



Kenya Anti-Corruption Commission v Ngongondi & another (Anti-Corruption and Economic Crimes Case 28 of 2017) [2023] KEHC 22270 (KLR) (Anti-Corruption and Economic Crimes) (12 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CASE 28 OF 2017
JN ONYIEGO, J
SEPTEMBER 12, 2023
(FORMERLY EMBU HCCC NO.168 OF 2008)**

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

JOEL MWALALO NGONGONDI 1ST DEFENDANT

DICKSON NDUATI NDUNGU 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 14th November 2008 and filed on 16th December 2008, the plaintiff herein sought for judgment against the defendants jointly and severally as hereunder;
 1. Kshs 4, 400,615 as against both defendants
 2. Kshs 636,220 as against the 1st defendant
 3. Costs of the suit
 4. Interest.
2. The plaintiff's suit is to the effect that at all material times to this suit, the 1st defendant was employed by government as provincial applied Technology officer Eastern province and was stationed at Embu. On the other hand, the 2nd defendant was employed as a manager for Nembure youth polytechnic but was at the material time to this suit working in the provincial applied technology office Eastern province assisting in the performance of various duties.



3. It was the plaintiff's case that during the material time, the office of the provincial Applied Technology officer was under the micro and small Enterprise department (hereafter "MSED") within the ministry of Labour and human resources. That MISED was responsible for the formation of Jua Kali sites and developing infrastructure as well as capacity building in terms of training and development of Jua kali sector.
4. That during the financial year 2005 / 2006, the MISED allocated Kshs 6,500,000 for its Embu projects. The said amount was allegedly divided into Kshs 3,000,000 for use by the Embu jua Kali Association and Kshs 3,500,000 for Kanorori youth polytechnic. According to the plaintiff, the 1st defendant had the authority to incur expenditure in respect of the said amount (hereafter the AIE holder). That in blatant breach of the Exchequer and Audit (public procurement) regulations 2001, the 1st defendant on various dates during the financial year 2005 /2006 unlawfully authorized payment of cash imprests to himself and the 2nd defendant purporting to be payment for materials, goods and services for MISED projects. It was averred that despite being a public officer, the 2nd defendant was not a civil servant and therefore not authorized to receive any imprests from the funds allocated to MISED projects.
5. It was further stated that most of the goods supplied were from a company operated by the 2nd defendant by the name of Gankere contractors and suppliers and Safi Enterprises. That some of the goods allegedly procured were never supplied despite the 2nd defendant receiving a total of kshs 2,959,100. Based on the said action and dealings, the plaintiff was of the view that the funds were illegally and fraudulently spent.
6. According to the plaintiff, the particulars of fraud includes; authorizing and purchasing materials in cash in total disregard of the *Exchequer and Audit (public procurement) regulations 2001*; knowingly misrepresenting that the PS ministry of labour and human resource development had authorized purchase of materials by cash; payment for materials or equipment partially delivered or not delivered; knowingly exaggerating the prices of materials and goods purported to have been delivered or not delivered ; knowingly receiving payment for no consideration; authorizing payment of money as per diem with knowledge that no visits were conducted; receiving per diem while fully aware that no visits were made; authorizing payment of per diem to the 2nd defendant and others while fully aware that they were not entitled.
7. On the aspect of particulars of illegality, the plaintiff stated as follows; having private interest in contracts or agreements entered into in respect to MISED projects; letting private interest conflict with those of the office; conflict of public interest with private interest; using public interest to confer a benefit on another or oneself; fraudulently acquiring public property; fraudulently acquiring a public benefit; fraudulently making payment for goods not supplied; engaging in projects without prior planning; willfully failing to comply with applicable law and guidelines relating to incurring of expenditure; procurement of goods and tendering of services; willfully or carelessly failing to comply with procedures relating to procurement; authorizing and purchasing materials in cash in total disregard of exchequer and Audit.
8. In response, the 1st defendant filed his defence dated 1st December 2009 denying the allegations of fraud or any illegality committed. He stated that he executed his mandate according to the law and that all goods and materials procured were properly supplied and paid for in accordance with the law. That the allegations of fraud and illegality were misplaced, unfounded and brought in bad faith. He termed the suit as frivolous, scandalous, vexatious or otherwise meant to embarrass him.



9. The 2nd defendant filed his statement of defence on 6th January 2010 also denying the allegations of corruption and fraud. He stated that there were similar proceedings being Embu A/C case No. 3 of 2008 instituted by the plaintiff against him touching on the same subject matter hence this suit was brought in bad faith, frivolous, vexatious, scandalous and in abuse of the court process.
10. During the hearing, the 1st defendant did not participate hence the matter proceeded in his absence. PW1 Dishon Mwangi Njere who at the material time to this case was the Director Micro and small enterprise development adopted his witness statement as his evidence. He stated that the year 2005/2006, his department had over 41 jua kali projects under Embu jua Kali Association. That from micro finance, they disbursed 3M and another 3.5m under another account to Embu for construction of jua kali shades. He told the court that the AIE holder then was one Mwalalo the 1st defendant herein. According to the witness, despite disbursing the said funds under the stewardship of the 1st defendant as the AIE holder, the money was spent but no work was done thus necessitating his transfer from Embu office to headquarters. That Mwalalo resisted the transfer thus calling for an audit investigation which revealed misappropriation of funds.
11. PW2 Alloys Ongeso Ojiambo a deputy director then in the ministry of industrialization under the ministry of labour also adopted his witness statement as his testimony. His role in this case was to facilitate a handing process between the 1st defendant and one Nzili following the 1st defendant's transfer from the Embu office. That during the handing over, they discovered several financial irregularities inter alia; issuing imprests to purchase materials for construction of materials instead of tendering; the officer (2nd defendant) who was taking imprests was not a designated government officer as he had been employed by the committee in the department of provincial enterprise headed by the 1st defendant;
12. He went further to state that out of the 3m disbursed to the Embu office, the 1st defendant authorized payment of Kshs 1,312,700 by way of imprest to the 2nd defendant. That he (1st defendant) irregularly took an imprest of kshs 240,000 for inspection of projects. He produced a report to that effect (Pexb6). He identified several imprests and vouchers taken in the name of the 2nd defendant to purchase several construction materials instead of tendering process contrary to government financial regulations and procedures then in place. That the 2nd defendant was not a government designated officer with no a personal number for surrender of imprest. He further stated that the imprests were being issued by the 1st defendant against advice- from his seniors. On cross examination by Mr. Juma, he stated that the 2nd defendant was a casual through whom payments were channeled for purchase of construction materials which were never supplied.
13. Pw3 Stanley Kiuma an accountant then with the ministry of labour also adopted his witness statement. He confirmed that during the material time to this case, he issued two AIEs to the Embu District applied technology officer (hereafter DATO). That he released the 1st batch of the AIE a mounting to kshs 1.5m on 1st July 2005 and the 2nd one on 1st (October 2006 for purposes of building jua Kali shades and kshs 1.7M for a youth polytechnic lab.in Embu. He produced a workplan on how the money was to be used (exh 23b). On cross examination, he clarified that the AIE was issued to DATO and not the provincial applied technology officer (hereafter PATO) which office the 1st defendant was occupying to whom expenditure of the funds was extended.
14. Pw4 Stephen Kinyua Embu district works officer then adopted his witness statement recorded with EACC and filed on 12th September 2017. He told the court that he was approached by the 1st defendant to prepare drawings for the construction of Kanorori workshop which he did and handed over



- drawings to the quantity surveyor and thereafter to PATO who was the 1st defendant. That he was not consulted thereafter.
15. Pw5 Nahashon D. Mwangi adopted his statement dated 12th September 2017 as his testimony. He confirmed that the year 2005 he was the cashier Embu district treasury. He confirmed making payment in respect of payment vouchers listed as document numbers 24-105 to Dickson Ndungu on behalf of the PATO Embu. On cross examination, he stated that all payments made and money received by Dickson (2nd defendant) were authorized by the 1st defendant.
 16. Pw6, Lameck Osano a certified fraud examiner working with EACC told the court that during the material time to this case, he was working with the ministry of labour. He adopted the content of his witness statement filed on 17th September 2018 as his evidence. In respect to this case, his task was to examine payment vouchers, Audit fund management for projects and prepare a report during the handover of the PATO office to the 1st defendant to his successor.
 17. He stated that in the cause of his investigations, they discovered that there were huge cashflow imprests obtained to procure building materials contrary to the procurement Act and regulations in force then. That around August 2006, he and One Machoka were assigned the duty to conduct an audit on the development funds that were allocated to that office. That they conducted an audit on kshs 3.5 million allocated for Kanorori youth polytechnic. That 2m was for the construction of a workshop and kshs 1.5 m was for securing educational aid and materials. He went further to state that Kshs 3m was for the development of Embu jua kali association to put up a fence, connect electricity and construction of toilets at the jua kali sites. That therefore a total of kshs 6.5million was allocated to the Embu PATO in that case the 1st defendant.
 18. He further stated that after perusing payment vouchers amounting to Kshs 5,820,856 he noted that; kshs 700, 000 was taken as imprest to purchase 8 computers and 4 printers without raising quotations; kshs 3,577,436 was used to purchase building materials without raising quotations;Kshs 4,644,700 was taken as imprest by Dickson Ndungu ,Muchoki and Stephen Kinyua all of whom were not civil servants; imprests issued in form of perdiems totaling to Kshs- 632,680 were irregular as they were charged to development funds instead of recurrent fund.
 19. He went further to state that; a vibrator engine worth Kshs 15,000 at the open market price was bought at Kshs 350,000; Alathe machine according to the receipts was bought at Kshs 253,500 instead of 22,000 at the open market; a wood cutter was bought at Kshs 50,000 instead of Kshs 45,000 in the open market and 8 computers purported to have been bought at Kshs 400,000 would have cost Kshs 200,000 in the open market.
 20. Regarding the supply of construction materials at Kanorori, he found that part of the materials paid for were not actually delivered as follows; ,out of 2010 cement quoted and paid for, only 200 bags were supplied hence a loss of Kshs 1,100,45; BRC, 50 pieces were quoted and paid for but none was supplied thus occasioning a loss of kshs 548,800; 100 rolls of chain link were quoted and paid for yet nothing was supplied hence a loss of kshs 320,000; 324 tons of sand were purchased and paid for yet 50 tons were supplied thus a loss of kshs 170,000; 343 tons of murram were purchased and paid for yet nothing was supplied leading to a loss of kshs 240,000; 200 tons of ballast were purchased but only 65 tons were supplied occasioning a loss of kshs 165,000; 36 rolls of binding were purchased and paid for but only 3 rolls were supplied attracting a loss of kshs 110,400; and out of 720 pieces of reinforcement bars ordered and paid for, only 278 pieces were supplied leading to the loss of kshs 304,550.



21. It was his evidence that out of a total of goods purchased worth kshs 5,245,715, only goods worth kshs 845,100 were supplied leaving a balance of Kshs 4,400,615 unaccounted for. That imprests of Kshs 632,680 was unaccounted for. That in total the government lost over kshs 5,003,295.
22. It was his evidence that out of kshs 6.5 M, a total of kshs 5.8 million was spent in the said project. He prepared an audit report (pexb 25) indicating that the 1st defendant had obtained cash in form of imprest which he spent contrary to the finance and procurement regulations in place then. That when they visited the workshop, they found some materials were supplied while others were not supplied. That some Kshs 632,680 was irregularly spent as per diem while the same was meant to be spent for development. He stated that a total of Kshs 5,033,295 was lost as a result of goods not supplied, illegal per diems and inflated prices. That some imprests were illegally made to non-government officers.
23. On cross examination by Mr. maina, the witness stated that among the non-government officers paid by the 1st defendant via imprests were the 2nd defendant, one Kinyua and E.M. muchoki. In his audit report, the witness broke down in detail at appendix II imprests and irregular payments made to various beneficiaries.
24. Pw7 Agnes Muthoni Gitari an accountant then working at Embu district treasury as a cashier basically identified various payments made in respect of the PATO Embu then headed by the 1st defendant. She confirmed that the 2nd defendant was mainly the one transacting payment processes on behalf of the 1st first defendant.
25. Pw8 Lydia Iguta also adopted the witness statement recorded on 12th September 2017. She stated that during the material time to this case, she was working in the department of youth affairs. That she was in-charge of grants earmarked for supporting Village polytechnics by payment of instructors and youth polytechnic managers who were not civil servants but employed by the management of community-based polytechnics. That Dickson (2nd defendant) was a youth polytechnic manager deployed to the PATO office hence had a grant number. That he was not entitled to take an imprest since he was not a civil servant.
26. Pw9 Rosemary Nyambura Kariuki then working as an accountant at Embu district Treasury adopted the content of her witness statement dated 23rd April 2019. She stated that during the material time she was working at the Embu district treasury as the incharge vote book. She identified various payment vouchers arising from PATO office which she approved for payment. Among the vouchers passed were; Exbs no., 7,8,9,10,12,13,14,15,17,18,19,20,35,36,37,38,39,40,41,42
27. Pw10, Simon Chaani Ndumia an accounting clerk at Embu district treasury at the material time adopted his witness statement recorded before the EACC on 23rd April 2019. He confirmed that during the material time he was deployed to work as an account's examination officer at Embu district treasury. He also confirmed examining various vouchers emanating from the PATO' office for examination and onward transmission for payment. Among the vouchers examined and passed for payment are vouchers marked; pexbhs 43 to 50. On cross examination, he stated that in all those vouchers, it was Joel Mwalalo (1st defendant) who signed as the AIE holder. That all those vouchers were for surrender of imprest.
28. Pw11 Gideon Mokaya then working with EACC as a forensic examiner was assigned to investigate a case of misappropriation of funds by the PATO office Embu then headed by the 1st defendant. That despite being transferred from Embu office to Nairobi office on 8th December 2005, the 1st defendant refused to hand over the office and account for the financial transactions he had undertaken during his tenure including the period when he was on transfer. That during his investigations, he found that



- the 1st defendant had taken imprests through which cash payment method was used to purchase goods worth above Kshs 500,000 instead of procurement by competitive bidding pursuant to the exchequer regulations then in force.
29. Besides, he observed that goods were processed through imprests issued to the 2nd defendant who was a casual worker and not a civil servant. That the 2nd defendant who was the imprest holder procured from companies/businesses owned by himself and or jointly with his daughter among them; Gankere and Safi enterprises. According to the certificate of registration (pexh 52) of Gankere Enterprise, the owners were; Dickson Nduati (2nd defendant), James Kamau, Lenity Wambui Nduati and James Kariuki. In regard to Safi enterprise, the same was not even in the prequalified list of suppliers for the year 2005 and 2006 nor in the list of contracted contractors. That in total Dickson (2nd defendant) was paid through imprests a sum of Ksh 4,486,160. That no goods were supplied in respect of a sum of kshs 5,033,295. That Dickson who received imprests failed to account for the goods purportedly bought. From his investigation, he recommended a charge of abuse of office and fraudulent payment.
 30. During cross examination by Mr. juma for the 2nd defendant, the witness stated that supplies for the construction of goods Kanorori polytechnic were not made. That Dickson who was the imprest holder used to act as the recipient of goods supplied yet was unable to account for the supply.
 31. The second defendant gave his defence claiming that he was a retired civil servant. That by profession he was a plumber who at the material time was teaching at Nembure youth polytechnic. He told the court that the year 2003 he was transferred to the Embu PATO office as messenger. That his main work was that of being sent to the district treasury to process payment vouchers on behalf of his boss one Joel the 1st defendant. According to him, he was following instructions from his boss. He stated that all goods procured were supplied. That it was mr. Mwalalo joel who used to procure building materials. He could not tell whether they were used or not. He denied being a director of Safi Enterprise nor supplying goods. He however stated that he was once a director to Safi enterprize but later ceased. He stated that it was his boss who received all the monies he processed through his name on behalf of his boss.
 32. On cross examination, he admitted that he was one of the directors of Gankere enterprises together with his daughter Lenity Wambui who was a supplier of goods to PATO. That it was Gankere enterprises receipts that were used to surrender imprests processed by PATO.
 33. Upon close of the case, parties agreed to file submissions. The plaintiff through C.Litoro their advocate, filed theirs on 20th December 2022 while the 2nd defendant filed his on 22nd March 2023 through the firm of Chege Kibati advocates.

Plaintiff's Submissions

34. The plaintiff reiterated the content contained in the plaint thus stating that the 1st defendant did during the material time authorize various payments purportedly for the purchase of goods through imprests contrary to the exchequer regulations then in place. That the goods purportedly procured as per the receipts issued by Gankere and Safi enterprises owned by the 2nd defendant were either partially supplied or not supplied. The plaintiff basically submitted on four issues; whether the 1st defendant had authority to incur expenditure after he was transferred on 20th December 2005; whether the applicants complied with procurement regulations; whether the defendants misappropriated public funds; whether the defendants should be held responsible for the loss of public funds.
35. It was counsel's submission that the 1st defendant was transferred on 20th December 2005 but refused to move until 7th February 2006 when he was forced to move out. That all the vouchers subject of this



suit marked exhibit 7 to 50 were executed during the intervening period when he had no authority to incur expenditure.

36. On non-compliance with procurement regulations, counsel contended that the 1st defendant acted in breach of Section 3(1) of the *exchequer and audit regulations 2001* by purchasing in cash goods whose value exceeded kshs 500,000 instead of floating competitive tenders. In support of that position, counsel placed reliance on the case of *Benson Anyona Ombaki and 5 others v Republic* (2015) eKLR and *Blueshield Shopping Mall Limited vs City council of Nairobi and 3 others* civil appeal No.129 or 201392015) eKLR where both courts held that procurement done in disregard of procurement laws and procedure was not only illegal but criminal.
37. On issue No. 3, Learned counsel basically relied on the auditor's report authored by pw6 to contend that out of the goods worth kshs 5,245,715 purchased and paid for, only goods worth kshs 845,100 were delivered leaving a balance of kshs 4,400,615 unaccounted for.
38. On the question whether the defendants should be held liable, counsel submitted that the 2nd defendant was not a civil servant hence legally not entitled to take an imprest and therefore any payment made through him was a nullity. Further, that monies obtained in total disregard of existing procurement laws was irregularly expended hence liable to recovery. That money paid for no goods supplied was fraudulently obtained hence liable to recovery.

2nd Defendant's Submissions

39. It is worth noting that the 1st defendant did not participate in these proceedings despite filing a statement of defence.
40. The second defendant through the firm of Chege Kibathi did submit on four issues inter alia; whether the payments in question were made to the 2nd defendant on behalf of PATO; whether the 2nd defendant was a civil servant attached to the office of the provincial Director youth affairs ministry of state for youth affairs; whether the 2nd defendant was involved in procurement process and processing of payments and; whether the plaintiff had proved its case to the required degree.
41. Concerning issue No. one, counsel submitted that the 2nd defendant who acted as a messenger took the relevant imprests on behalf of PATO (1st defendant) who together with other players in the district treasury authorized payment. Counsel contended a servant can not be held liable for acts committed properly with authorization from his master. To buttress this position, counsel placed reliance in the case of *Ndoo T/A Ngomeni Bus service v Kakuzi limited 91984*) eKLR where the court of appeal held that a servant's conduct can be within the scope of his employment only if the act is done during his authorized period of service or a period which is not unreasonably disconnected from the authorized period.
42. Learned counsel further relied on the case of *Hilton v Thomas Burton (Rhodes) Ltd* (1961) 1 WLR 705 at 707 where Lord Diplock held that a servant cannot be held liable for legally doing what his master directs him to do or for doing what he is employed to do. In counsel's view, there was nothing wrong in the 2nd defendant taking imprests on behalf of the PATO his boss.
43. On the second issue whether the 2nd defendant was a civil servant, counsel contended that the 2nd defendant did produce documents dated 6th July 2018 reflecting a letter 12th July 2011 addressed to the PS youth affairs bearing his personal no.302902 following his appointment as manager kithoka village polytechnic. That the deployment letter addressed to the 2nd defendant deploying him to PATO in 2003 bore same personal number hence a civil servant.



44. On the 3rd issue regarding whether the second defendant was involved in the procurement process, counsel contended that the 2nd defendant was on secondment to PATO hence had no role in PATO's procurement. That the officials at the district had the duty to ensure that no payment was made in respect of payments in breach of the procurement laws. On the allegation that the 2nd defendant was a director of the companies that supplied goods, counsel submitted that the 2nd defendant had ceased being a director of Gankere enterprise and that he was not a director of Safi enterprise hence the 2nd respondent was not involved in any procurement process.
45. As regards the 4th issue, learned counsel submitted that the plaintiff had failed to prove its claim against the 2nd defendant who acted within the law pursuant to his bosses' instructions hence no acts of fraud or illegality were proved against him.

Analysis and Determination

46. I have considered the claim herein, oral evidence and rival submissions by both parties. Issues for determination are;
- a. Whether the 1st defendant had authority to incur expenditure
 - b. Whether the defendants misappropriated public funds
 - c. Whether the defendants are jointly liable for the loss of public funds.
47. Regarding the question whether the 1st defendant had authority to incur expenditure, the evidence of pw1 the director micro and small enterprise department then stated that during the financial year 2005 to 2006, he issued an AIE of kshs 3m to one Mwalalo(PATO) for Embu jua kali sites and kshs 3.5 m for kanorori youth polytechnic. He confirmed that Mwalalo was the AIE holder then. He further stated that around 20th December 2005, the 1st defendant was transferred to Nairobi and ordered to hand over to his successor and account for his financial transactions.
48. He stated that, Mwalalo ignored the directive and continued incurring expenditure even after authority to do so was withdrawn by his seniors. This is clear from the letter dated 8th January 2006 addressed to Mwalalo (pex6a) authored by Mr.Njere for the PS labour and another dated 7th February 2006 (pexb 6b) by Marangu for the PS over Mwalalo's refusal to move on transfer and an order not to transact on any financial transactions. It is worth noting that the questioned financial transactions were mostly carried out at the time the 1st defendant was supposed to be on transfer and not allowed to carry out any financial transactions.
49. In view of the above holding, the questioned transactions can not be said to have been executed legally hence the expenditure incurred without authority or illegally was null and void. Therefore, the transactions were void abinitio. See *Mcfoy v United Africa Company Limited* (1961) ALL ER 1169, wherein it was held that if an act is void, then it is in law a nullity and there is no order of the court required to set it aside as it is automatically null and void.
50. The next issue is whether the defendants misappropriated funds. From the testimony of pw1 and pw2, during the financial year 2005/2006 kshs 3m was allocated to Embu Town Jua Kali site and kshs 3.5 m for the development of Kanorori village polytechnic all under the stewardship of PATO Embu office. There is no dispute that all those funds were received at the Embu district treasury. There is no dispute that the money was spent by PATO office with full authorization by the 1st defendant as the AIE holder. There is no dispute either that the 2nd defendant was authorized to take imprests for



purposes of expenditure. Since the 1st defendant did not participate in the hearing of the proceedings the claim against him is not controverted.

51. It is apparent from the auditor's report that the expenditure was carried out contrary to the exchequer and Audit regulations the year 2001 which required invitation for tenders in-case of procuring goods or services whose value exceeded khs 500,000. In this case all goods including those exceeding kshs 500,000 were purchased in cash a fact which was not disputed. According to the 2nd defendant, he was a mere messenger and had no role in procurement. Indeed, I must agree that it was not the duty of the 2nd defendant to comply with the procurement procedure. It was the duty of PATO (1st defendant) and the district treasury to ensure that no amount exceeding kshs 500, 000 was spent without competitive tendering hence an illegality. See *Benson Anyona*(*supra*) where the court held that where the entire process of procurement was not followed, the same amounts to a criminal act.
52. In the case of *Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties)* [2020] eKLR the court held that;

“Strict compliance with the law and tender procedures by both the procuring Entity and bidders is of central importance in public procurement of goods and services. The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive. In order to ensure a fair outcome in a tender award, the process itself must be fair. If the process is compromised or legal requirement are overlooked the process loses the attributes of fairness “.
53. In the instant case, the audit report which has not been challenged revealed that a Generator worth Kshs 350,000 was bought in cash. The open market price was Kshs 15,000. Obviously, the purchase of the generator in cash instead of raising a competitive tendering process was illegal and against the procurement rules and regulations then in place. In the same vein, the amount expended to purchase a generator worth kshs 15,000 at kshs 350,000 was outright theft. The same position applies to the purchase of a lathe machine bought at Kshs 253,500 instead of kshs 22,000 and computers at kshs 400,000 instead of kshs 200,000. This a pure act of misappropriation of public funds. How can one purport to purchase goods yet have some not supplied despite paying for the full consignment. This is indeed, an act of abuse of office. Unfortunately, the defendants were acquitted the criminal case for lack of consent to prosecute from the AG then.
54. Besides, the 2nd defendant was reflected as the imprest holder and the recipient of the purchased goods. Where were those items going after being purchased yet he was the custodian? The absence of the purchased items would explain the position that most of those goods which were being procured from businesses owned by the 2nd defendant were never supplied or were partially supplied. How would the 2nd defendant be the imprest holder, purchaser of goods from his Gankere business, receive them as a store man and then use them. This is an act of abuse of office. This was pure collusion between the defendants to syphon money out of the district treasury using the second defendant's business. The submission by Mr. Kibathi that the 2nd defendant had ceased being a director of Gankere enterprise was not substantiated. In any event, on his cross examination by counsel for the plaintiff he admitted being a director to the said business. The registration certificate of business name of Gankere which was produced confirmed the same.
55. Again, the 1st defendant having not participated in these proceedings, this evidence is unchallenged. As to the 2nd defendant, he stated that his role was to obey his master's orders and that he only obtained



impres on behalf of the 1st defendant his boss who then spent the money. This evidence again remained unchallenged as the 1st defendant never took part in the hearing of these case. I am persuaded to believe that the 2nd defendant was used by his boss to execute an otherwise illegal process. However, he could not fail to know that the goods supplied were not utilized or converted as he was the custodian. It was also illegal to acknowledge in the certificate of receipt of that such goods were received. Those goods if at all supplied could not have disappeared without his knowledge. This was outright theft orchestrated by servant and master jointly with mutual agreement.

56. As to whether the 2nd defendant was a civil servant to be able to take an impres, the answer lay with his boss. Although on secondment to PATO office, his deployment letter bore a personal employment number just like any other civil servant. In any event, he could not have known whether he was entitled to take an impres as a- civil servant on behalf of his boss or not. That was the duty of his boss and district treasury. He was an innocent junior officer who executed what he believed to be lawful orders from his master. He can not be blamed for such action. See *Hilton v Thomas Burton Ltd* [1961] 1 All ER 74, 76 where Diplock J preferred a simple test on the role of a servant in an action of vicarious liability vis a vis his master as follows:

“was the servant doing something he was employed to do? ...however improper the manner in which he was doing it, whether negligent as in *Century Insurance Co Ltd v Northern Ireland Transport Board* [1942] AC 509, or even fraudulent as in *Lloyd v Grace Smith & Co* [1912] AC 716 or contrary to express orders as in *Canadian Pacific Ry Co & Lockhart* [1940] AC 591 the master is liable. If however the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master’s knowledge, acquiescence, or permission.”

57. The money although issued in the name of the 2nd defendant, expenditure was done and approved by the 1st defendant with approval by the district treasury. Obviously, the money spent in excess of the prevailing market price was illegal and the 1st defendant was fully aware of the illegal spending hence the government lost the money. I do not find the 2nd defendant innocent either. Although to a larger extent he was used as a conveyor belt by his boss, he definitely knew that some of the transactions in respect of which he took impres were illegal. How could he purport to buy a generator kshs 350, 000 which in the open market was costing Kshs 15,000 and pretend to be clean.
58. In as much as full responsibility lay with the boss (1st defendant), the defendant was too bound to exercise due diligence. For all purposes and intends, both parties were to blame for the loss of public funds hence liable to refund the illegally paid money for goods not properly procured, partially supplied or not supplied totaling to kshs 4,400,615. Further, the 1st defendant shall be liable to pay for unaccounted for impres worth kshs 636,220.
59. Having held as above, it is my finding that the plaintiff has proved its case on a balance of probability against the defendants jointly and severally and thus enter judgment as prayed together with interest at court rate calculated from the year 2006. I also award costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH SEPTEMBER 2023

J.N. ONYIEGO

JUDGE

