she was a student in the school but in Class 7.

38. Peninah led Vivian out of the examination room. She handed her over to PC Solomon. She also informed the education office.

39. Alarmed, Peninah asked the candidates why some were sitting the examination for others. She was informed that it was their Class

teacher one *Mr. Kidenge* who had persuaded the candidates as such and accordingly organized for the replacement students.

40. Richard corroborated the evidence of Peninah. He confirmed that the identification of the candidates was done by the Appellant in the presence of Peninah, PC Solomon and himself. The Appellant handed over 15 candidates to Peninah which included Brighton Ochieng and Vivian as *bona-fide* candidates of the School.

41. Barnabas also corroborated the evidence of Peninah. He took over the role of the Center Manager after the arrest of the Appellant on 31/10/2018. Richard was the manager on the last day of the examination. Richard also confirmed that the Center Manager had the duty of confirming that the candidates he/she handed over to the Supervisor were the *bona-fide* candidates duly registered to sit the examination in a certain school.

42. Lukiri also corroborated the evidence of Peninah. He confirmed the role of the Center Manager as what Peninah, Richard and Barnabas stated. He produced an investigation report as an exhibit. The investigation had been conducted by the education ministry. He also confirmed that the School's results were recalled.

43. PC Solomon also testified. He also added weight to what Peninah said. He had witnessed all the events at the School as narrated by Peninah. He confirmed arresting Brighton Ochieng and Vivian and handing them over to the police.

44. PC Wambua was called to the School in the morning of 01/11/2018. On arrival at the school he met the Awendo OCPD, the Awendo sub-county education officers and Vivian. They were in the staff room. He was briefed on what had happened.

45. PC Wambua also interviewed Vivian. He discovered that indeed Vivian was a Class 7 student at the school and that she had been allowed to sit the examination as Lydia Adhiambo. He also learnt that Brighton Ochieng had been arrested on the previous day as he was impersonating a candidate one Kevin Odhiambo. PC Wambua charged the Appellant who was the Center Manager for allowing non-candidates at the School to sit the examination for the two candidates.

46. In the course of his investigations PC Wambua learnt that the Class teacher one *Mr. Kidenge* had persuaded the non-candidates to instead do the examination as the candidates. He was also aware that Kevin Odhiambo had been arrested on the previous day at Matagaro Primary School where he was sitting the examination on behalf of another candidate. PC Wambua confirmed that the police were pursuing the arrest of *Mr. Kidenge*.

47. At the close of the prosecution's case the Appellant was placed on her defence. She gave a sworn defence.

48. The Appellant confirmed that she was the duly appointed Center Manager for the School during the 2018 KCPE examination. She was also the proprietor of the school. The Appellant narrated the events as Peninah did. She however stated that when the cases of impersonation were detected the students were interrogated by the police and education officers and they disclosed that those who were behind the scam were their two teachers *Mr. Kidenge* and *Mr. Joshua Otieno*.

49. The Appellant stated that she was a full time employee as an ECD Care-giver at Oboke Primary School and that she had employed teachers to manager the school. She further stated that she had no interaction at all with the students and that she did not know the students personally.

50. The Appellant also stated that she was aware that Center Managers were mostly the head teachers of the schools. On how she became the school's Center Manager, the Appellant stated that the school's head teacher had left employment just before the examination and that she had to step in her place.

51. The Appellant confirmed that she attended the meeting where the Center Managers, Supervisors and Invigilators were variously briefed of their roles. She however stated that she arrived at the meeting when it was almost over as she had sent *Mr. Kidenge* to attend on her behalf.

52. On the outcome of the results, the Appellant testified all the candidates who sat the 2018 KCPE examination received their results and that they all joined secondary schools. She also stated that she was paid her dues as the Center Manager. As a teacher for 20 years the Appellant pleaded that she could not compromise her school's performance by engaging in malpractices whereas she was well aware of the repercussions. She prayed that the cases against her be dismissed.

53. The Appellant called a witness. He was one *Johnson Ooko Oloo* (hereinafter referred to as '**Johnson**'). Johnson testified as DW2. He was a teacher at the school. He confirmed that the Appellant did not interact with the students at all and as such she did not know them physically. He described the Appellant as a fair and polite person and did not believe that she could engage in examination malpractices.

54. The defence closed its case. Parties tendered submissions. The trial court rendered its decision on 12/09/2019 where the Appellant was accordingly found guilty as charged. She was sentenced.

55. As the Appellant was charged under **Section 40** as read with **Section 31(a) of the Examinations Act I** will reproduce the said provisions verbatim.

31. A person who, for purpose of an examination –

a. Is not registered to take a particular examination but, with intent to impersonate, represents or presents or attempts to present himself or herself to take part of a candidate;

b.

c.

commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding two years, or a fine not exceeding two million shillings, or to both and shall, in addition to this penalty, be prohibited from taking an examination for a period not exceeding three years immediately after the commission of the offence.

40. A person who aids, abets, induces, incites or does an act in a manner that facilitates the commission of an offence under the Act, commits an offence and is liable, upon conviction, to the penalty prescribed under the respective section in relation to that offence.

56. The trial court rightly so described the derivative nature of the offence of aiding. The court presented itself thus: -

The provisions of section 40 reflect the common law principle that aiding, abetting, counselling or procuring another person to commit an offence is not in itself a distinct offence. The secondary party is guilty of the offence committed by the principal and liable to the same penalties. Because the common law principle is that aiding and abetting is not a distinct offence, the liability of a secondary party is described as derivative; it derives from and is dependent upon the liability of the principle.

58. In other words, one cannot be guilty of an offence of aiding and abetting if the main offence is not *inter alia* committed and/or proved.

58. In this case the Appellant was charged with four counts of aiding the commission of examination offences. The first two counts related to the Appellant allowing one Brighton Ochieng to sit the 2018 KCPE examination papers on behalf of Kevin Odhiambo who was registered as a candidate.

59. Going by the derivative nature of the offences, the principal offence in these two counts was that Brighton Ochieng impersonated Kevin Odhiambo. Therefore, for the Appellant to be held guilty of aiding the said impersonation it must be *inter alia* demonstrated that Brighton Ochieng was charged and found guilty of the offences of impersonating Kevin Odhiambo.

60. I have carefully gone through the record. I did not come across any evidence that Brighton Ochieng was ever charged of any offence in respect to the allegations made against him. In that case therefore counts I and II were not sustainable. They could not stand in the absence of proof of the principal offence of impersonating under **Section 31(a)** of the **Examinations Act**.

61. The upshot is that the appeal against the convictions in respect of the first and second counts is successful. The convictions are quashed and the sentences set-aside.

62. Counts III and IV related to the Appellant allowing Vivian to sit the 2018 KCPE examination papers on behalf of Lydia Adhiambo who was registered as a candidate. Vivian was charged in the same case with the Appellant. She admitted the offences and was sentenced.

63. Aiding and abetting is defined in **Black's Law Dictionary** to mean '**assisting or facilitating the commission of a crime, or to promote its accomplishment**'.

64. The Court of Appeal in **Nairobi Criminal Appeal No. 124 of 2012 John Ouma Awino & Another vs. Republic (2014) eKLR** had the following on the offence of aiding and abetting: -

35. Aiding and abetting generally means someone to assist in the commission of a crime or to be an accomplice. The elements of the offence have been variously expressed in different jurisdictions of the world, but they encompass proof that the person knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. It is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed....

(Emphasis added)

65. In this case therefore the cardinal issue which the prosecution was to prove was that the Appellant knew that allowing Vivian to sit for the 2018 KCPE examination on behalf of Lydia Adhiambo was tantamount to assisting the commission of the offence of impersonation by the said Vivian.

66. The Appellant admitted that she was the proprietor of the school. She testified that she had employed one *Lydia Makera* as the school's head teacher. She further stated that the head teacher left employment just a short while before the sitting of the 2018 KCPE examination. As a result, the Appellant was appointed as the Center Manager.

67. The Appellant testified that she never used to interact with the students at all, but only the teachers and only knew some few parents. She hence did not know the students personally. That averment was affirmed by Johnson who was a teacher at the school.

68. The Appellant also testified that she was only an ECD teacher in another school and had not handled any examination before. She also

stated that she only attended the briefing very late as she dispatched one of the teachers to attend on her behalf.

69. The role of a Center Manager was canvassed by Peninah, Richard, Barnabas and Lukiri. It was Lukiri who produced a copy of the *Kenya National Examination Council User Guide for the Management of Examinations - Kenya Certificate of Primary Education (KCPE) (1st Edition, 2017)* (hereinafter referred to as **'the Guide'**).

70. The Guide under *item 3.2.14* provided for the role of the Center Manager. Sub-items (xv) and (xix) provided as follows: -

(xv) introduce candidates to Supervisor(s) and Invigilators and brief them on how to conduct themselves during the examination period;

(xix) identify and ensure that only bona-fide candidates are presented to the Supervisor during examination to avoid impersonation.

71. The Center Manager bore the absolute responsibility over the genuinity of the candidates he/she handed over to the Supervisor. A Center Manager was to ensure that no person impersonated a candidate. The Manager therefore remained under a duty to ensure that before handing over the candidates to the Supervisor he/she knew all of them personally and to continually confirm that the examination was only written by the genuine candidates. As a result, the Manager was called upon to identify each student as the *bona-fide* candidate and hand the candidate over to the Supervisor.

72. Thereafter, the burden passed to the Supervisor and the Invigilator to ensure that only those candidates identified and handed over to them took the examination.

73. **Section 7** of the **Penal Code, Cap. 63** of the Laws of Kenya provides as follows: -

Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence.

74. The foregone provision is in consonance with the finding in **John Ouma Awino & Another vs. Republic** (supra).

75. The law bestowed specific duties on the Center Manager. It is clear the Appellant did not discharge them. She stated that she did not know the candidates personally as she did not interact with them. That was confirmed by Johnson.

76. The Appellant was a teacher by profession. She was also the proprietor of the school. If it were true the head teacher had left employment, then the Appellant would have appointed any of the teachers as the head teacher even on interim basis or for the purposes of conducting the examination. The Appellant instead accepted the appointment as the Center Manager. She did not even raise any red flag in any manner whatsoever to the education officers over her appointment.

77. Having accepted the role of a Center Manager and also having accepted the payment for acting as such, the Appellant is now estopped from running away from the responsibilities of that office (See **Section 120** of the **Evidence Act**).

78. The Appellant did not take the responsibilities of the office of a Center Manager. At one point she even did not attend the very important briefing session, but instead sent a teacher on her behalf. One wonders therefore why the Appellant did not allow one of the teachers to be the Center Manager. The Appellant cannot now plead ignorance.

79. By failing to fully discharge her duties as a Center Manager the Appellant was aware that her conduct was likely to encourage the commission of any examination offences or malpractices including the offence of impersonation. Her conduct amounted to aiding the commission of an examination offence and truly the offence of impersonation was committed and proved.

80. The Appellant was therefore culpable. She was rightly found guilty of the offences in Counts III and IV and was properly convicted. The appeal against the convictions thereto is unmerited and is hereby disallowed.

81. I will now deal with the issue of the sentence. The **Examinations Act** provides that anyone convicted of the offence of impersonation or aiding the impersonation is liable to a fine of Kenya Shillings two million and/or a term of imprisonment of two years. The Appellant was sentenced on each count to a fine of Kshs. 200,000/= in default to serve one year in jail. The sentences were to run consecutively.

82. **Sections 12 and 14** of the **Criminal Procedure Code** provides as follows: -

12. Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.

14. (1 Subject to subsection (3), when a person is convicted over one trial of two or more distinct offences, the court may sentence him for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by the reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent impose on conviction of a single offence, to send the offender for trial before a High Court.

(3) Except in case to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences-

a. of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

83. In Peter Mbugua Kabui v Republic Criminal Appeal 66 of 2015 [2016] eKLR the Court of Appeal made reference to the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97 a position which was later on agreed with in Ondiek – v- R 1981 KLR 430, and in Nganga – v- R, 1981 KLR 530. In the case, the then Court of Appeal for Eastern Africa stated as follows: -

..... the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

84. In BMN v Republic Criminal Appeal No. 97 of 2013 [2014] eKLR the Court of Appeal dealt with a similar situation and pronounced itself as follows: -

[15] As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

85. To be able to analyze the issue further, there is need to understand what the phrase ‘*same transaction*’ means. In William Kimani Ndichu v. Republic [2015] eKLR the Court of Appeal referred to *Rex v Saidi Nsabuga s/o Juma and Another (1941) 8 EACA 81* and to *Nathani v R (1965) EA 777*, where the meaning of the phrase “*same transaction*” was defined as follows:

If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.

86. Returning to the case at hand, the offence in Count III was committed on 30/10/2018 and that in Count IV was committed on 31/10/2018. The twin offences were however committed in the course of the same examination. The duty to ensure that there was no impersonation was on the Appellant. That duty was continuous throughout the examination period. The two counts related to the same impersonator and the same candidate. Based on the principle of continuity of action I deem that the offences were committed in the same transaction.

87. The appeal on sentence is hence allowed. The sentence in Count III and that in Count IV shall instead run concurrently.

88. The upshot is that the following final orders do hereby issue: -

a. **The appeal against the convictions and sentences in respect of Count I and Count II is successful. The convictions are hereby quashed and the sentences set-aside.**

b. **The appeal against the convictions in respect of Count III and Count IV is disallowed. However, the appeal on the sentences in respect to the offences in Count III and Count IV is allowed to the extent that the sentences shall run concurrently. Consequently, the Appellant shall pay a fine of Kshs. 200,000/= or in default to serve one-year imprisonment.**

89. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Jura, Counsel for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant