REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CRIMINAL APPEAL NO. CASE NO. 27 OF 2017

STEPHEN MBOGUAH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. Felix Kombo, Principal Magistrate delivered on 6th September, 2015 in Nairobi Anti-Corruption Case No. 27 of 2011)

JUDGMENT

1. ***Stephen Mboguah*** the appellant herein was charged and convicted of the following offences;

Count I: ***Knowingly deceiving principal contrary to Section 41 (2) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003.*** Particulars being that the appellant on the 30th day of June 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi within the Nairobi Province, being a Senior Education Officer in the Ministry of Education tasked with the duty of conducting an Infrastructure Needs Assessment at District level in Nyanza and Western Provinces, to the detriment of the said Ministry of Education knowingly used false payment receipts from Kisumu Polytechnic in support of the surrender Payment Voucher No. 11624 to the said Ministry of Education, purporting the said receipts to be a true and just account of the expenditure of the sum of Kshs.3,446,362/= issued to him for purposes of conduction the said Infrastructure Needs Assessment for Nyanza and Western Provinces between 10th June, 2009 and 19th June 2009.

Count 2: Fraudulent acquisition of public property contrary to section 45 (1) (a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars being that the appellant on the diverse days between the 10th day of June, 2009 and 30th June, 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi of the Nairobi Area Province within the Republic of Kenya did fraudulently acquire Public Property namely the sums of Kshs.160,000/= had been spent for purposes of hiring Computer and Accessories (LCD and Laptops) for use at a workshop on the Infrastructure Needs Assessment at the District levels for Nyanza and Western Provinces at the Kisumu Polytechnic, which was false.

Count 3: Fraudulent acquisition of public property contrary to section 45 (1) (a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars being that the appellant on the diverse days between the 10th day of June 2009 and 30th June, 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi of the Nairobi Area Province within the Republic of Kenya did fraudulently acquire Public Properly namely the sums of Kshs.360,000/- belonging to the Ministry of Education, by purporting that the said sum of Kshs.360,000/= had been spent for purposes of hall hire at the Kisumu Polytechnic for purposes of a workshop on the Infrastructure Needs Assessment at the District levels for Nyanza and Western Provinces, which was false.

Count 4: Fraudulent acquisition of public property contrary to section 45 (1) (a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars being that the appellant on the diverse days between the 10th day of June 2009 and 30th June, 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi of the Nairobi Area Province within the Republic of Kenya did fraudulently acquire Public Properly namely the sums of Kshs.731,400/- belonging to the Ministry of Education, by purporting that the said sum of Kshs.731,400/= had been spent for purposes of purchasing mineral water for participants attending a workshop on the Infrastructure Needs Assessment at the District levels for Nyanza and Western Provinces, which was false.

Count 5: Fraudulent acquisition of public property contrary to section 45 (1) (a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars being that the appellant on the diverse days between the 10th day of June 2009 and 30th June, 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi of the Nairobi Area Province within the Republic of Kenya did fraudulently acquire Public Properly namely the sums of Kshs.196,000/- belonging to the Ministry of Education, by purporting that the said sum of Kshs.196,000/= had been spent for purposes of purchasing stationery for purposes of a workshop on the Infrastructure Needs Assessment at the District levels for Nyanza and Western Provinces, which was false.

<u>Count 6</u>: Fraudulent acquisition of public property contrary to section 45 (1) (a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars being that the appellant on the diverse days between the 10th day of June 2009 and 30th June, 2009 at the Ministry of Education Headquarters, Jogoo House in Nairobi of the Nairobi Area Province within the Republic of Kenya did fraudulently acquire Public Properly namely the sums of Kshs.1,202,500/- belonging to the Ministry of Education, by purporting that the said sum of Kshs.1,202,500/= had been spent for purposes transport reimbursement for workshop participants of a workshop on the Infrastructure Needs Assessment at the District levels for Nyanza and Western Provinces, which was false.

2. Upon conviction, he was sentenced as follows;

1) Under Section 48 (1) (a) of the ACECA, the appellant was sentenced to pay a fine of Kshs.1,000,000/= (One Million) in Count 1 or suffer an imprisonment of 12 months in default.

2) He was sentenced to pay a fine of Kshs.500,000/= (Five Hundred Thousand) in Count 2 – 6 or suffer an imprisonment of 12 months in default for each Count.

3) Under Section 48 (1) (b), the court established that the sum of Kshs.1,081,000/= was a quantifiable benefit received by the appellant, being the amount comprised in the seven receipts pros-Exhibit 2 (a).

4) The appellant was therefore further required to pay a mandatory fine two times the benefit that accrued to him which is Kshs.1,081,000 x 2=2,162,000 (Two Million, One Hundred and Sixty Two Thousand) in default of payment of the further mandatory fine, the appellant to serve imprisonment for a period of 12 months.

3. The appellant being aggrieved by the Judgment has appealed against both convictions and sentence on the following grounds;

(i) The Learned Trial Magistrate erred in law and in fact relying on the documents be expunged from record as exhibits to convict the appellant.

(ii) The Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the appellant contrary to the Constitution and the Law.

(iii) The Learned Trial Magistrate erred in law and in fact in failing to evaluate the evidence on record and finding that the prosecution had proved its case against the appellant to the required standard insofar as all the six (6) Counts are concerned.

(iv) The Learned Trial Magistrate erred in law and in fact in convicting the appellant on the basis of hearsay and mere suspicion.

(v) The Learned Trial Magistrate erred in law and in fact in failing to find that the evidence of the prosecution's witnesses was inconsistent, incredible and unreliable to convict the appellant.

(vi) The Learned Trial Magistrate erred in law and in fact in failing to find that the Ministry of Education did not lose or confirm if any money meant for the activity under the hands of the appellant was lost.

(vii) The Learned Trial Magistrate erred in law and in fact in failing to find that most of the prosecution witnesses confirmed that the infrastructure Needs Assessment for Nyanza and Western Provinces between June 10th 2009 and June 19th 2009 took place and funds were actually utilized to facilitate the participants during the activity; Provisions of Government Finance Management Act Section 19 on discipline, reporting of government officers was clearly not followed herein; there was no official complaint by the Ministry of Education that any funds were misappropriated; there was no audit query raised by either by the internal auditors or the Auditor General relating to the appellant in respect of the activity in question and there is no evidence of money trail suggesting that the accused fraudulently acquired public property.

(viii) The Learned Trial Magistrate erred in law and in fact in failing to find that the prosecution failed to prove loss of money indicated in the charge sheet or at all and that the amount alleged to have been lost is at variance with the amount alleged in the produced documents thus rendering the conviction and sentence unlawful.

(ix) The Learned Trial Magistrate erred in law and in fact in convicting and passing a sentence against the appellant contrary to his findings and the law.

(x) The Learned Trial Magistrate erred in law and in fact by failing to consider the defence and submissions of the appellant which responded and challenged the evidence by the prosecution.

(xi) Without prejudice to the above, the Learned Trial Magistrate erred in law and in fact in passing an excessive and harsh sentence under the circumstances.

4. The case of the prosecution is premised on the evidence of fifteen (15) witnesses.

The charges facing the appellant are based on an imprest of Kshs.3,446,362/= given to him for running some programme in the Ministry of Education. The regions to be covered were Nyanza and Western. From the evidence of ***PW4 Lucy Wanjiru Murage***, ***PW5 John Mureithi Mbogo***, ***PW6 George Oyaro Itaye,*** and ***PW10 Prof. Edward Karege Mutahi,*** it's clear that the process of authorization of the imprest, expenditure, programme to be covered was clearly followed. Issues came up after audit was done.

5. The main issue raised which is the subject of this case is the one of surrender of the imprest. It is PW5's evidence that the appellant made a surrender of the money given to him by attaching to the imprest warrant, the following documents: receipts, payment schedule for field workers (lunch and transport), participants' attendance register plus a breakdown of the payment summary.

6. ***PW3 Fred Jona Ochanda*** testified that the seven receipts (Exhibit 2a – g) attached to the imprest warrant (Exhibit 4) did not originate from Kisumu Polytechnic as claimed by the appellant. His explanation was that there was no workshop on secondary schools needs assessment held at the Kisumu Polytechnic in June 2009. He further stated that the amounts stated in the seven (7) receipts was never received by the Kisumu Polytechnic. The institution had issued receipts bearing similar numbers but to different people, different amounts and for different purposes.

7. ***PW2 Joseph Ochieng Ondoro, PW7 Kenneth Kebenei Miso, PW8 Bicker Lungagi Mugaya,*** and ***PW12 Patriciah Ndila Nzoya*** testified denying having attended any workshop nor paid any money as indicated in the surrender documents. They admitted that the money paid to them was less the figures shown and it was not for a workshop attended.

PW13 Humphrey Opondo Osuo and ***PW14 Jacinta Ondongo Omondi*** on the other hand admitted having attended the workshop but denied having been paid the sums of money indicated in the surrender documents.

8. ***PW13*** added that one ***Charles Onyango*** was indicated as a Board of Governors Member in her school (Got Abiero Secondary School). She denied this being such a member. The said Charles was shown as having been paid a total of Shs.3,400/= in (Exhibit 9 and 15). On the other hand, PW14 denied that one Hillary Okoth was a member of the Board of Governors of her school (Wambasa Girls Secondary School). He had been shown as having attended the workshop and paid some money. She also added that the workshop was residential and lunches were provided. There was therefore no need of paying lunch allowances.

9. ***PW10*** was a Permanent Secretary in the Ministry of Education. He said no queries had been raised during the surrender. The issues came much later. ***PW11 No. 231371, Mr. John Munde*** the Document Examiner found the disputed and undisputed signatures to have been by one hand which was the appellant's hand. His report was Exhibit 14 (a) while the exhibits Memo was Exhibit 14 (b).

10. ***PW15 Prester Nzasi Mbiwa*** was the Investigations Officer herein. He testified that he was given an imprest warrant (Exhibit 4a), surrender voucher (Exhibit 6) with various attachments, namely;

- Internal memos – Exhibit 4a - f
- Receipts – Exhibit 3a – g, 6.
- Transport reimbursement payment schedules – Exhibit 8a – w
- List of lunch reimbursement to participants – Exhibit 15
- Taxi services receipts – Exhibit 10
- Schedule of receipts Exhibit 7 and 12
- Schedule for field officers lunch – Exhibit 7
- Receipts for services from Kisumu Polytechnic – Exhibit 2a – g

11. The witness used the receipt numbers from Exhibit 2a – g to retrieve the corresponding genuine receipts after interrogating PW3 who was in charge of Finance at the Polytechnic. He found that the receipts on the surrender voucher purported to have been issued by Kisumu Polytechnic were fake. Further, that the Polytechnic's receipts were computer generated unlike what had been surrendered.

12. He stated that he interrogated persons whose names appeared on the list of workshop participants. He was able to establish that no needs assessment workshops were conducted in Western and Nyanza regions. That it was only District Quality Assurance Officers who were each paid Shs.10,000/= for facilitating the distribution of the questionnaires. He also found that the signatures on the documents were not by the alleged participants. He therefore concluded that money had been misappropriated.

13. When placed on his defence, the appellant gave a sworn statement and called no witness. It is his testimony that he was a senior officer in the Ministry of Education having risen through the ranks up to the current position of Principal Education Officer, a promotion he got on 11.7.2014. He produced various appointment letters to various special appointments in the ministry.

On the activity in question, he confirmed that he had been assigned the work in Nyanza while Mr. Omuga was attached to Western region and they were in one team. It was his evidence that workshops were held and he produced the team activity report (D Exhibit 11).

14. He testified that there were two components to this activity namely;

(i) Infrastructure needs assessment;

(ii) Training of institutional managers.

According to him, both components were undertaken. He said, he was only involved in payments while the sourcing of the venue was the responsibility of the Director of Secondary Education. The training was done at Lakers Hotel (D Exhibit 22).

15. He further stated that the amounts reflected in counts 2 – 5 were utilized in the sensitization workshop. That those involved in the needs assessment exercise were each paid Kshs.10,000/= for lunch and accommodation and they surrendered receipts to him. He dismissed PW3 as a witness of questionable character and his evidence proving counts 2 – 5 should not be relied on. He produced a copy of charge sheet (D Exhibit 23) to support his statement.

16. He testified that out of 500 persons sensitized, only two (Pw13 and PW14) had been called to testify and they confirmed that they had indeed attended the workshop at Lakers Hotel. He denied misappropriating any money saying there was no substance in the charges against him.

17. When the appeal came for hearing, ***Mr. Wandugi*** for the appellant consolidated the grounds of appeal. He submitted that though the appellant was convicted and sentenced on all counts, there was no finding made on count 5, from the records.

18. Counsel argued that the lower court went into serious error by allowing written submissions which is against the law and practice. The practice he said, was for the court to allow counsel to highlight the submissions in the presence of the accused person. He submitted that written submissions had been allowed at both the close of the prosecution case and close of the defence case. This to counsel was a violation of the appellant's rights under Article 50 (2) of the Constitution. To support his argument, he cited the case of ***Henry Odhiambo Otieno Criminal Appeal No. 83 of 2005 (Kisumu) [2006] eKLR.***

19. He further submitted that on both these occasions the appellant suffered prejudice and the entire trial became a nullity. He cited the case of ***Robert Fanali Akhuya –vs- Republic Court of Appeal Criminal Appeal No. 42 of 2002 Kisumu [2003] eKLR*** to buttress his argument.

20. ***Mr. Wandugi*** submitted that there was an unjustified shifting of the burden of proof to the appellant. He stated that there was evidence that payments had been done at Kisumu Polytechnic. That the appellant had no explanation to make as suggested by the court. He went further to submit that the case against the appellant was not proved to the required standard, but the court amended its findings in order to convict. He referred to the court's comments at page 185 line 16 – 20 in respect of the evidence by the Investigation Officer.

21. Mr. Wandugi submitted that the appellant gave a detailed sworn statement of defence. He added that though the appellant's defence was not displaced, it was not considered in detail by the court.

22. Counsel contended that Section 35 of ACECA had not been complied with. He referred to the lower court's ruling on the same but said it referred to written communication which was never produced as it was only attached to the submissions. He argued that the said Section was couched in mandatory terms and communication cannot be said to be compliance. He cited the case of ***Esther Theuri Waruiru –vs- Republic Criminal Appeal No. 48 of 2008 (Nairobi)*** to support his argument.

23. On sentence, Counsel submitted that the appellant had been given the maximum fine and default sentence which was too harsh in the circumstances. It was his final submission that the appellant did not have a fair trial.

24. **Mrs. Aluda** for the State opposed the appeal. She submitted that the appellant was well represented in the lower court by Mr. Karauka who still appears for him in this appeal. Further, that the appellant attended all court proceedings while the State was represented throughout. That Article 50 (2) (f) (g) was fully complied with.

25. Counsel submitted that the appellant was given an imprest with which to undertake the exercise. He surrendered the imprest with an over expenditure of Kshs.8,086/= which he did not seek to be reimbursed. The surrender was made up of receipts, lunch receipts, transport receipts etc. It was however the position of the State that no workshop took place at Kisumu Polytechnic, but there was one at Lakers Hotel Kisumu.

26. She stated that PW2, PW7 and PW8 had testified that they had not received the amounts shown as received by them. PW13 and PW14 had also testified that the amounts shown in the documents were questionable. Further that the document examiner had confirmed that the documents in question had been signed by the appellant.

27. On the issue of written submissions, she stated that it was the defence Counsel that made the request which was granted. He further made a request for a ruling date which was granted. All along, the appellant was present, she said. Further at the end of the defence case, the defence counsel again stated that he wished to file written submissions and was allowed. She submitted that the presence of the appellant and his counsel in court signified consent.

28. On Section 35 of ACECA it was her submission that the communication with the DPP plus the presence of counsel signified consent and the lower court had dealt with the issue. She was satisfied that the learned trial magistrate had explained why he had convicted on all the six counts.

29. She finally submitted on sentence and stated that the fine was excessive/harsh as some money had been accounted for. She however, left the issue to the court which had the power to review the sentences.

30. This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence on record before arriving at its own conclusion. The court must bear in mind that it did not see nor hear the witnesses who testified in the court. In the case of ***Ajode –vs- Republic [2004] 2 KLR 81,*** the Court of Appeal held;

"3. In law, it is the duty of the first appellant court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that."

In ***Kiilu & Another –vs- Republic [2005] 1 KLR 174*** it was held;

"2. An appellant of a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.

3. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

Lastly in ***Patrick & Another –vs- Republic [2005] 2 KLR 162***

"3. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own conclusions."

31. In light of the above authorities, I have carefully considered the evidence on record, the submissions by both the appellant's and respondent's counsel together with the grounds of appeal.

I find the issues to be falling for consideration to be the following;

(i) Whether the prosecution proved its case against the appellant beyond reasonable doubt;

(ii) Whether the sentence imposed was too harsh and excessive;

(iii) Whether non-compliance with Section 35 ACECA is fatal;

(iv) Whether the Court's reliance on written submissions at the close of the prosecution case and the defence case was prejudicial to the appellant.

32. I will deal with the last two issues first even though they were not part of the grounds of appeal.

Issue No. (iii) Whether non-compliance with Section 35 ACECA is fatal

Section 35 of the ACECA provides;

35. ***(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.

It was Mr. Wandugi's submission that communication between the Director of Public Prosecution and the Investigator was not compliance with Section 35 of the ACECA. That no consent was obtained before the appellant was charged. He relied on the Court of Appeal case of ***Esther Theuri Waruiru & Another –vs- Republic Criminal Appeal No. 48 of 2008*** to make that submission.

33. In the ***Esther Theuri case***, the Court of Appeal found that Section 35 (1) of ACECA was a mandatory provision and had to be complied with. Section 35 (1) does not call for the consent of the DPP before commencement of criminal proceedings. The Ethics and Anti-Corruption Commission (EACC) is to give a report on the results of the investigation. My understanding of this is that results could include prosecution of the person who was investigated. Section 12 of the repealed Prevention of Corruption Act Chapter 65 stated:

"12. 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 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. Under the said provision, the prosecution had a duty to obtain a written consent from the Attorney General to commence a prosecution. It meant that failure to obtain this consent was fatal to any prosecution. There is no similar provision in the ACECA. Under Section 35 (1)

of the ACECA only reports on the results of the investigation should be filed.

35. Section 32 of the ACECA provides;

> ***"32. Without prejudice to the generality of section 23(3), the Secretary and an investigator shall have power to arrest any person for and charge them with an offence, and to detain them for the purpose of an investigation, to the like extent as a police officer.***

Under this provision, the officers of the EACC have similar powers of arrest and arraigning of suspects in court, just as police officers. A provision such as Section 32 of the ACECA was not found in the repealed Prevention of Corruption Act. The distinction between the provisions of these two Acts are therefore clear.

36. This issue of Section 35 (1) of the ACECA was discussed at length by ***Juirus Ngaah J.*** in the case ***Stephen Mburu Ndiba –vs- Ethics and Anti-Corruption Commission & Director of Public Prosecution – Nyeri High Court Miscellaneous Criminal Application No. 20 of 2014.***

I entirely agree with his Lordship's reasoning on this issue.

37. Finally the matter in the lower court was prosecuted by the Director of Public Prosecution through ***Mrs. Obuo*** a prosecuting counsel. This confirms that the Director of Public Prosecution was in full picture of the matter.

This argument by the appellant therefore fails.

Issue No. (iv) Whether the Court's reliance on written submissions at the close of the prosecution case and the defence case was prejudicial to the appellant.

38. The record shows that the prosecution closed its case on 24th February, 2016. Immediately after the closure of the prosecution case, Mr. Kurauka who appeared for the appellant requested to file written submissions. This request was not opposed by Mrs. Obuo for the State. The court proceeded to make an order for filing and exchanging of written submissions.

The same were not ready until 19th July, 2016 and a Ruling date set for 4th August, 2016 and was delivered on the said date. It is clear the parties were not heard on these written submissions.

39. The defence closed its case on 23rd February, 2017. It was again indicated by the State that the parties wished to file final written submissions. The court granted their request. This was complied with on 22nd June, 2017 and a judgment date set for 16th August, 2017, but deferred to 6th September, 2017 when it was delivered. The record confirms that the parties were again not heard on these written submissions.

40. The failure to have the parties heard on the written submissions elicited the submissions before this court by Mr. Wandugi to the effect that the lower court had applied the wrong procedure on the same.

41. Mrs. Aluda for the Sate argued that the request to file written submissions was made by Mr. Karauka who was acting for the appellant in the lower court and is acting for him in this appeal.

Secondly, that the appellant together with his counsel were present throughout the hearing of the case before the lower court and so there was no prejudice caused to him.

42. This is not the first time such an issue is coming up before our courts. Mr. Wandugi relied on two cases to buttress his case. These were (i) ***Akhuya –vs- Republic Criminal Appeal No. 42 of 2002 Kisumu [2003] eKLR*** and (ii) ***Henry Odhiambo Otieno –vs- Republic Criminal Appeal No. 83 of 2005 Kisumu [2006] eKLR***

In both cases, the Court of Appeal found that the trial court erred in relying on written submissions to write a judgment when the parties had not been given an opportunity to address the court on the same. Such denial was found to be a violation of the accused person's right to a fair hearing. The Court of Appeal had then quashed the convictions and set aside the sentences in both cases.

43. In the most recent case of ***Katana Kaka alias Benson, Kitsao Kalume Sanga & Changawa Charo Karisa –vs- Republic, Criminal Appeal No. 93 of 2014*** (***Malindi) 2017 eKLR*** the Court of Appeal made a different finding in similar circumstances. It distinguished the ***Katama Kaka alias Benson case*** from the ***Akhuya*** one. It found that relying on the written submissions without calling the parties to address the court was not fatal.

44. This is what the court states;

> ***[17] This address is what is colloquially referred to as final submissions. From a reading of the above provisions, that address is mandatory and inalienable where the accused person does not intend to give or adduce evidence. This means the accused person would have declined to testify (on oath or otherwise) or to call witness (es) to testify on his behalf. However, in the instant case, the appellants gave unsworn statements in their defence. So they cannot fault the learned trial Judge for not calling upon them to give an additional address to the court. In any case the prosecution did not have a final address either and it is counsel for the appellants who intimated to court, the appellants desire to file written submissions as a final address to the court. Are the***

appellants' now approbating and reprobating at the same time" It is without doubt that by directing the appellants to file their submissions, the requirements of section 311 were fulfilled. The appellants were in no way prejudiced by their failure to give oral submissions as their counsel opted for written submissions. What emerges is a failure by counsel on record to comply with that directive. *(Emphasis added)*

[18] Revisiting the Akhuya case (supra) which was cited to support the assertion that the appellants had to be granted an added opportunity to participate and orally address court over and above the filing of the submissions; it was held that filing of written submissions without the accused persons' express consent and participation was found to be a denial of his right to a fair trial and thus a ground rendering a conviction unsafe. One distinguishing element however, is that in the present appeal, the appellants gave unsworn statements, unlike the Akhuya case where it remains unclear whether the accused was ever heard on defence as well as on closing statement at all.

[19] Of particular importance to note is that the Akhuya case (supra) was decided, before the current Constitution, according to section 77 (2) (f) of the repealed Constitution, it specifically provided that the right of the accused to be present at trial was only limited either by his consent or his conduct. In the current Constitution, Article 50, the consent of the accused is not a deciding factor in the determination whether the trial is fair. Indeed, Article 50(2) (f) of the Constitution dispenses with the question of consent and envisages the conduct of an accused to be the deciding factor. As a result, the consent of an accused is presumed unless otherwise proven. Interestingly also, the case of Otieno Kopiyo Gerald v. Republic [2010] eKLR, echoes this position. In that it was held:-

"It is not necessarily a fatal mistake for the court to accept written submissions. The mistake is only fatal if the express consent of the accused is not obtained by his advocate, who then files written submissions." *(Emphasis added)*

In the instant appeal, failure by counsel for the appellants who requested to be allowed to make written submissions and failed/neglected to abide by the court's direction cannot be construed as failure by court to ask for the appellants' consent in so far as written submissions were concerned. The said failure was occasioned by counsel, who neglected to put in submissions for their clients despite the undisputed directive by court that written submissions be filed. In this regard therefore we find the appellants were never prejudiced by the decision of the court to direct the filing of written submissions and by proceeding to issue judgment as directed. On the same note, we wish to point out that section 230 of the CPC, upon which learned counsel for the appellants also relied, was repealed by section 82 of Act No. 5 of 2003. As such, the same is no longer applicable law. *(Emphasis added)*

[20] We have closely considered this line of argument and are of the view that the appellants were well represented by their respective counsel during the hearing, very vigorous cross examination of the prosecution's witnesses took place, the appellants gave their defence evidence and failure by their counsel to file written submissions as directed by court did not prejudice the appellants as they fail to point out any issue of law or fact that was missed in the said submissions. In any event there was no failure or lapse that can be ascribed to the learned trial Judge. We would also hasten to add that if there was any lapse, it is a kind that would be curable under the provisions of section 382 of the Criminal Procedure Code, Cap 75, Laws of Kenya which provides:-

"Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

Also see the case of; Joseph Maina Mwangi -vs- Republic- Criminal Appeal No. 73 of 1993, Tunoi, Lakha and Bosire JJA, held:-

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."

45. The record shows that in both instances, ie at the close of the prosecution case and at the close of the defence, it is the counsel for both parties who consented to the filing of written submissions. They thereafter requested for a date for Ruling and Judgment respectively. None of them had an advantage over the other. At no point has it been shown that proceedings were conducted in the absence of the appellant and/or his advocate. Counsel for the appellant have also not set out before this court what was left out in their written submissions which they may have wanted to address the court on.

46. My finding on this issue is that the appellant was well represented by Counsel of his own choice. The said counsel elected to file written submissions on his behalf. It was obviously with this consent. He was therefore not prejudiced at all.

Issue No. (i) Whether the prosecution proved its case against the appellant beyond reasonable doubt

47. The appellant at the time he was charged, worked with the Ministry of Education, Jogoo House B. Nairobi. He was a Principal Education Officer. The issue giving rise to the various counts of offences facing him was an imprest of Kshs.3,446,362/= for purposes of conducting an Infrastructure Needs Assessment for Nyanza and Western provinces between 10th June, 2009 and 19th June, 2009.

48. The amounts broken down in counts 2 – 6 are part and parcel of the grand imprest of Kshs.3,446,362/=.

49. What the court was to deal with is whether the said imprest was accounted for, as per the Government regulations on imprest.

Did the infrastructure needs assessment and sensitization workshop take place as per the approved programme?

50. There is no dispute that the imprest was received by the appellant. This is confirmed by the evidence of PW4, PW5, PW6 and PW10. There is evidence by PW5 that the appellant made a surrender of the imprest, through the imprest warrant; which had attached to it receipts, payment schedules for field workers (Lunch and Transport), participants attendance register plus a breakdown of the payment summary among others.

51. Apparently, the accountants and internal auditors at the Ministry did not notice anything wrong with the surrender. It was until an audit was conducted that issues emerged. It is at that point that the surrendered receipts were audited and some persons who were alleged to have participated in the workshops interviewed.

52. The appellant does not deny having surrendered the questioned documents and receipts (Exhibit 2, 3, 6, 7, 8, 9a-z, 10(i) – xii), 11, 16). To him, these were genuine receipts obtained from the service providers and participants.

53. The Document Examiner (PW11) subjected all these documents plus the signatures on them with the specimen signatures of the appellant to a forensic examination. He found all these signatures to be similar and to have been made by the same author. According to PW5 all the receipts and documents in support of the surrender had been signed by the appellant. The Document Examiner in his evidence and report (Exhibit 14 (a) & (b)) confirmed that the said signatures were by the appellant.

54. In his sworn defence, the appellant stated that the needs assessments in Nyanza and Western were conducted by himself, Thomas Omuga, Lucy Oyoo Oduesso and Milcah Otieno. He mentioned schools where this occurred as shown in D Exhibit 11, 12 – 21. He stated that the sensitization workshop was conducted at Lakers Hotel which had been outsourced by Kisumu Polytechnic. He never called the mentioned officers to support his case.

55. PW3 an accountant at Kisumu Polytechnic at the time, denied that the institution held any workshop in relation to this matter. The appellant also admitted that no workshop was held at the said institution, instead, he says the said workshop was held at Lakers Hotel Kisumu. The disputed receipts were alleged to have been issued by Kisumu Polytechnic a fact denied by PW3. The appellant was the one making payments as an imprest holder. He did not tell the court whom he paid money for the "Lakers Hotel Workshop" and who led him to that Hotel from the Kisumu Polytechnic. He does not also say who he paid at Kisumu Polytechnic and who issued him with those receipts.

56. There were no receipts from Lakers Hotel attached to his surrender documents to show that money was paid to the said Hotel for a workshop or workshops. There is also no evidence to show that there was any arrangement between Kisumu Polytechnic and Lakers Hotel on the holding of the workshop or workshops.

57. PW2, PW9, PW12 confirmed having been each paid Kshs.10,000/= as a facilitation allowance for filing some questionnaires on the needs assessment. They were not paid anything else. The payment schedules show otherwise.

PW13 and PW14 both confirmed having attended a workshop at Lakers Hotel in Kisumu and said there were several participants. They have also mentioned the names of Charles Onyango & Hillary Okoth who they know very well and who never attended the workshop but were shown to have received payments. They pointed out the names of these two people as appearing on the list of participants yet they did not attend. PW13 and PW14 also indicated that each participant was given Kshs.1,000/= as a flat rate of reimbursement for transport. They denied receiving the Kshs.2,500/= shown against their names and those of Charles Onyango and Hillary Okoth as "lunches".

58. PW7 confirmed payment of two days lunch at Kshs.750/= per day. He denied receiving the Kshs.3,000/= shown on the schedule.

PW8 also confirmed receiving Kshs.3,000/= in respect of payment of four (4) lunches at Kshs.750/= each. He denied being paid Shs.4,200/= under No. 20 as shown on the schedule.

59. As an imprest holder, the appellant was entrusted with money to the tune of Kshs.3,446,362/= for a specific assignment. The assignment was facilitation of an infrastructure needs assessment exercise and a sensitization workshop. Some assessment appears to have been done plus a workshop being held at Lakers Hotel Kisumu. This can be gleaned from the evidence of PW2, PW3, PW7, PW8, PW9, PW13 and PW14. Inasmuch as that may have happened, there is evidence from the said witnesses indicating:

(i) Inflated figures of amounts paid.

(ii) Names of persons who did not attend the workshop, yet figures of paid up cash are indicated against their names.

(iii) No workshops were held at Kisumu Polytechnic.

60. Secondly, PW3's evidence is clear that there was no money paid to Kisumu polytechnic for which any receipts could have been issued. The issue on PW3's credibility was never put to him and so could not be part of a submission by the defence. The learned trial magistrate was right in dismissing the said submission. The evidence shows that the receipts alleged to have emanated from Kisumu Polytechnic were surrendered to deceive. Even the appellant knew they were not genuine receipts. He was on the ground and could not pretend to have been unaware of what was happening.

61. When the appellant did the surrender, he signed all the receipts, attendance sheets, lunch payment schedules to confirm that they were genuine and a correct reflection of the amounts spent. In other words, he was telling his employer "you gave me Kshs.3,446,362/= and this is how I spent it". Endorsement on the documents by him showed that he was confirming they were genuine documents which was not the case. He has to carry the cross. He should have called the other officers he mentioned as having worked with but he chose not to.

62. I have calculated the amount in Count 2 to Count 6 and it comes to a total of Ksh.2,649,900/= as money having been embezzled.

These figures were based on what had been allocated in terms of the programme. Since there appears to have been a workshop held at Lakers Hotel, it cannot be completely ruled out that some money was spent on mineral water, stationery, transport reimbursement, hire of hall. The hire of a hall if any, was at Lakers Hotel and not the Kisumu Polytechnic as per the receipts surrendered. The witnesses have clearly expressed themselves and I find no contradiction in their evidence.

63. As I mentioned earlier on, the transaction here was one and should not have been broken to create several counts (Count 2 – Count 6) according to each payment. The fraud committed in Count 2 to Count 6 though in various segments, was just one. The appellant should therefore have been charged with a 2nd count of Fraudulent acquisition of public property contrary to Section 45 (1) (a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act. No.3 of 2003 in respect of the amounts in Count 2 to Count 6.

64. I have also indicated that credit ought to have been given for the amounts that had been genuinely paid. This may not be possible because not all the persons whose names appear in the schedules testified for purposes of confirming who had been genuinely paid and who the impostors were for purposes of surrender.

65. Only PW2, PW7, PW8, PW9, PW13 and PW14 out of the many people who were each paid Kshs.10,000/= and those who attended the workshop at Lakers were called to testify. It is not for this court to do these calculations. This should have flowed from the evidence. Without such detail it is impossible to state exactly how much was fraudulently acquired by the appellant save for the fictitious payments at Kisumu Polytechnic.

66. The appellant has in his defence stated that the programme was successfully carried out. He produced some documents to show this and how the training had been conducted at Lakers Hotel (D Exhibit 22). It was his defence that the amounts reflected in Counts 2 – 6 were utilized in the sensitization workshop.

67. Having considered the prosecution evidence alongside the appellant's defence on Count 2 to Count 6, I find some gaping holes not sealed by the prosecution. A lot more needed to be covered on the actuals rather than relying on the allocations. I will give the appellant the benefit of doubt on Count 2 to Count 6. The result is that his appeal is allowed in respect of those Counts and the convictions thereon quashed and sentences set aside.

68. He is not as lucky in terms of Count 1. It is glaringly clear that he used forged receipts/documents in the surrender of the imprest. He endorsed the receipts and documents as being genuine and for purposes of surrender. In so doing, he knowingly deceived as is stated in Count 1. It is clear from the receipts Exhibit 2a – g that no money was paid to Kisumu Polytechnic as alleged which means the money ended up in somebody's pocket.

I therefore uphold his conviction on Count 1.

Issue No. (ii) Whether the sentence imposed was too harsh and excessive

69. (a) The sentence meted out in respect of Count 1 under Section 48 (1) (a) of the ACECA though lawful was too harsh as admitted by the State. I hereby set it aside and substitute it with a fine of Shs.600,000/= (Six Hundred Thousand Kenya Shillings) in default, nine (9) months imprisonment.

(b) As a result of the appellant's conduct, the Ministry of Education suffered a quantifiable loss, which was a benefit to the appellant. The seven receipts Exhibit 2a – g allegedly paid to Kisumu Polytechnic amount to Kshs.1,081,000/= but as I stated earlier, part of this money may have been paid to Lakers Hotel where a workshop took place. I will therefore apportion this figure into two, and find the benefit to be 540,000/=. Under Section 48 (2) (b) of the ACECA, this figure must be doubled and it comes to Kshs.1,081,000/=. I therefore set aside the mandatory fine passed under Section 48 (1) (b) of the ACECA and I substitute it with mandatory fine of Kshs.1,081,000/= (One Million, Eighty One Thousand Kenya Shillings) in default 12 months imprisonment.

Orders accordingly.

***Delivered, signed* and *dated*, this *19th* day of *December, 2017* in open court at Nairobi.**

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE