



**Chacha v Republic (Anti-Corruption and Economic Crimes Appeal E013 of 2022)
[2023] KEHC 18971 (KLR) (Anti-Corruption and Economic Crimes) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E013 OF 2022**

PN GICHOHI, J

JUNE 22, 2023

BETWEEN

CHRISTINE CHACHA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from conviction and sentence by the Chief Magistrate's Court
(Hon. R. Makungu, CM) dated 4th October, 2022) and 18th October,
2022 respectively in Nairobi Anti-Corruption Case No. 10 of 2010)*

JUDGMENT

1. Before the Chief Magistrate's Court were five accused persons variously charged with offences under *Anti-Corruption and Economic Crimes Act*, 2003 and the *Penal Code*. Vide Judgment dated 4th October, 2022, the trial magistrate acquitted them in some counts and convicted them on other counts as charged. The subject of this appeal is in regard to the Appellant Christine Chacha who was the 2nd accused.
2. The prosecution presented its case through 47 witnesses and their case was that in the financial year 2008/2009, the Ministry of Education embarked on various activities to support the training of secondary school teachers on double shift sensitization programmes which were funded under Kenya Education Sector Support Programme (KESSP). At the time, the Ministry had 23 programmes running one of which forms the basis of this case.
3. The former Permanent Secretary in the Ministry of Education Prof. Edward Karega Mutahi (PW1) who was the Accounting Officer testified that the Acting Director of the Secondary and Tertiary Education, Concelia Ondiek (1st Accused), presented to him a budget in form of an internal memo



dated 4th May, 2009 seeking an approval of a double shift sensitization Programme for secondary school teachers to take place from 20th to 23rd May 2009 targeting 900 teachers.

4. The budget attached to the internal memo was for various items such as transport reimbursements, accommodation, hall hire, airtime, air tickets, lunches among others with the total coming to Kshs 14,608,800/=. Out of this total, Kshs 3,340,600/= was set aside as imprest money while the rest was to be utilized for accommodation and other purposes. The Programme that was to be carried out in three identified institutions being Kisumu Polytechnic, Mombasa Polytechnic and Nyeri Technical. There was a list of 20 resource persons. The PS approved the budget on the same date thus setting the stage for the roll out of the programme.
5. An Imprest Warrant (P Exhibit 2) prepared in the name of the Appellant for Kshs 3,340,600/= on 14th May, 2009 was presented to Elias Kimani Macharia (PW2) for payment by the Appellant. After ascertaining that the same had gone through all internal processes and approved by the A.I.E holder, Concelia Ondiek and the Accountant, PW2 gave the money in cash to the Appellant which she signed for.
6. The programmes/workshops ran between 29th May to 4th June in the three Regions and the Appellant did surrender the imprest through a surrender voucher to which she attached receipts and schedules showing how the imprest had been spent.
7. PW1 testified that through an internal audit report presented to him raised a number of flaws especially the authenticity of the documents used to surrender the imprest. This forced PW1 to suspend all the officers involved in the exercise pending a further scrutiny and also reported the matter to the EACC (then the Kenya Anti-Corruption Commission) for investigations.
8. After investigations carried out by PW47 and which involved some of the participants and facilitators of the project and also the findings by the document examiner, the Appellant with four others were charged in court with seven (7) counts. The prosecution called a total 47 witnesses and at the close of the prosecution's case, the Appellant and her co-accused were placed on her defence. The Appellant was found guilty and convicted on count 4 and 6.
9. The two (2) counts were as follows:

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 of the offence 2. Christine Chacha

On the diverse days between the 25th day of May 2009 and 29th May 2009 at Jogoo House in Nairobi Province within the Republic of Kenya did fraudulently acquire Public Property namely Kshs 54,000/= by purporting that the said sum of Kshs 54,000/= had been properly spent for purposes of paying the accommodation for resource persons facilitating a workshop on double shift workshop at the said Nyeri Technical , which was false.

Count 6 – False Accounting by a Public Officer contrary to Section 331 (1) and (2) of the *Penal Code*, Cap. 63 Laws of Kenya.

Particulars of the offence 1. Concelia Ondiek 2. Christine Chacha 3. Thomas Odhiambo Omuga

On or about 30th June, 2009 at Jogoo House Nairobi, being Senior Education Officers in the Ministry of Education in charge of public revenue to wit Kshs 3,334, 600/= intended for sensitisation workshops for secondary schools on double -shift program, knowingly



furnished a false schedule to the said Ministry purporting it to be a just and true account of the expenditure of the said funds.

10. On 18th October, 2022, the Appellant was sentenced as follows;

Count 4:

A fine of Kshs 300,000 or in default one (1) year in prison .

In line with the provisions of Section 48 (1) (b) and 48 (2) (a) and (b) of the Anti- Corruption and Economic Crimes Act, the 2nd accused person will pay additional mandatory fine of Kshs 108,00/= as fine or in default to serve one year imprisonment.

Count 6:

The 2nd accused person to pay a fine of Kshs 1,000,000/= (One million) in default to serve two years imprisonment.

Sentences to run concurrently .

Right of Appeal 14 days.”

11. The Appellant was dissatisfied and aggrieved by the conviction and sentence and through the firm of Amuga & Company Advocates, she filed Petition of Appeal dated 31st October 2022 raising the following Eleven grounds of appeal;

1. The trial Magistrate erred in law and fact in convicting the Appellant when there was no sufficient evidence against the Appellant to support such conviction.
2. The trial magistrate erred in law and in fact in convicting the Appellant on count 4, for alleged fraudulent acquisition of Kshs 54,000 upon the discredited and/or unreliable evidence of PW29, even after correctly finding the issue of resource persons for whom the Appellant paid Kshs 54,000 towards accommodation was not controverted as the same had been confirmed in evidence by PW 27, John Muriithi Mbogo.
3. The trial Magistrate erred in law and fact in rejecting the credible evidence which was given by the Appellant, on oath, as regards the expenditure of Kshs 54,000/=, more specifically the Appellant's testimony that she had indeed been issued with the receipt which was produced in evidence as PExh27C by a male employee at Banana Leaf Hotel after she paid the said sum of Kshs 54,000/= to the said Hotel for the accommodation of the resource persons who attended and facilitated the Nyeri Workshop.
4. The trial Magistrate erred in law and fact in sustaining the charge under Count 6 which did not disclose an offence under Section 331 (1) of the Penal Code, and the trial Magistrate further erred when she rejected the objection raised by the Appellant concerning the legality or validity of the charge as presented before court.
5. The trial Magistrate erred in law and fact in sustaining the charge under Count 6 by holding that her understanding was that the "Schedule" referred to in the charge under Count 6 "is a "return" and therefore the charge is properly before the court", but the trial Magistrate thereafter proceeded to list one of



the key elements of the offence under Count 6 as "Prove that there was false "return" made in connection with the said money ". In so holding, the trial Magistrate clearly contradicted herself on the question of validity of the charge under Count 6.

6. The trial Magistrate erred in law and fact in holding that it was the Appellant who tendered the alleged falsified documents which were used to surrender the imprest of Kshs 3,334,600/= without specifying the particular documents which were allegedly falsified, yet there was overwhelming evidence on record showing that the documents which were alleged to have been falsified were documents from the Kisumu and Kisii Workshops which were not tendered by the Appellant who was never present in Kisumu for Workshops and never facilitated the Kisumu or Kisii Workshops.
7. The trial Magistrate erred in law and fact in rejecting the Appellant's truthful evidence on how the imprest of Kshs 3,334,600/= was apportioned to finance the Workshops in Kisumu, Nyeri and Mombasa, and the trial Magistrate further erred by holding that it was only the Appellant who was in charge of the management of the imprest of Kshs 3,334,600/=: yet the evidence tendered by the prosecution witnesses showed that the Appellant only facilitated the workshops in Nyeri and Mombasa while other officers, including the 1st and 3rd Accused, facilitated the Workshops in Kisumu, which were financed from the same imprest.
8. The trial Magistrate erred in law and fact in ignoring credible evidence given at the trial by independent witnesses who attended the Kisumu and Kisii Workshops, especially as regards the persons who attended and facilitated the Workshops in Kisumu, and therefore procured the documents which were used to surrender the bulk of the imprest sum of Kshs 3,334,600/=.
9. The trial Magistrate erred in law and fact in finding and holding that the 1st Accused's role regarding the imprest of Kshs 3, 334 600/= ended after she directed that the imprest be drawn in the name of the Appellant and that the trial Magistrate further erred by finding and holding that the 1st Accused did not directly participate in the imprest management or surrender when there was overwhelming evidence on record showing that the 1st Accused did facilitate the Workshops held in Kisumu and Kisii and must have been using the same imprest to do so.
10. The trial Magistrate erred in law and fact in disregarding credible evidence from the Appellant confirming that the portion of the imprest which was budgeted for the Kisumu Workshops was retained by the 1st Accused and that the Appellant only facilitated the Workshops in Nyeri and Mombasa after which the Appellant clearly indicated in the imprest warrant that she only surrendered the imprest used in the Nyeri and Mombasa Workshops.
11. The trial Magistrate erred in law and fact in imposing upon the Appellant harsh and oppressive sentences on each of the 2 Counts on which the Appellant was convicted.



12. This Appeal was canvassed by way of written submissions with the Appellant filing hers on 10th January, 2023, while the Respondent filed on 19th January, 2023.

Appellant's Submissions

13. Counsel for the Appellant extensively cited evidence before the trial court and in regard to the charge of false accounting, counsel submitted that count 6 was defective for reasons that it did not specify the particular schedules which the prosecution contended had been falsified by the Appellant yet it was clear from the evidence presented that there were many schedules that were furnished from Kisumu, Mombasa and Nyeri. That the schedules related to transport re-imbusement to participants who attended the said workshops and contained names of the attendants.
14. Further, counsel argued that the alleged false schedule was not only not specified in the charge but was also not identified in the charge sheet or the evidence tendered in support of the charge considering that the Appellant did not facilitate the workshop held in Kisumu where where the bulk of the subject imprest was used and schedules from Kisumu were what the prosecution witnesses, especially the Investigating Officer PW47 and PW3 alleged to have been falsified.
15. He further submitted that the trial court's findings that it was the Appellant who was solely guilty for the offence, was not supported by the evidence tendered by both the prosecution witnesses and the Appellant herself. He further submitted that the particulars of the said charge were not consistent with Section 331 (1) of the Penal Code and citing the case of Yogo v Republic [1983]eKLR 319, he submitted that the defective charge ought to have been dismissed by the trial court under Section 134 of the Criminal Procedure Code.
16. Counsel also submitted that the Appellant never applied the imprest of Kshs 3,334,600/= and that she had no prior knowledge about the workshops or the budget for which the imprest was issued until the time the 1st accused summoned her and directed her to go and collect the imprest from the cash office, and which imprest had already been processed in her name, and take to her which she did. That at the 1st accused's office, she was shown a budget which indicated the imprest was for three regions that is, Kisumu Nyeri and Mombasa. That out of this sum, the 1st accused retained Ksh. 2,410,800/= saying herself (1st accused) and the PS were to handle Kisumu workshop.
17. The 1st Accused then assigned Appellant to handle the imprests for Nyeri and Mombasa and gave her Kshs 923,800/= out of which the Appellant was to use Kshs 576,400 for Nyeri and Kshs 397,400 for Mombasa. That these were the only workshops the Appellant facilitated.
18. He further submitted that the Nyeri workshop having been held between 24th May and 27th May 2009 and the Mombasa workshop between 1st and 4th June 2009, the Appellant would not have handled the money for workshop in Kisumu which also took place between 24th May and 27th May 2009. He submitted that the Appellant, therefore, did not spend or handle the money for Kisumu workshop as was confirmed by the Imprest Warrant (Exh. 2). Counsel submitted that when the Appellant signed the imprest warrant to surrender the imprest, she clearly indicated at the back of the imprest warrant that she was surrendering the imprest for Nyeri and Mombasa.
19. Counsel therefore submitted that the findings of the trial court that only the Appellant was in charge the management of the imprest were contrary to the evidence of on record, and in particular, PW3 who confirmed that he received 100,000 from the 1st accused person to pay transport reimbursements to participants and prepared a schedule of payment which he surrendered to the 1st accused person. He faulted the trial court for finding that the 1st and 3rd accused persons did not directly participate in the Management of the imprest which was used in Kisumu workshops.



20. Further, he submitted that the Appellant had given a sworn statement that the imprest was shared amongst three regions, Kisumu , Nyeri and Mombasa which statement was corroborated by the evidence of PW3, PW4 and PW47 among other witnesses. He argued that the 1st accused person who was the architect of the double shift program and who also directed that the imprest be issued in the name of the Appellant elected to give an unsworn statement. He contended that as between the 1st Appellant sworn statement and unsworn statement of the 1st Accused, the trial Magistrate should have believed the Appellant.
21. Lastly, counsel submitted that the prosecution did not prove the element of knowledge or Mens rea on the part of the Appellant. He argued that assuming the finding by the trial Magistrate was true that the Appellant attached certain schedules that were used to help in retiring the imprest, it was necessary for the prosecution to establish that not only that certain schedules were falsified, but also that the Appellant knowingly furnished them but the magistrate failed to deal with this aspect.
22. On the charge of fraudulent acquisition of public property, counsel submitted that the said charge was erroneous and conviction unsafe as it was wholly based on the shaky evidence of PW29 Agnes Wanjiku Wachira. That this witness did not tender any evidence to prove that she was indeed an employee of Banana Leaf Hotel at the material time and did not prove that she was on duty between May and December in 2009 when the Appellant sought accommodation for resource persons in the said hotel.
23. Counsel further submitted that PW29's evidence that Exh 27C was different from receipts being issued by Banana Leaf Hotel at that time was not supported and there was no receipt brought by the witness or prosecution to compare to Exh 27C. As a consequence, counsel submitted that the conviction of the Appellant based on the strength of discredited evidence of PW29 was wholly unsafe. Besides, counsel submitted, the Appellant was not charged with forgery or uttering a false document.
24. Further, counsel submitted that the prosecution had names of resource persons and the best evidence should have been for prosecution to call any of them to say that they were indeed not accommodated at the said hotel. Therefore, he submitted that failure to call any of them in this case must have been because their evidence would have helped the Appellant's case.
25. Regarding the sentence, counsel submitted that the court erred in imposing a harsh fine totalling to Kshs 1,408,000 for reasons that the magistrate noted in her sentence that the money was largely utilized in the workshops in Kisumu which the Appellant did not facilitate. He argued the trial court ought to have noted that the Appellant only handled Kshs 923,800 /= meant for Mombasa and Nyeri and that she had been acquitted of the charges relating to the two regions. Confirm This
26. Lastly, counsel urged the court to allow the Appellants Appeal set aside her conviction and sentence on the two charges and acquit her.

Respondent's Submissions

27. On the issue that Count 6 was defective, counsel for the Respondent cited case of [*Pamela Zipporah Moriasi v Republic*](#) [2021] eKLR on the principles of law governing charge sheets and further on the ingredients of the offence under Section 331(1) of the [*Penal Code*](#) which the prosecution was required to prove, that is;
 - a. That the Appellant was public officer,
 - b. That the sum in question was public property,



- c. That there was Evidence that the money was placed under the custody of the Appellant and that she had a duty over the management of the sum in question or any part thereof,
 - d. There was false return made in connection with the said money,
 - e. If the appellant knowingly furnished the said false return.
28. Counsel therefore submitted that the Appellant was charged with an offence known in law and understood it as demonstrated by her participation throughout the proceedings through her advocate. He submitted that there was no prejudice occasioned to the Appellant.
29. He further submitted that the former Permanent Secretary in the Ministry of Education at the time of the incident (PW1), testified that he approved a budget that had been set aside by the Ministry under the Kenya Education Sector Support Programme and that the Appellant was a Senior Education Officer at the Ministry of Education. He therefore submitted that the Appellant was a Public Officer.
30. Further, counsel submitted that during the hearing of the case before the trial court, the Respondent had led evidence which demonstrated that there were discrepancies in the schedules of transport reimbursed to the participants of the various workshops that had been organized in various regions. That it was the Appellant who signed for the imprest warrant (Exhibit 2) and surrendered the same (Exhibit 7). He contended that the documents the Appellant used to surrender the imprest were falsified as shown by the forensic report (Exhibit 17) produced by the document examiner (PW7). Counsel therefore submitted that the charge is not defective. In addition, counsel relied on the submissions by the Respondent in the lower court.
31. As regards the issue as to whether the sentence was excessive or not, counsel submitted that the sentence was legal and that the trial court considered all the relevant factors of the law as provided for under Section 48 of the Anti-corruption & Economic Crimes Act and Section 332(2) of the *Penal Code* respectively.
32. Lastly, he urged this court to dismiss the appeal for lack of merit and uphold both the conviction and sentence by the trial court.

Analysis And Determination

33. I have considered the lower court record and the submissions by the parties. The broad issues that arise for determination of this appeal are whether;
- a. Count 6 was defective.
 - b. Count 6 was proved beyond reasonable doubt.
 - c. The Appellant's conviction on Count 4 was erroneous.
 - d. The conviction and sentence should be set aside on both counts.
34. This being the first appeal, this court has a duty to re-evaluate the evidence before the trial court and reach its own conclusions bearing in mind that unlike the trial court, this Court had neither saw nor heard the witnesses – *Okeno v Republic (1972) EA 32*.
35. In regard to the issue as to whether count 6 is defective, the principles guiding determination as to whether a charge is defective or not are now settled and these are that: the offence under which an accused is charged is known in law; the offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand and also, to enable the accused person prepare for his defence.



36. Further, Section 134 of the *Criminal Procedure Code* provides that;

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

37. Again Section 331 of the *Penal Code* which is the subject of Count 6 provides that;

(1) Any person who, being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of any money or property received by him or entrusted to his care, or of any balance of money or property in his possession or under his control, is guilty of a felony.

(2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.

38. A look at Count 6 as framed shows that it contains particulars of the offence that the Appellant was facing before court. These were in clear and unambiguous terms, that is: the Appellant was a public officer; the money in question was public property ; the money was placed in the custody of the Appellant who had a duty to manage it or a part thereof ; there was a false return made in regard to the said money and that she knowingly furnished the said false returns.

39. The Appellant understood the charge read to her and actively participated in the proceedings before the trial court and even her statement of defence shows that she understood what she was defending herself against. It is not in dispute both in the prosecution and defence case, that the Appellant was a Senior Education Officer at the Ministry of Education at the time in question which means that she was a “Public Officer”.

40. The imprest of Kshs 3,334, 600/= which she admitted having taken from cash office was in her name. This was public funds having been budgeted, approved and disbursed to facilitate a double-shift sensitization programme for secondary schools that was to take place in Kisumu, Mombasa and Nyeri. She attached schedules to surrender the imprest. There is no defect in that charge.

41. That then flows to the issue as to whether Count 6 was proved beyond reasonable doubt. It is not material that the Appellant was called back to the office by the 1st accused from an ISO Certification at the Kenya School of Monetary Studies and told to pick the imprest. This imprest in the Appellant’s name was a total of Kshs 3,334, 600/= and the Appellant signed for it (P Exh2). She admitted that as a senior officer who was not handling an imprest for the first time, she understood the implication of taking an imprest and not surrendering it or surrendering it falsely.

42. It is not material that some money went to Kisumu, the other to Nyeri and the other to Mombasa. It was a single imprest of Kshs 3,334, 600/= and it was her duty to surrender it as a whole. She admitted that the money was spent in the three regions. The surrender of imprest voucher was in the name of the Appellant and to which several surrender documents comprising of receipts and schedules had been attached. It is not contested that the said documents were meant to account or the imprest of Kshs 3,334,600/= that had been placed under the custody of the Appellant.

43. In her own testimony, the Appellant admitted that she is the one who signed the surrender voucher and attached all the documents including the schedules a bulk of which she admits were falsified.



44. The evidence adduced by the prosecution was that majority of the documents attached to the surrender voucher submitted by the Appellant were not genuine. The trial magistrate observed that the testimony by several prosecution witnesses remained unchallenged that the schedules allegedly used to pay all participants in all the three regions were manipulated. The schedules did not reflect the true position as to the number of the participants who attended the trainings and the amount of money they received as reimbursement.
45. Further, the prosecution adduced evidence that the Appellant falsified the amounts in the payment schedule by including people who did not attend the workshop. The document examiner who was called as witness by the prosecution testified that the signatures of the payees all of who did not attend had been forged.
46. Indeed, the Appellant's testimony was that even in the regions she allegedly handled and where the budget was for 100 participants, 103 people turned up and participated and she paid them. She also defended herself that she was using district leaders to assist her pay the participants transport reimbursements and that these leaders were chosen by the participants themselves. She did not know how many district leaders assisted her. That where she gave a list of 150 participants, transport was paid for 156 participants at Ksh. 2,500/= each. The question then would be why she went beyond the budget.
47. It is not material that the Appellant was not charged for forging the documents. It is also not material that she had signed at the back of the surrender voucher that she was only accounting for the part of the imprest she had spent in Mombasa and Nyeri. That had no effect at all in the circumstances analysed above and it does not affect the evidence established herein that she made false returns for the public funds totalling Kshs 3,334,600/= that had been entrusted to her as an imprest holder.
48. It was the Appellant's responsibility as an imprest holder to account for its expenditure. I am therefore satisfied that there was no error either in law or fact leading to the Appellant's conviction under this charge. The charge was proved beyond any reasonable doubt and that conviction was safe and is therefore upheld.
49. That now leaves the issue as to whether the Appellant's conviction on Count 4 was erroneous. The Prosecution counsel did not submit on this issue. The subject of this count is Kshs 54,000/= where the Appellant had attached a receipt (PEXh-27(C)) to the surrender voucher to demonstrate that 4 resource persons had been accommodated at Banana Leaf Hotel for 3 days. The Prosecution case was that this receipt was forged and used by the Appellant to defraud the public the said sum of money a total of Kshs 54,000/=.
50. The main Prosecution witness to prove this offence was PW29 who was allegedly the manager of Banana Leaf Hotel and on duty between 24th to 26th May, 2009. She denied having attended to any clients presumably from the Ministry of Education during the period in question. She testified that during inquiries by EACC officers about the receipt (PEXh-27(C)) that related to accommodation of three officers, she informed the officers that: the receipt was not in their books; the logo was missing on that receipt; the colour was different and the receipt was half the size of the receipts from the hotel. She further testified that the rooms rates were Kshs 1,200 per person and therefore, the Kshs 54,000/= indicated therein was on the high side for 4 people 3 days.
51. When she was cross-examined by the learned counsel for the Appellant, the witness did not have anything to show that she worked for the hotel during the period in question and did not have a receipt from the hotel to compare with PEXh-27(C).



52. On the other hand, the Appellant testified that she accommodated 4 persons at the hotel for three days at a cost of Kshs 54,000/= and was issued with a receipt (PEXh 27 C) by a gentleman in the hotel but she could not recall his name. She maintained that the receipt was genuine.
53. The Investigating Officer (PW47) rode on the evidence by PW29 and told the court that the receipt (PEXh-27 (C), which had been attached to the surrender voucher, was not from Banana Leaf Hotel as alleged. During cross-examination by counsel for the Appellant, PW47 did have original receipt from the hotel to compare with the disputed receipt.
54. The burden lay on the Prosecution to prove that this receipt was not genuine and to do so, the Prosecution ought to have produced the alleged genuine receipt from the hotel for comparison. Failure to do so left only a demonstration, through PW29 and PW47, a strong suspicion that the Appellant falsified documents and in an attempt to show how the said Ksh. 54,000/= was spent.
55. Such suspicion cannot suffice however strong. Indeed, the Court of Appeal in *Joan Chebichii Sawe v Republic* [2003] eKLR had this to say on the value of suspicion as evidence:-
- “The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”
56. In the circumstances, I find that conviction on Count 4 herein on the evidence stated above was erroneous and unsafe. The gaps and doubts in the Prosecution case ought to have been resolved to the benefit of the Appellant.
57. As regards the sentence, the lower court record shows that the trial magistrate indeed heard the parties and considered the Appellant’s mitigation through his counsel. She was also considered aggravated factors and guided by the Sentencing Guidelines and all factors before passing a sentence and in particular, she stated;
- “I am now called upon to weigh and balance the aggravating as well as the mitigating factors before sentencing the 2nd accused person herein. I have had the benefit of observing the demeanour of the accused person throughout the trial process; her battle with illness (depression and high blood pressure.) which was evident throughout the trial process; and her readiness to engage with the DPP early into trial and to be surcharged even though the some of the fraudulent activities happened outside her watch especially the Kisumu workshop.
- Considering the circumstances that pertain, find that a non-custodial sentence would be the most suitable sentence to the accused person.
- However, due to the gravity of the offence, a maximum deterrent sentence should be meted out to send out a message to public officers entrusted with public funds that it is no longer business as usual.”
58. Indeed, one of the goals intended to be achieved when a court of law passes a sentence is deterrence. This is what the trial magistrate employed in the sentencing herein. I find no reason to interfere with the exercise of that discretion. The sentence of Kshs 1,000,000/= in default two years imprisonment was lawful and justified.



59. In the circumstances the appeal succeeds to the extent that this Court makes the following orders :

1. The Appellant's conviction and sentence on Count 4 be and is hereby quashed and set aside.
2. Any money that may have been paid by the Appellant herein as fine in Count 4 be and is hereby ordered to be refunded to the Appellant.
3. The conviction and sentence on count 6 is upheld.

DATED,SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 22ND DAY OF JUNE , 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Amuga for Appellant

Ms Ndobi for Respondent

Kevin Isindu, Court Assistant

