



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ANTI-CORRUPTION CRIMINAL APPEAL NO. 10 OF 2010

KENNETH CHEGE KABETUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal against the Judgment of Senior Principal Magistrate

(Hon. Lawrence Mugambi) in Nairobi Anti-Corruption Case No. 46 of 2010 delivered on 4th November, 2016)

JUDGMENT

1. Kenneth Chege Kabetu (hereinafter referred to) as the Appellant was charged and convicted of five (5) counts name;-

Count 1: Fraudulent acquisition of public property contrary to section 45 (1) (a) as read with section 48 of Anti-Corruption and Economic Crimes Act No. 3 of 2003

Particulars being that the Appellant on or about 15th day of January, 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi within Nairobi Province, being a Senior Education Officer employed by the said Ministry, did fraudulently acquire a sum of Kshs.433,210/- from the said Ministry of Education which money was intended to cater for capacity building workshops on the Most Vulnerable Children (MVC) Support Grant programme for stakeholders held at the Garissa and Machakos Teachers Training Colleges, by purporting that the same had been lawfully utilized for the payment of Transport Reimbursements to the participants at the Machakos Teachers Training College which was not true.

Count 2: Fraudulent acquisition of public property contrary to section 45 (1) (a) as read with section 48 of Anti-Corruption and Economic Crimes Act No. 3 of 2003

Particulars being that the Appellant on or about 15th day of January, 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi within Nairobi Province, being a Senior Education Officer employed by the said Ministry, did fraudulently acquire a sum of Kshs.109,799/- from the said Ministry of Education which money was intended to cater for capacity building workshops on the Most Vulnerable Children (MVC) Support Grant programme for stakeholders held at the Garissa and Machakos Teachers Training Colleges, by purporting that the same had been lawfully utilized for the payment of Transport Reimbursements to the participants at the Machakos Teachers Training College which was not true.

Count 3: Deceiving principal contrary to section 41 (2) as read with section 48 of Anti-Corruption and Economic Crimes Act No. 3 of 2003

Particulars being that the Appellant on or about 29th day of December, 2008 at the Ministry of Education Headquarters, Jogoo House in Nairobi within Nairobi Province, being a Senior Education Officer in the Ministry of Education tasked with the duty of coordinating capacity building workshops on the Most Vulnerable Children (MVC) Support Grant programme for stakeholders held at the Garissa and Machakos Teachers Training Colleges, to the detriment of the Ministry of Education knowingly furnished false payment schedules and receipts in support of the Surrender Payment Voucher No. 004855 to the said Ministry of Education, purporting the same to be true and just account of the expenditure of the sum of Kshs.3,936,200/- issued to him for purposes of conducting the said workshops between 2nd December, 2008 and 20th December, 2008.

Alternative Charge: False accounting by a public officer contrary to section 331 (1) as read with section 331 (2) of the Penal Code

Particulars being that the Appellant on or about 29th day of January, 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi within Nairobi Province, being a Senior Education Officer employed by the said Ministry, an Officer charged with management of public revenue to wit Kshs.3,936,200/= meant for the facilitation of capacity building workshops on the Most Vulnerable Children (MVC) Support Grant programme for stakeholders held at the Garissa and Machakos Teachers Training Colleges, knowingly furnished false returns of the monies issued to him for purposes of the said workshop.

Count 4: Uttering a false document contrary to section 353 of the Penal Code

Particulars being that the Appellant on or about 29th day of December, 2008 at the Ministry of Education Headquarters, Jogoo House in Nairobi within Nairobi Province, knowingly and fraudulently uttered false documents namely receipt number 5080 dated 19th December, 2008 and receipt number 5081 dated 19th December, 2008 for a cumulative sum of Kshs.109,799/- to **Charles Osango**, an Accounts Assistant employed by the Ministry of Education purporting them to be genuine receipts issued by KIB Stationers & Electricals in respect of payments for stationery purportedly utilized at a capacity building workshop on the Most Vulnerable Children (MVC) Support Grant programme at Machakos Teachers Training College.

Count 5: Uttering a false document contrary to section 353 of the Penal Code.

Particulars being that the Appellant on or about 29th day of December, 2008 at the Ministry of Education Headquarters, Jogoo House in Nairobi within Nairobi Province, knowingly and fraudulently uttered false documents namely payment schedules to **Charles Osango**, an Accounts Assistant employed by the Ministry of Education purporting them to be genuine payment schedules in respect of payment of transport reimbursements for participants attending a capacity building workshop on the Most Vulnerable Children (MVC) Support Grant programme at Machakos Teachers Training College.

2. Upon conviction, he was sentenced as follows;

Count 1:

Fined Shs.300,000/= in default, one year imprisonment. Compulsory additional sentence of a fine of shs.966,420/= in default, eighteen (18) months imprisonment.

Count 2:

Fined Shs.100,000/= in default, six (6) months imprisonment. Compulsory additional sentence of a fine of shs.219,598/- in default one (1) year imprisonment.

Count 3:

Fined Kshs.300,000/= in default, one (1) year imprisonment.

Count 4:

Fined Kshs.300,000/= in default one (1) year imprisonment.

Count 5:

Fined Kshs.300,000/= in default, one (1) year imprisonment.

There was an order for the sentences to run consecutively.

3. Being aggrieved by both conviction and sentence therein, he filed this appeal citing the following grounds:

1. The Learned Magistrate erred in law and fact by delivering a judgment which was not reflective of the facts presented by the parties.

2. The Learned Magistrate erred in law and fact by failing to appreciate the law as it relates to burden of proof required in proof of criminal cases.

3. The Learned Magistrate erred in law and fact by convicting the accused on evidence which was insufficient and hence erroneous.

4. The Learned Magistrate erred in law and fact by not finding that section 200 of the Criminal Procedure Code had not been complied with.

4A. The Learned Magistrate erred in fact and law by failing to appreciate that the proceedings against the Appellant were a nullity by failure to comply with section 35 (a) of the Anti-Corruption and Economic Crimes Act.

4B. The Learned Magistrate erred in law and fact by failing to find a doubt in favour of the Appellant on the face of glaring contradictions of prosecution witnesses.

5. The Learned Magistrate erred in law and fact by failing to appreciate that the offences the appellant had been charge which had not been proved beyond reasonable doubt against the appellant.

6. The Learned Magistrate erred in law by failing to consider the appellant's defence and mitigation.

7. The Learned Magistrate erred in law by imposing a sentence which was to excessive in the circumstances.

4. The Appellant had denied all the counts at the time of plea taking and the case proceeded to full hearing with the prosecution calling a total of nineteen (19) witnesses. The prosecution closed its case on 18th April, 2012 and the Appellant was placed on his defence on 29th May, 2012. It was not until 27th September, 2016 that his defence was eventually taken (exactly 4 years 4 months wasted). The reasons for the delays can be picked from the proceedings. I will speak to that later in the judgment.

5. A summary of the prosecution's case is that the Appellant is an employee of the Ministry of Education (Ministry). The Ministry was involved in a number of activities in the area of trainings. **PW1 Kimathi M'nkanata** was an acting Director of Policy and Planning in the Ministry. He explained the steps undertaken before any training was approved. Authority for any expenditure had to be sought (**Memos**

Exhibit 1 a-c). After approval, he handed over the work to the implementing team headed by M/s Keroki, to whom the Appellant was answerable.

At the appropriate time, PW1 authorized payment of an imprest in the sum of Kshs.3,936,200/=. This money was to be used for training at Machakos and Garissa Teacher Training Colleges.

6. **PW2 Cornelius Makutwa Sayi** an employee at the Ministry who deals with processing of payments of donor funded projects confirmed that he received the imprest warrant by the Appellant dated 27th November, 2008 (Exhibit 2) and he noted it in the imprest register. It was properly raised.

PW3 Charles Onsango Obindi deals with vouchers at the Ministry. He explained that upon receipt of a voucher, he gives it a number and flags it for reference using A420 and A422. Thereafter, the voucher is referred to the examination section. He confirmed seeing the surrender voucher for Kenneth Chege Kabetu (Appellant). The Appellant was surrendering the imprest he had taken for activities outside the Ministry. Accompanying the voucher No. 004555 (Exhibit 3) were;

- Imprest warrant no. 004555,
- Total expenditure incurred,
- Receipts for stationery and fuel **Exhibit 4 and 5,**
- Schedules for transport reimbursement **Exhibit 7,**
- Duplicate of the warrant,
- Authority to issue imprest,
- Summary work ticket **Exhibit 6,**
- Payment schedule for facilitators **Exhibit 9,**
- Transport reimbursement **Exhibit 8.**

7. After the surrender voucher has been prepared, it is sent to the AIE holder for necessary action. This witness confirmed that the Appellant had paid Kshs.10,330/= in the cash office as part of the surrender. He further confirmed that he did not deal with examination of the receipts as this is done in the examination office.

8. Part of the surrender receipts were stationery receipts Nos. 5080 dated 19th December, 2008, No. 5081 dated 19th December, 2009 for Kshs.109,799/=. The said receipts were alleged to have been issued by **KIBS Stationers and Electrical Box 1431 Machakos**. The proprietor of the business **Peter Kibiria Njoroge (PW4)** disowned those receipts. He produced all the details in respect of his business as Exhibit 10 – 13. This included the entire receipts book (Exhibit 13). His employee **PW16 Lilian Malau** also denied having issued receipts Exhibit 17 nor selling the items shown in those receipts.

9. **PW5 Stephen Nalelia** the Principal of Machakos TTC confirmed conducting a workshop in respect of Most Vulnerable Children between 2nd December, 2008 – 20th December 2008. The institution charged for accommodation and facilitation for four facilitators for each workshop. Their total claim was shs.1,392,000/= as per the invoices (Exhibit 14). The Ministry paid vide two cheques namely no. 171717 for Kshs.1,176,000/= and No. 171730 for Kshs.216,000/= (Exhibit 15 is the Bank Statement). A receipt was issued for the payment (**Exhibit 16**).

10. **PW6 Eliud Onyango Owino** was a facilitator at the workshop at Machakos TTC from 2nd – 20th December, 2008. He explained that claim forms were filled for purposes of transport reimbursement.

The process was handled by the class teachers, Benson Nganga and Judith Soita. The claim forms would then be handed to him and he would in turn hand them over to his supervisor who was the Appellant. The Appellant would moderate the claims before a payment schedule for all participants was prepared. The original schedule was handed over to the college bursar for the reimbursement process.

11. This witness was categorical that the payment schedules before the Court (**Exhibit 7**) were different from the ones they had prepared for this workshop. The difference was that the Exhibit 7 schedules did not have an indication of the project, dates, type of course and week. The amounts were also not the same.

He also compared the claims forms (exhibit 17) which were in the original and the payment schedule. He found them to differ in terms of the amounts. He pointed out the name of Mansuga who claimed Kshs.1,400 and was paid the same but the payment schedule in Court showed he had been paid Kshs.1,700/= (Exhibit 18 and 18a).

He confirmed having been paid Kshs.3,700 as transport reimbursement and Kshs36,000/= for facilitation at Kshs.2,000/= for 18 days.

12. **PW7 John Mureithi Mbogo** works with the Ministry in the Accounts Department. He said his work entailed checking and tallying the surrender documents and in particular he checked for;

- Authority/approval
- Kind of payment to be made on behalf of the imprest holder
- Schedules attached to the payment voucher
- Tally the payment schedules with the amount given.

He confirmed handling the imprest warrant and surrender voucher in respect of the Appellant Exhibit 2 and 3. It had various supporting documents, namely;

- Receipt No. 9082578 for cash Kshs.10,313/= balance of imprest (**Exhibit 20**).
- Payment voucher (**Exhibit 21**).
- Copy of budget approval (**Exhibit 22**); triplicate copy of imprest.
- Receipt no. 9082579 for shs.100/= unspent amount (**Exhibit 24**).
- Payment schedule for per diem for 3 officers for shs.153,000/= (**Exhibit 25**).
- Fuel receipts for motor vehicle GK A945R (**Exhibit 26**).
- Work ticket (**Exhibit 26 a**)
- Stationery receipts Nos. 5384, 5385 for Shs.63,000/= (**Exhibit 4**)
- Stationery receipts for Kib Stationery and Electrical for Kshs.109,799/= (**Exhibit 27**).
- Transport reimbursement for the participants at Machakos TTC dated 3.12.2008 – 6.12.2008 Kshs.34,000/= and others Exhibit 7 (26 in total) totaling shs.1,987,520/=.
- Transport reimbursement for participants at Garissa TTC dated 14th – 17th December, 2008 (32 payment schedules) totaling Kshs.1,257,720/= (**Exhibit 28**).
- Payment schedule for facilitators at Garissa TTC dated 2nd – 17th December, 2008 (**Exhibit 29**).
- Payment Schedule for facilitators travelling refund for Kshs.40,055/= (**Exhibit 30**).
- Schedule of payment for trainers at Machakos TTC for Kshs.14,060/= (**Exhibit 31**).
- Payment for facilitation at Machakos TTC for Kshs.144,000/= (**Exhibit 32**).

13. He testified that he tallied all these documents, examined them and found them to be tallying. There had been an error and that's why the Appellant had to pay shs.100/= in order for the witness to approve the voucher. He was quick to add that his duty did not include authenticating the documents. That the documents submitted were original documents. He finally, approved the surrender.

14. **PW8 Esther Ndinda Kione** is the bursar at Machakos TTC. She confirmed making payments to the participants as transport refunds. She used a payment schedule to make the payments. The participants signed against the payment schedules upon receipt of the money. At the end of the exercise, the original copy of the payment schedule would be given to the official while the copy would be retained by her.

She confirmed the figures in Exhibit 8, 18, 18c, 18d and 18e as what she had paid to the participants.

15. When she compared Exhibit 7a and 18a for 3rd December, - 6th December, 2008 she found the names to be the same, but the amounts differed. The formatting in Exhibit 7a was different, same to the signatures. She pointed out that payments were made using the schedule (Exhibit 18) and not Exhibit 7, which had a flat figure of Kshs.2,000/= for each participant while Exhibit 18 (b) had different payments. She identified the Appellant as the official who used to give her the money for payments to the participants.

16. **PW9 Benson Nyaga Mutunga** participated in the training at Machakos TTC in December, 2008. He confirmed preparing the transport payment schedules Exhibit 18 (b) and Schedules the payment schedules Exhibit 18 (c) and (e). These were in respect of class “S” and not “N” as he was not in-charge of the latter. He denied preparing payment schedules Exhibit 7.

17. **PW10 Limo Mohamed Abdi** attended the workshop at Garissa TTC from 3rd December – 5th December, 2008. He left on 5th December, 2008 before payment and has never been paid. He denied signing Exhibit 28 for receipt of shs.200/=.

18. **PW11 Daniel Simiyu Barasa** was part of the team that prepared the budget for the workshops for the Most Vulnerable Children (MVC). He referred to the budget Memo (Exhibit 22). The Workshop supervisor was one **Kimosop** assisted by the Appellant. The Appellant was the supervisor for Machakos. He confirmed that the workshop took place.

19. **PW12 Bibiaba Kabure Makau** was a facilitator at the workshop at Machakos TTC from 3rd – 6th December, 2008 and 6th – 9th December 2008. She confirmed the filling of registration and claims forms by the participants. She prepared the payment schedule for the first group (Exhibit 28). Only the names were written and not the amounts. Their coordinator was the Appellant. She was paid her dues in terms of facilitation, 2 night outs and travel allowance.

20. **PW13 Michael Karuru Karoki** was another facilitator at Garissa TTC workshop on 2nd – 17th December, 2008. He stated that he did prepare payment schedules but Exhibit 28 (k) was not one of them. He confirmed having been paid his dues.

21. **PW14 Jim Njeru Mugo** is a driver with the Ministry and was the one tasked with taking and returning the Appellant to the workshops in Machakos and Garissa. He fuelled the vehicle as per the receipts (Exhibit 5) and the work ticket (Exhibit 6) showed the movement of the vehicle. The said work ticket was signed by the Appellant. He confirmed having been paid per diem for the night-outs.

22. **PW15 Patrick Kinyua Njagi** an undersecretary then, confirmed that there was money for the trainings hence the approval. He therefore authorized the payment as per the approved budget. He did not deal with expenditure in his operations.

23. **PW17 Rachel Muthoni Ndungu** a senior Accountant then, was one of the officers who checked the questioned imprest warrant (Exhibit 2) and the payment voucher (Exhibit 3). When she checked, she found all certificates to have been signed by the AIE holder (Mr. Kinyanjui) and the examiner Mr. Njogu. Among the documents was the vote book certificate, meaning it had been found to be in order. To her, this meant that the expenditure had been incurred. She was satisfied and approved the payment (surrender) voucher.

24. **PW18 Antipas Nyanjwa** is a document examiner of 15 years standing as at 2012. He testified that he is a holder of a Master’s Degree in Criminology and Forensic Science. He had on 24th June, 2010 been brought some documents with disputed signatures. They were brought by Mr. Jeremiah Otieno of the then Kenya Anti-Corruption Commission (KACC). The documents were in form of

- Imprest warrant,

- Payment voucher,
- Cash sale receipts.

Also given to him were specimen signatures and known signatures of the Appellant. They came with a Memo form Exhibit 35. Upon examining the signatures circled in red ink on the questioned documents with the specimen and known handwriting, he found them to be similar and indistinguishable.

He subjected the signature to magnifying procedure on three platforms for visibility and projection for absolute identification. He found peculiar characteristics that formed common authorship. He prepared his report which he produced as Exhibit 36.

25. **PW19 Jeremiah Otieno** was an investigator with KACC in corruption matters. He gave a background to the investigation he undertook as far as this case was concerned. It was his evidence that he compared the amount in the payment voucher and what was at Machakos TTC and found them to vary. The variance totaled to Kshs.433,210/- which was more in the payment schedule attached to the payment voucher (see Exhibit 3, 17 (a), 18, and 37). They visited KIB Stationers and Electrical in respect of receipts Exhibit 27) and confirmed that the amount of Kshs.109,799/= in the said receipts was never used for that purpose.

In cross examination, he stated that the participants exceeded the number budgeted for at Machakos TTC.

26. The appellant elected to make a sworn statement of defence. He denied all the charges. He did not deny having taken the imprest of Ksh.3,936,200/= for the workshops which were conducted. He stated that he used to move from one college to another to ensure the workshops attendants are paid. They paid for transport, per diem, stationery, fuel and any other expenses. He denied signing or retaining any document after payment of the workshop attendants. The documents were brought to the Ministry Headquarters by the coordinators, he said.

27. After the exercise, he asked a clerk (**Florence Kibue**) to do the surrender for him. Along the way, he learnt that he had a balance of Ksh.10,000/= to account for. He paid it and thereafter surrendered the entire imprest. He was never called by internal auditor or external auditors to be questioned on this issue. The issue only cropped up over a year after the workshop had taken place. In cross examination, he said he used to give out money to the coordinators as per their requests. They brought their receipts which he signed and payments were only made as per the payment schedules presented by them to the Aids Control Unit.

28. When the appeal came for hearing, **Mr. Nzioki** for the appellant abandoned grounds No. 4 of the amended petition which had raised an issue of compliance with Section 200 Criminal Procedure Code.

Arguing ground 4A, he submitted that there was failure to comply with Section 35 (4) of Anti-Corruption & Economic Crimes Act (ACECA). He referred to the case of **Nicholas M. Kangangi –vs- The Attorney General Civil Appeal No. 331 of 2010 KLR** on this point and asked the Court to allow the appeal on that ground.

29. On grounds 2, 3 and 4B he submitted that the evidence was not sufficient to sustain any conviction. That PW13 at page 77 (ROA) said it was not the appellant who prepared the documents but the trainers/coordinators. The appellant surrendered shs.10,000/- after the assignment and it has not been shown that he authored those questioned documents. He finally submitted that there was no evidence to show that the appellant knowingly and fraudulently issued false documents.

30. The appeal was opposed by the respondent through Mrs. Aluda. She submitted that doctored documents were used to surrender the imprest. The Document Examiner confirmed this. Finally, she submitted that the evidence by the nineteen (19) witnesses was tangible and corroborative in regard to all the five (5) counts.

31. This being a first appeal, this Court is enjoined to reassess and re-valuate the evidence on record and

arrive at its own independent conclusion. This Court is alive to the fact that it was not able to see and hear the witnesses who testified in the matter – see Okeno –vs- Republic [1972] EA 32; Muthoko & Another –vs- Republic [2008] KLR 297.

32. I have considered the evidence on record, grounds of appeal and the submissions by both the appellant’s counsel and the State. In the course of the submissions, Mr. Nzioki for the appellant abandoned ground 4 of the amended petition of appeal. In it, the appellant had raised the issue of non-compliance with Section 200 of the Criminal Procedure Code. He explained that after reading through the response by the Respondent on that ground, he had decided to abandon it.

33. Another ground I wish to tackle at this point is ground No. 4A. Counsel submitted that there was failure to comply with section 35 (4) of ACECA. section 35 ACECA provides;

(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission’s report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.

As can be seen, there is no section 35 (4) in ACECA. His submission was that there was no consent given by the DPP as required under section 35 (4) of ACECA. Such consent before prosecution was required under section 12 of the repealed Prevention of Corruption Act. Any prosecution without such written consent from the Attorney General would have been fatal. Section 12 of the said Prevention of Corruption Act stated;

“A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney General. Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.”

34. The Anti-Corruption & Economic Crimes Act (ACECA) does not have a similar provision. I have already stated above what section 35 (1) and (2) of ACECA provides. Once the reports of investigations and recommendations are forwarded in compliance with section 35 (1) and (2) of ACECA the Director of Public Prosecution then independently reviews the file and may recommend for either further investigations or prosecution of the person or closure of the file. There is no provision for giving of consents because once the DPP recommends for prosecution, it’s that office of the DPP that prosecutes. The DPP cannot therefore give itself consent to prosecute. See the cases of Stephen Mburu Ndiba –vs- Ethic and Anti-Corruption Commission & Another [2015] eKLR; Michael Waweru Ndegwa –vs- Republic [2016] eKLR.

35. Since the DPP cannot give himself consent to prosecute, can such consent come from someone else? The answer is “NO” and it is found in Articles 157 (6) and (10) of the Constitution which provides as follows;

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered

any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

My finding is that the offences herein are covered by the ACECA which became operational in 2003. The repealed Prevention of Corruption Act is not applicable to them as they were committed after 2003. Ground 4A therefore fails.

36. I will deal with grounds 1, 2, 3, 4B, 5 and 6 together as they all relate to the sufficiency of the evidence on record.

37. The evidence from both the prosecution and defence has established that indeed there were workshops that had been lawfully approved by the Ministry. The appellant was a supervisor for the four workshops held in both Machakos TTC and Garissa TTC between 2nd December – 20th December, 2008 (Exhibit 1a – c).

38. It is also not disputed that the appellant received a sum of Kshs.3,936,200/= in the form of an imprest for purposes of these workshops (Exhibit 2 and 3). Specifically, the appellant was to pay refunds in terms of transport for the participants, facilitation for the trainers, plus per diems for the officers who were working out of their stations.

39. The issue touching on the appellant related to transport reimbursement and stationery receipts.

PW6 Eliud Onyango Owino who organized for the workshop at Machakos TTC confirmed that there was a total of 429 participants in these workshops (Exhibit 17)

PW11 Daniel Simiyu Barasa was part of the team that prepared the budget for the Machakos workshops. They budgeted for 368 participants (Exhibit 22). He also trained at Machakos TTC and confirmed that indeed they trained 452 participants.

He confessed that they had extra 104 participants at the Machakos TTC alone.

40. PW13 was a trainer at the Garissa TTC and one of his duties was to register the participants. He prepared payment schedules but saw none of those he prepared in Court. He denied preparing the schedule **Exhibit 28K**. He trained with three others namely; Bibiana Kabure Makau (PW12) plus Phoebe Okango and Jared Maswi who never testified. She was categorical that the appellant did not make any adjustments to the claim forms. It was the coordinators who did so. In Garissa, the organizers were Phoebe and Jared who were answerable to the appellant.

From the budget at page 8 of the Memo (Exhibit 22) the budgeted for participants were as follow:

Machakos	368
<u>Garissa</u>	<u>408</u>
<u>TOTAL</u>	<u>776</u>

41. There is evidence that the participants in Machakos were **452** according to **PW11 Daniel Simiyu Barasa** a Senior Officer from the Ministry. It is clear that the persons who were organizers at the Garissa TTC workshops and who could have assisted the Court in knowing the number of participants did not testify. Since Count one, is dealing with the shortfall that may have been there, it is very important to know the exact number of participants vis á viz the budget and cash given to the appellant to come up with a correct figure.

42. The appellant was given money based on the budget of 368 participants in Machakos. What then would be the impact on the imprest in the face of the over one hundred extra participants? There is no evidence that the Ministry catered for the extra participants, that is, Machakos TTC alone.

43. **PW13 Michael Karuru Karoki** did not know how many participants attended the Garissa TTC. Those who could have assisted the Court were deliberately not called by the Prosecution i.e. Phoebe and Jared for reasons best known to them. The most likely reason is that they may have not given favourable evidence to the prosecution. See ***Juma Ngodia –vs- Republic (1982 – 88) I KAR 454***. The particulars in the 1st Count are to the effect that there was a shortfall of shs.433,210/= on the basis of transport reimbursements to participants in both Garissa & Machakos TTC's.

44. I have already mentioned that there is no known number of participants at Garissa TTC. **PW8 Esther Ndinda Kione** gave evidence on the payment schedules she maintained in respect of participants at the Machakos TTC. PW8 did not give any accounting documents in respect of Garissa TTC expenditure as she was not working for them. It follows that the issue of Garissa TTC in respect of the amount paid to the participants remains outstanding.

45. Without the figures of participants as is the case with Machakos TTC, it is not possible to state exactly how much was not accounted for. Secondly, none of the prosecution witnesses explained how the Ministry had catered for the 104 extra participants at Machakos TTC. It is not known if there were any extra participants at Garissa TTC. From Exhibit 37 which was prepared by PW19 a sum of Shs.433,210/= was unaccounted for. Is this the amount that the Ministry lost? If so, how were the extra participants reimbursed their transport?

46. This Court is very keen on this because while sentencing the appellant, the Learned Trial Magistrate was giving an additional sentence based on these figures e.g. on the 1st Count, the figure he used was Kshs.483,210 and not Kshs.433,210/= as is shown in the charge sheet.

Exhibit 37 could therefore not be taken in isolation of all the other evidence to determine what had not been accounted for. The moment figures are taken as the basis of any action, these figures must be established and proved beyond reasonable doubt.

Secondly, the particulars in the 1st Count state that the unaccounted for figure was in respect of the trainings at Machakos and Garissa TTC.

47. The evidence given herein contains nothing about the Garissa TTC participants. Count 2 and Count 4 relate to one and the same thing. Receipts No. 5081 and 5082 both totaling Kshs.109,799/= are dated 19th December, 2008. They were among the bundle of receipts and accounting documents surrendered by the appellant in respect of the imprest in issue (Exhibit 2) vide voucher No. 00**** (Exhibit 3). These receipts have been confirmed to have been false. The reason being that they did not originate from KIB Stationers & Electricals, as alleged.

48. In his defence, the appellant denied any knowledge of the falsity of these receipts. He claimed that the receipts had been surrendered by the Course Coordinators at the Aids Control Unit. The evidence adduced is that the documents were given to the appellant who was the Supervisor. He could not surrender accounting documents he had no clue about.

49. The schedule of payments mentioned in Count 5 is still part of the surrender of documents. This schedule has also been confirmed to have been a false document. It was not surrendered in isolation. The document examiner **PW18 Antipas Nyanjwa** examined the signatures on selected documents, namely; imprest warrant (Exhibit 2), payment voucher (Exhibit 3) and cash sale receipts (Exhibit 27). It is not clear why these specific signatures were being examined because the appellant had never denied signing Exhibit 2, 3 and 27. He stated that he had signed them.

50. What needed to be examined were the writings on the payment schedules and the cash sale receipts

(Exhibit 27). This was never done and so it was not established whether it is the appellant who authored them or not.

51. When all this evidence is put together, a clear case of false accounting is established against the appellant. In the process of surrendering the imprest received, he used false documents which amounts to false accounting. I therefore find the offence of uttering a false document as is contained in Count 4 and 5 to be part and parcel of the offence of false accounting.

The appellant was in the alternative to Count 3 charged with the offence of False Accounting by a Public Officer contrary to section 331 (1) as read with Section 331 (2) of the Penal Code. This Alternative Count which encompasses Counts 4 and 5 has been well proved. The Court in passing sentence has to always be cautious so as not to be seen to be punishing the appellant twice for the same offence. I therefore find Count 1 not proved for reasons stated above. Further, I find the only benefit established to be that found in Count 2.

Before I make my final Orders, I wish to refer to paragraph 4 above. It is clear that many factors contributed to the uncalled for delay in taking the appellant's defence. In all this, the Court bears the heaviest share of the blame. Keeping an accused for over 4 (four) years waiting to make a defence is unfair and a pervasion of justice and should never be allowed to happen again. This kind of delay should always be taken into account while sentencing in case of a conviction.

52. The above being my findings, I make the following orders:

I. Appeal against both conviction and sentence in Count 1 is allowed. The conviction and sentence are quashed.

II. Appeal in respect of Count 4 and 5 is partially successful. The conviction on both Counts 4 and 5 is upheld.

The sentence on both Counts is **set aside** and substituted with a sentence of discharge under Section 35 (1) Penal Code on each Count (i.e. Count 4 and 5 only).

III. The conviction and sentence in Count 3 are set aside, and substituted with a conviction on the Alternative Count of False Accounting by a Public Officer contrary to section 331 (1) as read with Section 331 (2) of the Penal Code.

For this, the appellant is fined Kshs.600,000/- in default eighteen (18) months imprisonment from the date of conviction.

IV. The appeal against conviction and sentence in Count 2 is **disallowed**. I confirm the conviction and sentence in respect of Count 2.

V. The appeal succeeds only to the extent stated above.

Orders accordingly.

Signed, dated and delivered this 11th day of **April, 2017** at **Nairobi**

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HEDWIG I ONG'UDI

HIGH COURT JUDGE