



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ANTI-CORRUPTION CRIMINAL APPEAL NO. 9 OF 2019

JAMES ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. James Odhiambo (hereinafter referred to as the appellant), was on 11th July 2011 arraigned before Nairobi Anti-Corruption Chief Magistrate's Court vide ACC No. 29/11 charged with two counts relating to corruption. According to the amended charge sheet substituted on 22nd September 2011, count one he was charged with knowingly giving a false document to one's principal contrary to Section 41 (2) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act 2003. Particulars are that on or about the 4th day of June 2008, at Jogoo House "B" in Nairobi within Nairobi Province, being an agent of the Ministry of Higher Education, Science and Technology, an officer charged with the management of the public property to wit Kshs.2,263,440/= received by him vide imprest warrant number C806410; to the detriment of the said ministry knowingly gave false receipts to the said Ministry purporting that he had spent Kshs.2,263,440.00 to carry out rehabilitation works at the Provincial Technical Training Eastern Province Office in the period between 3rd April 2008 and 4th June 2008, documents which he knew to be materially false.

2. In relation to that count, he was charged with an alternative count of false accounting by a public officer contrary to Section 331 (1) as read with Section 33 (2) of the penal code. Particulars are that on or about 4th day of June 2008, at Jogoo House "B" in Nairobi within Nairobi Province, being the head of school equipment and maintenance under the Ministry of Higher Education, Science and Technology, an officer charged with the management of public property to wit Kshs.2,263,440 received by him vide imprest warrant number C 806410 money intended for renovation and rehabilitation of the offices of the Provincial Technical Training officer Eastern Province Embu knowingly furnished a false return of the said money.

3. With regard to Count two, he was charged with uttering a false document contrary to Section 353 of the penal code. Particulars are that on or about the 4th day of June 2008, at Jogoo House "B" in Nairobi within Nairobi Province, being the head of school equipment and maintenance under the Ministry of Higher Education Science and Technology, with intent to defraud knowingly uttered a false document to wit a letter reference number MST/EST/TT/C8/1/29 dated 15th May 2008 to Samuel Eric Oreta a Senior Deputy Secretary in the Ministry of Higher Education, Science and Technology purporting it to be a genuine letter written by F.M. Macharia, the Provincial Technical Training Officer for Eastern Province.

4. Having entered a plea of not guilty on both counts, the trial commenced with the prosecution calling a total of 21 witnesses. After the close of the trial, the appellant was found guilty and convicted in respect of count I but acquitted of Count 2.

5. Subsequently, he was sentenced to a fine of Kshs.500,000/= in default to 12 months imprisonment. He was further sentenced to an additional mandatory sentence under Section 48 (2) (a) of ACECA of Kshs4,526,880 in default serve 12 months imprisonment.

6. Aggrieved by the conviction and sentence thereof, he in person lodged the instant appeal dated 15th March 2019 and filed on 18th March 2019 citing the following grounds:

(1) That the learned magistrate started showing anger from the beginning of the case and even became worse during the end.

(2) That the learned magistrate refused to consider the facts that the said cash which was said to have been misappropriated was an imprest which was well processed and well surrendered as per the requirements of the government.

(3) That the learned magistrate failed to consider that if any imprest were not well surrendered it should have been recovered from his salary.

(4) That the learned magistrate also failed to consider the fact that the recovery of the same imprest had been recommended by the senior ministerial board committee to be deducted from his salary.

(5) That the learned magistrate failed to consider the fact that the appellant is an old man of 57 years who has diligently worked for the government and is due for retirement in two years.

(6) That the learned magistrate failed to consider his health status.

7. This being a first appeal, this court is duty bound to re-examine, re-analyse and re-evaluate a fresh the evidence tendered before the trial court and arrive at an independent finding and conclusion without losing sight of the fact that the trial court had the advantage of hearing, seeing and assessing the demeanour of the witnesses. See Kiilu and another vs republic (2005) KLR 17 and Okeno vs R (1972) EA 32 AND Mark Oiruri Mose vs R (2, 3) eKLR where the court said that 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.

8. Brief facts of this case are that at all material times to this case, the appellant was an employee of the Ministry of Education, Science and Technology (hereinafter referred to as the Ministry) and the head of the ministry's school equipment and maintenance unit (SEMU) located at Kabete within Nairobi.

9. Vide a letter dated 3rd April 2008, the appellant addressed a memo (Pros Ex. 1(a) to Mr. Eric Oreta (PW20) who was by then holding the position of Senior Deputy Secretary and also the AIE holder, seeking approval of an imprest to facilitate refurbishment and or renovation at Embu Provincial Technical Training Office (PTTO). Annexed to the said memo was a list of items worthy Kshs.2,315,440/= for purposes of installation of sound proof materials of three offices plus grilling and metal works at the said office.

10. Pursuant to PW20's approval, the request was marked for the ministry's Chief Finance Officer one James Kimani Mugambi (PW8) who examined the request and adjusted the value of some 5 items thus reducing the figure to Kshs 2,2263, 440. He finally directed for the imprest to issue. Subsequently, it landed on to the desk of the Chief Accountant Mr. Kefa Oseko (PW1) who also approved it and marked it for the action of the imprest accountant who prepared an imprest warrant No. 8064110 (P Ex 2).

11. After processing the imprest warrant, payment was made in favour of the appellant by the Ministry cashier one Perminus Kamau Njoroge (PW17) who released the amount of money in three instalments of Kshs.700,000/= on 4th August 2008, 1,000,000/= on 8th April 2008 and the balance on 11th April 2008.

12. Later, the appellant submitted the surrender imprest voucher (PEXh.3) together with supporting documents showing on how the money was spent. Among the documents attached were material purchase receipts (PEXh4(a) – (f) and a letter dated 15/5/2008 (MFI.5) purportedly authored by the Embu Provincial Technical Officer one Francis Macharia(pw7) confirming that work had been done to his satisfaction.

13. Among the other authorized officers who verified the surrender voucher were Benard Mijiza Nduri (PW2) an accountant at Imprest Surrender Office and Zuura Zainabu (PW11) incharge voucher examination who verified on 3rd April 2008 and on 4th April 2008 respectively that the surrender voucher was compliant. They confirmed that the check list (PEXh16) in support of the voucher and letter of authority (PEXh5) plus purchase receipts (Exh.4a – f) were attached. They however stated that they could not tell whether the documents attached were genuine or not.

14. PW5 Thomas Kibende senior accountant told the court that he was the one who was then charged with the responsibility of authorizing vouchers and issuing accountable documents. He confirmed issuing S13 books S/N 118475 – 1184800 to the appellant for purchase of goods.

15. However, after the Auditor General's office conducted its audit, it emerged that the work alleged to have been done and paid for was not actually done. This was brought to the attention of the PS Prof, Kiamba (PW15) who then requested his internal audit team to conduct an audit. He received a report (MFI-15) dated 26th February 2009 from the principal internal Auditor (MFI.27) confirming that work had been done. The PS further stated that, the purported work was supposed to be initiated by the user department (Embu PTTO) and not the maintenance unit.

16. On cross examination, he stated that the amount of money involved was far beyond the limit pw20 was supposed to authorize and that it was the PS who could authorize. After convening a ministerial committee to deliberate on the issue, he realized that there was fraud and forgery committed thus recommended for the interdiction of the appellant which he did through a letter dated 28th February 2009.

17. PW12 Francis Nganga Kabui from the Auditor General's office based at Nyeri further confirmed that their office did carry out an audit on the purported work done but there was no proof. Having examined all relevant documents including a letter purported to have been written by the provincial technical training officer one Macharia who denied writing the letter (PEXh5), he was satisfied that payment was irregularly made. He submitted his report dated 15th September 2009 although its production was successfully objected to as it was a file copy and was not signed.

18. Upon receipt of the Auditor General's report, the Kenya Anti-corruption Commission then through PW21 one Eva Wachuka a forensic investigator took up the matter for investigation. After analysing the relevant documents, the investigating officer interrogated a number of persons who in one way or another could be of help to ascertain the truth.

19. The officer examined the surrender imprest documents among them receipts for purchase of materials (EX4 (a) – (f), a letter dated 15th May 2018 (PEXh5) purportedly authored by one Francis Mwangi Macharia the Embu PTTO who allegedly confirmed that work had been done, counter receipts (Pros Exh7- a) and issue vouchers S13 (PEX.7(f).

20. After interrogating Francis Macharia PW7, the officer denied writing nor signing a letter dated 15th May 2008 a fact that the document examiners report confirmed. In his testimony, Macharia categorically denied that the appellant ever did any renovation nor refurbishment in their Embu office. He stated that the letter head used was a forgery as it is different from their official letter head. He produced a sample letter head (P Ex12) which had different features from the one used to write the letter dated 15th May 2008 (PEx5) which reflected the box number as 2330 instead of the official box number 1339. Again the forged letter head had a fax number yet their official letter head had none. The word department of technical education reflected in PEx5 does not appear in the sample letter head.

21. The witness further stated that some of the work purported to have been done by the appellant like tiling and installation of doors and widow grills was done by himself using the normal office AIE allocation much earlier. He produced local service orders (LSO) marked (PEXh13, 14 and 15) as proof of the work done and the contractors involved. Concerning sound proofing, the same had not been done even up to the time he was testifying.

22. He further stated that, he only saw the appellant visit his office on 3rd April 2009 with a pick up full of renovation materials but he turned him away as there was no work to be done without direct authorization by the PS as per the PS's circular dated 29th January 2009. He produced a visitor's book signed by the appellant as proof of his visit (PEXh.17). He stated that when the appellant insisted in leaving the materials, he organised for storage for him pending collection later. It was his evidence that an inventory of the materials left there was done on 11th March 2010 by Public Works Officials which was confirmed by PW18 Sebastian Anampiu Mechanical Engineer from works office Embu in the presence of the appellant. That those goods were never used until this case came up.

23. PW3 Patrick Mwangi Richoti and Benard Mwanzia Muema (PW14) both artisans in the electrical mechanic department-based Kabete School equipment maintenance unit denied ever taking part in any renovation work at Embu PTTO with their boss the appellant. They denied preparing nor signing any estimates list for renovation nor sign for S13 acknowledging receipt of any goods purported to have been bought for renovation at Embu. They disowned Exhibits No. 7 (a) to (f).

24. PW5 Kitemi Itonge from KRA Embu office checked PM and VAT numbers in the receipts for purchase of materials (PEXh4 (a) – (f) which were purportedly issued by the Embu Agricultural Hardware and confirmed that such numbers did not exist in their Data bank.

25. PW6 Ruth Wanjiru Kariuki property manager Mugo Holdings Embu confirmed that sometime the year 2003 – 2004, they had a tenant by the name of Embu Agricultural Hardware dealing with Agricultural products but they ceased being their tenants on 31st March 2004. She produced a rental card (Exh9) and notice to terminate tenancy.

26. Betty Kainyu (PW9) an employee of Postal Corporation of Kenya then the Eastern Regional Manager confirmed the owner of Box No. 253 then appearing in receipts marked PEXh4 (a) – (f) as Muchira Magu who had rented it from 2006 – 2010. She produced the rental card as an exhibit (PEXh.23).

27. PW10 – Evans Odhiambo Okite Senior Supplies and Procurement officer told the court that as a department, they were not aware nor were they involved in the procurement process for the work purported to have been done at Embu. He dismissed the work as it was in excess of Kshs 30,000 which was the maximum limit then for cash purchases. He stated that the work required quotation or competitive tendering.

28. On his part, PW13 Owate Norman Wambai, Director Technical Education then stated that he was not aware of any work done in his Embu office. When he was shown a letter dated 15th May 2009 allegedly signed by PW7 he stated that it was not Macharia's normal and known signature.

29. PW20 confirmed that he was the Senior Deputy Secretary Ministry of Education Science and Technology then. He stated that he was the AIE holder who approved a request to renovate their PTT office after receiving a request from the PTTO incharge Embu one Macharia (PW7). He stated that according to him work done as it was confirmed by Mr. Macharia vide his letter dated 15th May 2008.

30. The document examiner PW19 John Muinde superintendent of police received several documents among them 1(a) – (f), 3, 4(a) – (f), 6, Prose 7 (a) (8) and 28 together with known handwriting and sample signatures of James Odhiambo (Ex.31 – 36 and 37 and 40), Francis Mwangi Macharia (Pros.38). Samuel Oreta (PEX39) and Bernard Muema Pros Ex. 41 and 42, plus Patrick Richoti (PEXh43 and 44).

31. After subjecting these documents to examination and analysis, it emerged that the handwriting and signature at the receipts marked Ex PEXh4 (a) (f) were authored and signed at the back by a handwriting similar to that of the appellant. Equally, the examination further confirmed that there was no agreement in the handwriting and signature on the letter dated 15th May 2008 (PEXh6) with that of PW7. That exclusively means PW7 was not the author.

32. The investigating officer PW21 basically gathered all the information as per the evidence of PW1 – 20 and confirmed that work was not done although money was paid to the appellant. She stated that she had gathered sufficient evidence to confirm that the documents attached to prove that work was not done were a forgery hence the appellant was culpable.

33. On his defence, the appellant denied the charges. He admitted taking an imprest and that he used the money for the intended purpose. He denied authoring the letter dated 15th May 2009 claiming that he only saw it in the office of pw20 who according to him should explain the source. He claimed that he bought construction materials at the Embu Agricultural Hardware and the receipts issued (PEX 4(a) – (f) were authored by the supplier. He admitted signing at the back of the receipt. He stated that PW7 received the construction materials as per the inventory done by PW18 (MFI30) and that the only work pending is renovation. He acknowledged that he delivered goods on 3rd February 2009 but surrendered the imprest on 4th June 2008. He termed the charges before court as initiated maliciously by PW7 with whom he had a grudge.

34. Parties filed submissions with the appellant filing his on 18th October 2018 and the state on 3rd June 2018. I have gone through the submissions before the trial court which are similar to the ones before me.

35. When the matter came up for hearing of the application for bail pending appeal, parties agreed to canvass the main appeal. Subsequently the appellant filed his submissions on 22nd May 2019 and the respondent followed suit on 12th June 2019.

Appellant's Submissions

36. Mr. Nyaberi appearing for the appellant collapsed the grounds of appeal into two as hereunder:

(1) Whether the honourable court shifted the burden of proof to the appellant; and

(2) Whether or not the prosecution proved its case beyond any reasonable doubt.

37. It was Nyaberi's submission that the prosecution had not discharged their burden by proving the case beyond reasonable doubt. He referred the court to the decision in the case of **Peter Mwangi Kariuki vs R (2015) eKLR** where the court stated that the legal burden of proof beyond reasonable doubt constantly remains with the prosecution. He further made reference to the decision in the case of **J.O vs R (2015) eKLR** where the same principle was emphasized.

38. Mr. Nyaberi urged the court to find that the appellant bought the necessary materials as required but the user stopped him from completing the work.

39. He submitted that the materials bought are still with the government which refused to do a valuation to ascertain the truth. That the letter dated 15th May 2008 was not part of the documents submitted for surrender of imprest and that PW2 and PW6 had confirmed that evidence which the court ignored. Counsel submitted that it was PW20 the AIE holder who summoned the appellant and directed him to commence renovation work at Embu a directive he executed as a junior. That he prepared a memo requesting for funding after assessing the renovation work as per the directive of PW20. That no inventory of the materials was produced before court.

40. Learned counsel submitted that the case was a fabrication by the prosecution which this court should dismiss. Asserting that there was no factual foundation upon which this case was filed counsel referred the court to the decision in the case of **R vs Attorney General Exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 and Nairobi HCC No. 17 of 2001 – Thomas Mboya Oluoch and another vs Lucy Muthoni Stephen and another** where J. Ojwang held that:

“...policemen and prosecutors, who fail to act in good faith are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense”.

41. Mr. Nyaberi urged the court to find that the charges against the accused are illusory, imaginative and an abuse of the court process and fair administrative action as stipulated under Section 4 (1) of the Fair Administrative Action.

Respondent's Submissions

42. M/s Sigei for the state purely reiterated the charges and the evidence as stated by the witnesses. She urged the court to uphold the conviction and sentence based on the prosecution evidence which according to him is watertight.

Finding of the trial court

43. Having examined the prosecution and defence case together with the submissions, the trial court arrived at the finding that there was sufficient evidence to prove that the appellant had taken an imprest but did not do the work intended. He dismissed the claim that the case was fabricated due to a grudge between PW7 and the appellant terming it as an afterthought considering that no question of bad blood was put to Pw7 during cross examination.

44. He further found that the receipts marked Exh4 (a) to (f), Ex.7 (a) (f) and the letter dated 15th May 2008 were all forged as confirmed by the document examiner. He blamed PW20 for keeping the PS (PW15) and the Director Technical Training in darkness as he approved an amount he was not authorized to. He therefore disqualified the evidence of PW20 as an incredible witness. The learned magistrate questioned why the applicant had to supply materials much later after having surrendered the imprest. He however acquitted the accused of count two for uttering a document in this case the letter dated 15th May 2008 which PW20 had kept away from the court hence there was no proof of its existence.

Analysis and Determination

45. I have considered the petition herein and the grounds cited thereof. I have also considered the evidence before the trial court plus the submissions. The petition cited five grounds of appeal but counsel collapsed them into two interalia; whether the honourable court shifted the burden of proof to the appellant and whether or not the prosecution proved its case beyond any reasonable doubt

46. It is trite that in a criminal trial, the burden of proof squarely lies upon the prosecution to prove its case beyond any reasonable doubt. As correctly stated in the case of **Peter Mwangi Kariuki vs Republic (Supra)** the burden of proof does not shift and it remains constant

throughout the trial.

47. The onus to discharge the burden of proof in a criminal trial the world over squarely lies with the prosecution. It must be discharged without necessarily weighing or capitalizing on the weaknesses of the defence case. In the case of **State of Punjab vs Jagir Singh (1974) 3 SCC 277**, the Indian Supreme court had this to say:

“A criminal trial is not like fairy tale wherein one is free to give flight to one’s imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged ... In arriving at the conclusion about guilty of the accused charged with commission of the crime, the court has to judge the evidence by the yard stick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts....”.

48. It is incumbent upon the trial judge to weigh the evidence at hand and make a finding that considering the circumstances of the case and the evidence at hand, it is safe to convict. It has been accepted in legal circles and indeed in numerous precedents that it is better to acquit ten people who are guilty than to convict one innocent person (**See J.O.O. vs R (Supra)**).

49. In the instant case, the accused is charged with two substantive counts with an alternative to count one. He was however discharged of the alternative count and acquitted of count 2. Regarding Count 1, he is charged with knowingly giving a false document to ones principal contrary to Section 41 (2) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act. Section 41 (2) provides as follows:

(1) ...

(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.

50. There is no dispute that the appellant was an employee to the Ministry of Education Science and Technology at the material time working as a public officer and therefore discharging duties as an agent for and on behalf of the Ministry of Education as the principal.

51. He is alleged to have raised a memo dated 3rd April 2008 seeking authority to refurbish Embu PTT office. He does not deny receiving the amount of money requested for. He admitted submitting the surrender imprest together with supporting documents among them receipts for purchase of materials. He has been accused of submitting forged supporting documents while fully aware that he did not execute the necessary work and the supporting documents attached to the surrender imprest were all forged.

52. Among the documents submitted were four receipts marked PExh 4(a) – (f) purportedly issued by Embu Agricultural Hardware. The investigating officer (PW21) testified that those receipts were fake as their visit to Embu to look for that hardware did not bear any fruit. This was confirmed by the evidence of PW6 Ruth Wanjiru the land lady to the said Embu Agricultural Hardware who stated that her client left her premises sometime 31st March 2004.

53. The appellant argued that, it was the duty of the investigating officer to look for the suppliers even if they had shifted. To support their position that the said hardware did not exist, the investigating officer went further to confirm whether the VAT number and PIN number appearing on the receipts was authentic. PW5 an official from KRA confirmed that the VAT No. 6133428K and PIN 011712284M did not exist in KRA data bank. Besides, the document examiner’s report found similarities in the handwriting on the face of the receipts and the signature at the back of the receipt to be that of the appellant implying that they were authored by the appellant with an ill motive.

54. Further, PW9 the Eastern regional post master testified confirming that the box number on the receipts marked PEx 4 a-f belonged to one Muchira Magu and not Embu Agricultural Hardware. Considering that the appellant in his own defence admitted that he delivered the materials in question to Embu PTT office on 3rd February 2009, one would be tempted to ask, where were the materials kept from 10th April 2008, 8th April 2008 9th May 2008, 11th April 2008, 13th October 2008 and 14th April 2008 when they were purportedly purchased?

55. From this chain of events, it is logical and reasonable to arrive at an inescapable conclusion that the receipts were not from a genuine and recognized hardware. It is not possible to tell the investigating officer to look for what may not physically be in existence even if the name is registered in the companies’ registry. The prosecution did exercise due diligence to ascertain the existence of the hardware but they could not trace it. The appellant does not claim that he offered to show them of its location but they refused.

56. Although the document examiner’s report is an opinion, the same is corroborative to the other otherwise strong evidence pointing a blame worthy finger against the appellant in so far as the forgery of documents was concern. Why would the appellant manufacture receipts if he had genuinely bought those items? Why did he keep the materials purportedly bought away from the office for over six months till 3rd February 2009? Why could he surrender the imprest even before buying materials or even commence renovation?

57. Why would the appellant surrender an imprest May 2008 yet the materials were being delivered on 3rd February 2009? I do agree with the trial court that the materials were delivered much after the surrender imprest to cover up on the fraud. The other pertinent question not answered by the defence is; whether the materials bought covered the entire imprest without taking into account the labour charge. Where was he to get the money from to pay for labour yet he had spent the entire amount in buying materials? There are so many questions than the answers provided.

58. To claim that all the finance departments approved the imprest and surrender voucher does not validate the illegality. The officers who approved the imprest and then passed the same plus its surrender acted in good faith and had no reason to suspect that there was something sinister. The fact remains that no refurbishment was done at Embu PTT office which is admitted by the appellant. PW7 clearly confirmed that he had done refurbishment by using the normal AIE.

59. PW7 questioned the whole transaction terming it suspect hence his refusal to allow the appellant to do any renovation on what he had already done. He also questioned the action given that the PS had not authorized the project as per his earlier administrative directive. The PS (PW15) confirmed he was not aware of the project and that PW20 irregularly approved the imprest as he had no authority.

60. PW13 the Director Technical training and the PS were all kept in darkness by PW20 who seemed to have been behind the racket. It is no wonder that the letter purportedly authored by PW7 dated 15th May 2008 falsely confirming that work was done successfully disappeared.

61. That letter was among the documents attached to the surrender imprest as confirmed by PW1 at Page 9 of the proceedings and PW20. Unfortunately, it could not be found for production in court. PW3 and PW14 employees and colleagues to the appellant denied ever preparing the list for the items required nor signing for S13 acknowledging receipt of the items bought.

62. The document examiner found that the handwriting on Ex 7 (a) – (f) S13 did not belong to PW14. Who forged PW14's signature in Exh No. 7(a) and (f)? These are also questionable documents submitted by the appellant for surrender of imprest.

63. It is evident from the evidence of PW15 PS and PW10 the Senior Procurement Officer that the exercise to renovate Embu PTT office was an illegal process. PW10 said the procurement law does not allow cash purchase of items exceeding Kshs.30,000/= . Anything beyond Kshs.30,000/= was subject to quotation or tender process. The PS said that he was not aware of the exercise. From the evidence on record, it is discernible that false renovation works exercise was hatched by PW20 and the appellant.

64. I do not agree that the case is a fabrication as claimed. There is no proof that PW7 had a grudge with the appellant. As correctly observed by the hon. magistrate, that issue did not even arise during cross examination of PW7. To raise it at the defence would amount to an afterthought.

65. I do not agree with Mr. Nyaberi that non production of a letter dated 15th May 2008 (mfi-5) which was used as a supporting document for payment but disapproved is not enough to defeat the otherwise strong prosecution case. In any event, the appellant should answer the question whose certificate did he use to support proof that work was done before payment? It is obvious, the letter was submitted for surrender of the imprest and the appellant even saw it with PW20. After securing payment, it disappeared. PW20 must have known where it disappeared to. That does not mean that it did not exist. Since it was one of the supporting documents as evidenced by PW1. I have no doubt a reasonable inference can be drawn that it was submitted by the appellant as the person seeking clearance that he had performed the work.

66. Regarding the claim that no valuation was done on the items bought, an inventory was done and a list prepared (MFI30) by PW18 in the presence of the appellant. The appellant admitted as much in his defence. The items were purchased irregularly hence the government cannot be held liable of their illegal existence and therefore be forced to accept legal ownership. At its best, the same can be valued if found necessary for the state to recover part of the lost money.

67. Regarding sentence, the same is a discretionary issue for the trial court to judicially exercise and this court can only interfere if the same is illegal or excessive . The offence carries a fine of Kshs.1,000,000/= in default serve ten years imprisonment. The appellant was however sentenced to a fine of Kshs.500,000/= in default 1year imprisonment which is in my view is sufficient. Concerning the mandatory fine, the same is not negotiable and it was properly imposed as there was no prove that part of the money lost had been recovered through salary deduction. I therefore find the same lawful.

68. Although not raised by any of the parties, I have noted that the sentence imposed is Kshs.500,000/= in default 1year imprisonment and a mandatory additional penalty of Kshs.4,526,880. The court did not state whether it is to run consecutively or concurrently. However, as an appellate court I am duty bound under section 354 of the CPC to ensure that the proper sentence is pronounced by correcting an error. For avoidance of doubt since the penalty is attracting an additional fine of the amount lost, the same shall run consecutively from the date the sentence was pronounced. For the above stated reasons, the appeal is hereby dismissed, conviction upheld and sentence sustained. The Deputy Registrar to amend the committal warrant to reflect the proper sentence indicating that it runs consecutively.

Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF AUGUST 2019.

J.N. ONYIEGO

JUDGE