REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC APPEAL NO 31 OF 2019

WYCLIFF MAREGE MITEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Milimani ACC Case No 12 of 2012 (Hon. L. Mugambi(CM(dated 11th May 2018)

JUDGMENT

1. The appellant was charged in ACC Case No. 12 of 2012 with three counts under the provisions of the Anti-corruption and Economic Crimes Act (ACECA) No. 3 of 2003. Under count I, he was charged with the offence of unlawful acquisition of public property contrary to section 45(1) (a) as read with section 48 of ACECA. The particulars of the offence were that on diverse dates between 13 th October 2008 and 30th September 2009 at the Makueni District Accountant's office, Makueni in the Republic of Kenya, he unlawfully acquired public property, to wit, the sum of Kshs. 3,804,931.00 from the said office.

2. Count II charged the appellant with wilful failure to comply with applicable procedures and guidelines relating to management of public funds contrary to section 45(2)(b) as read with section 48 of ACECA. The particulars of this offence were that on diverse dates between 30th October 2008 and 30th September 2009, at the Makueni District Accountant's Office, Makueni, being a person whose function is concerned in the management of public property as the District Accountant Makueni, he willfully failed to comply with sections 31 and 32 of the Government Financial Management Act, 2004 by applying public funds entrusted under his care to unlawful purposes.

3. The appellant was charged at count III with the offence of abuse of office contrary to section 46 as read with section 48 of ACECA. The particulars of the offence were that on diverse dates between 30th October 2008 and 30th June 2009, at the Makueni District Accountant's office, being a person employed in the public service, to wit, as District Accountant, used his office to improperly confer a benefit on himself by irregularly advancing himself the sum of Kenya shillings 3,804,931.00 without following the laid down procedures.

4. The appellant pleaded not guilty and following a full trial, he was found guilty on the three counts and sentenced, on count I, to a fine of Kshs one (1) million in default to serve one (1) year's imprisonment. He was also sentenced to a mandatory fine under section 48 1 (b) of ACECA, of Kshs. 15,219,724/-. In default, he was to serve a term of four (4) years' imprisonment.

5. The appellant was sentenced on count II to a fine of Kshs.500,000/= in default to serve one (1) year's imprisonment. He was discharged unconditionally under section 35 (1) of the Penal Code in respect of count III. In default of the payment of the fines in count I and II, the sentences were to run consecutively.

6. The appellant was dissatisfied with both his conviction and sentence and in his Memorandum of Appeal, he raises the following grounds of appeal:

> **1. The learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution to the accused here in the petitioner.**
>
> **2. The learned trial magistrate erred in law and fact by not considering the plausible submissions of the petitioner's uncorroborated evidence to convict the petitioner.**

3. The learned trial magistrate erred in law and fact by failing to appreciate the inconsistencies and contradictions in the prosecution evidence and went ahead to give an opioniated judgment and conviction.

4. The learned trial magistrate erred in law and fact by imposing a sentence of four years in count one(1) give that he appellant is a first offender.

5. The learned trial magistrate erred in law and fact by not considering the offences should run concurrently given that the offences are of the same character. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single transaction/act a concurrent sentence should given.

6. The learned trial magistrate erred in law and fact by not considering that the series of the offences are so connected together by proximity of time, criminality, criminal intent, and continuity of action and that they are of the same character.

7. The learned trial magistrate red in law by shifting the burden of proof to the appellant contrary to the law.

8. The learned trial magistrate red in law and fact by failing to take into account the plausible defense given by the appellant.

9. The trial court failed to appreciate that the appellant was materially prejudiced within the meaning of section 200(4) of the criminal procedure code.

10. The trial court erred in law by failing to appreciate the full import and implications of section 200 of the constitution and section 28, 35, 36, & 37 of the penal code.

11. That the trial court failed to appreciate that there were material contradictions and inconsistencies in the testimony that ought to be resolved in favour of the appellant.

12. That the trial court failed to appreciate that the charges were never proved beyond reasonable doubt.

13. That the appellant is of advancing age and also a church elder.

7. The parties elected to canvass the appeal by way of written submissions.

8. In the submissions in support of the appellant's appeal dated 30th June 2020, his Advocates identify and submit on the following as the issues for determination in the appeal:

i. Whether the sentences imposed on the appellant ought to run concurrently considering that the series of the offences are so connected together by proximity of time, criminality, criminal intent and continuity of action and that they are of the same character.

ii. Whether the trial court ought to have been lenient with its sentence given that the appellant is a first time offender and of advancing age.

iii. Whether the prosecution proved its case beyond reasonable doubt.

9. From the issues identified by the appellant, it is evident that his main concern is with respect to the sentences imposed upon him, mainly whether they should run consecutively or concurrently. However, the third issue relates to the sufficiency of the evidence presented by the prosecution before the trial court. I will accordingly first consider the evidence presented to the trial court before analysing the above issues and the respective submissions of the parties and making a determination thereon.

The Evidence

10. The prosecution called a total of 11 witnesses and their evidence was as follows.

11. The appellant was the District Accountant, Makueni. In that capacity, he had the responsibility, *inter alia,* to approve imprest for other officers working in the District Treasury. Should he be the one who required imprest, his application was required to be approved by his Deputy. PW1, Joshua Wambua Makanda was the District Internal Auditor in Makueni, a position he had held since 2005. In 2009, he was working at Makueni District and was responsible for checking routinely and confirming that financial regulations are followed.

12. PW1 explained the process required to be followed in approving imprest. The applicant was required to apply, and in the application indicate the reason for which the imprest was required. The imprest had to be approved by the AIE (Authority to Incur Expenditure) holder. It would then go to the vote book to be committed in order to show that funds for the imprest were available, then would be taken to the imprest section to be recorded in the ledger. The imprest would then be authorized by the District Accountant and thereafter sent to the cash office for payment.

13. As District Accountant, the appellant could also apply for imprest. If he did so, however, he could not authorize the imprest for himself. Someone else was required to authorize for him, and according to PW1, this should be the District Accountant's Deputy. Further, an applicant for imprest could only hold one imprest at a time. He was required to surrender the first imprest before applying for another.

14. PW1 testified that the taking of funds on the basis of an IOU (1 owe you) note was not an authorized manner of taking imprest in government. It was unlawful for a government officer to sign a document saying 'give me money' without following the lawful process. This, however, according to PW1, is what the appellant had done. While checking cash management in Makueni District in 2009, PW1 had found imprest taken and IOUs issued by the appellant that were not done in accordance with government regulations.

15. PW1 had checked the cash books warrants and register for the office of the President in Makueni for the period 22nd February 2008 to 30th October 2009. His analysis of the cash book (P. exhibit 1) showed that it was overdrawn. It showed that the appellant had collected A-1-A of Kshs 1,513,220 which should have been surrendered to the government and banked. There was also a miscellaneous deposit of Kshs 1,918,073.25 which should also have been banked, but that the only amount that was in the bank was Kshs 74,998.60.

16. On further verification, PW1 had found that the appellant had authorized for himself imprest amounting to Kshs 2,051,000. PW1 produced a letter dated 30th June 2009 (P exhibit 2) in which he had pointed out to the appellant the anomalies arising out of his use of imprest and IOUs and recommended that the appellant surrenders the A-I-A which, at the time of the letter had accumulated to Kshs 1,461,320. He had also recommended that action be taken on the IOUs, which then amounted to Kshs 5,421,443.20. PW1 had also recommended that action be taken to recover the overdue imprest. By a letter dated 30th October 2009, PW1 sent a reminder to the appellant, but the appellant did not reply and did not surrender the imprest or A-I-A.

17. PW1 identified various imprest warrants and IOUs in which the appellant requested for money, indicated the purpose as '*official*' but never surrendered any of the imprest. The IOUs were also signed by the appellant, asking for payment of various amounts, to be processed later. The imprest warrants included warrant number 0226003 for Kshs 85,000, which was undated. The warrant was signed and authorized by the appellant, and the purpose was indicated as *'official duties'*. It directed the cashier to *'pay and process later'*. It was signed on 3rd November 2008. There was also warrant number 0226007 by the appellant as applicant and AIE holder. It was dated 21st November 2008, was for Kshs 85,000, and it also instructed the cashier to pay and process later.

18. PW1 further testified with regard to imprest serial number 0226008 dated 25th November 2008 for Kshs 110,000; 0226010 dated 3rd December 2008 for Kshs 30,000; and 0226011 dated 4th December 2008 for Kshs 20,000. There were another 20 imprest warrants or so, with the appellant as the applicant, signing in authorization as the AIE holder, being the recipient, and indicating that the purpose of the imprest was 'official'. The instruction to the cashier were to pay and process later, and the evidence of PW1 is that the appellant received the amounts and signed for them.

19. PW1 also testified with respect to several IOU notes in which the appellant had requested for and received various amounts of money from the cashier. They included Kshs 150,000 on 26th June 2009; Kshs 10,000 on 2nd December 2008; Kshs 13,650 also on 2nd December 2008; and Kshs 20,000 on 8th September 2009. All the notes were signed by the appellant, and he had acknowledged receipt and the documents were stamped 'paid.' According to PW1, the appellant did not respond to his letter and report (p. exhibit 2 and 3) on the imprest warrants and IOUs. Instead, he disappeared from the office.

20. PW1 stated in cross examination that there was no other District Accountant, other than the appellant, when he made the report. It was the District Accountant who was in charge of the District Treasury and supervised the cash book. While the cashier made entries in the cash book, it was the District Accountant who was supposed to check the cash book daily.

21. Julius Mongare Achoki (PW2) was a clerk at the Makueni District Treasury from 2008-2010. He was in charge of imprest and his duties were to examine payment vouchers and imprest. He would record in the imprest register the date of the imprest warrants and the imprest warrant number, the amount taken, the date it was due for surrender and the outstanding balance. His evidence was that all the imprest warrants in respect of the amounts taken by the appellant had not been entered in the imprest register. These warrants, imprest number 0226014 for Kshs 100,000 dated 11th December 2008, 0226008 for Kshs 110,000 dated 25th November 2008; 0226032 dated 3rd March 2009 for Kshs 85,000; 0226029 dated 17th February 2009 for Kshs 90,000 among others bore the name of the appellant and his personal number 92051916.

22. According to PW2, all the imprest warrants in the name of the appellant did not pass through his office and he did not sign them. They were also not captured in the imprest register. PW2 recognized the signature on all the imprest as belonging to the appellant, who was his superior. He noted that some of the warrants had notes to the cashier stating *'cashier pay and process later'*. From his imprest register, he noted that the appellant did not surrender the imprest. Other staff who had taken imprest had surrendered it. He produced the imprest register as P exhibit 38.

23. PW3, Julius Musyimi Kilinda was, at the material time, in charge of supervising operations in District Treasuries. His office had received an audit report that indicated that money had been misappropriated at the District Treasury, Makueni. The report had been made by the District Internal Auditor, Mr. Makanda (PW1). Another report with regard to the loss at the Makueni District Treasury had been prepared by the Acting District Accountant, Mr. George Wathiru (PW7). The loss report, dated 2nd October 2009, showed a loss of Kshs 4,389,960.

24. PW3 testified that the DCIO in Makueni was asked to investigate the matter and the human resources department was asked to institute disciplinary proceedings against the appellant. When a letter was sent to the appellant asking him to explain the loss, he wrote a letter dated 10th November 2009 to the Permanent Secretary, Treasury. In his letter, the appellant said he accepted that he drew for himself IOU to the tune of kshs, 3,804,931 which he was ready to repay.

25. PW4, Martin Mbuthi Kivulu was, at the time material to this case, working as a cashier in the Makueni District Treasury. The appellant was his supervisor as the District Accountant. PW4's testimony was that he would make payments to the appellant through imprest even though the appellant had not completed the process for issuance of imprest. He would also pay cash to the appellant through IOUs. He identified the various warrants and IOUs that he had paid to the appellant, who was both the applicant and the receiver. The warrants would have notes stating *'cashier pay and process later'*. The payments were not charged on vote, nor were they registered in the imprest register.

26. PW4 testified that he had made the payments to the appellant, even though they did not go through the entire process, because they were marked *'official duties'* and *'cashier pay and process later'*. The appellant had not specified the purpose of the amounts requested, indicating only that it was *'official'*. He also did not surrender the imprest. PW4 had personally paid Kshs 1,981,000 to the appellant on his instructions.

27. PW5, Francis Mwaura Kariuki, a Chief Accountant at the National Treasury, was posted to Makueni in November 2009 as the District Accountant. He reported to Makueni in December 2009 and was handed over the running of the Makueni District Treasury by the Deputy District Accountant, Mr Wathiru (PW7). Upon reporting on duty, he learnt of the misappropriation of funds by the appellant, who had by then disappeared from the station. PW5 had been requested by officers of the Ethics and Anti-Corruption Commission in 2012 to explain the procedure for taking imprest.

28. He explained the procedure in his evidence and produced a memo dated 28th March 2012 (P. exhibit 43). He confirmed the evidence of PW1, PW2, PW 3 and PW4 with respect to the application for and authorization of imprest. It was his testimony that the appellant did not account for the imprest he had taken. PW5 stated in cross examination that if imprest is paid without going through the process, the District Accountant is responsible because he should ask the cashier why he paid without the full process being followed.

29. Peter Ndambuki Matheka (PW6) was also a cashier at the District Treasury, Makueni. He worked under the appellant who was the District Accountant in 2008-2009. His testimony was that they knew the process to be followed in issuance of imprest and followed them for sometime after the appellant became the District Accountant. After a while however, the systems were abandoned and the appellant was not personally following them. The appellant would go to the cashier with notes or imprest warrants that had not gone through the process and insist that they be paid. The notes would not indicate the purpose of the money and the appellant would fill imprest warrants that instructed cashiers to pay and process later. The processing was, however, never done.

30. PW6 stated that the appellant was their boss and they did not have the power to tell him 'no' but paid all his requests. PW6 had worked for almost one year with the appellant, and he knew his handwriting. He identified payments that he had personally made to the appellant.

31. PW7, George Mucheru Wathiru was, at the material time, the Deputy District Accountant Makueni in which the appellant was the District Accountant. PW7 had realized that there was a loss of funds when working on an audit report of the District Treasury. PW7 also explained the process to be followed when applying for imprest. If it was the District Accountant who was applying for imprest, his application was supposed to be authorized by his Deputy in order to ensure that the imprest is accounted for, examined and that funds are available. There was loss of funds through cash imprest and IOUs that the appellant had awarded himself.

32. PW7 had prepared a loss report from summaries from cash books given to him by the cashiers which showed a loss of Kshs 4,393,457 and had given the report to the Directorate of Criminal Investigations Office (DCIO) Makueni. The losses had occurred between 15th October 2008 – 16th September 2009. At the time PW7 was preparing the loss report, the appellant had absconded from the office. There was an adjustment when PW7 did the report to show a loss of Kshs 4,389,960. PW7 identified the imprest warrants which the appellant had authorized for himself and received payment upon. The appellant had also written IOUs and obtained money from the cashiers. PW7 produced the loss report (p. exhibit 39) which showed the amounts taken by the appellant from the District Treasury.

33. PW8 was Kenneth Odhiambo Ayiulu, a Human Resources Officer working as the Acting Assistant Director, Human Resources and Development. His evidence was that the appellant was employed in the Public Service in 1992. He was dismissed on 16th September 2009 for gross misconduct. The letter of dismissal was dated 2nd July 2010. The appellants had written a letter dated 10th November 2009 addressed to the Permanent Secretary, Ministry of Finance. The appellant's letter was in reply to a *'show cause'* letter sent to the appellant. In his letter, the appellant had stated that he had advanced himself Kshs 3,804,931 in form of IOUs, and not Kshs 4,915,531 as had been indicated in the Ministry's show cause letter. The appellant had indicated that he had taken the money as he had an urgent matter to attend to and was ready to pay back the money. PW8 stated that there was no evidence that the appellant ever repaid the money.

35. PW9 Charles Mutwiwa Sole was a Clerical Officer in Makueni where he worked as a revenue clerk. He confirmed that he had received notes from the appellant requesting to be given money, which PW9 would accede to. The money had been taken by Martin Kivulu who would go to PW9 for the money with a note from the appellant.

35. PW3, Julius Musyimi Kilinda, was recalled at the request of the defence and cross examined. He stated that while the loss report indicated a loss of Kshs 4,389,960, the the IOUs by the appellant totalled Kshs 3,804,031. Though PW2, Julius Achoki, was also recalled at the insistence of the appellant, he was not cross-examined as the the defence Counsel left in the course of proceedings and the appellant did not cross examine the witness.

36. PW10, SSP John Muinde, a forensic document examiner, had examined various documents comprising imprest warrants and IOUs against the specimen signature of the appellant. He found the signatures on the documents to be indistinguishable from the specimen signature of the appellant, and his conclusion was that the documents were made by the same author.

37. Gideon Mokaya, PW11, was the investigating officer from the Ethics and Anti-Corruption Commission (EACC). He was assigned the investigation after it was forwarded from the CID headquarters to the EACC on 16th January 2012. He had retrieved the imprest warrants with which the applicant had applied for imprest (p. exhibit 4-29) and the IOUs (p. exhibit 30-36). He reiterated the evidence relating to the audit done by PW1 that revealed the cash overdrawn as Kshs 2,208,203.70 (p. exhibit 2) and the lost cash report (p.exhibit 39) done by George Wathiru indicating a loss of Kshs 4,389,960 which had been drawn by the appellant using the imprest warrants. The appellant had written to Treasury (p. exhibit 40) indicating that he had taken Kshs 3,804,931 which he promised to repay. The appellant was the applicant, authoriser and approver of the imprest warrants. PW11 had recommended that the appellant be charged with the offences.

38. When placed on his defence, the appellant gave an unsworn statement. He denied all the charges against him, stating that he did not acquire any public property, did not fail to comply with procedure, and was not the one who was posting the cashbook. He alleged that the 1st, 4th and 7th witnesses acted in malice.

39. In its judgment, the trial court found that the funds in question which the appellant was alleged to have acquired were public property. The court also found that the appellant acquired Kshs 3,804,931.00 which the appellant had acknowledged in his letter dated 10th November 2009 (exhibit 40) that he had advanced himself. The court also found that the acquisition of the funds was unlawful or fraudulent. The appellant had indicated in the imprest warrants *'official'* or for *'office use'*, without the purpose being indicated, and the warrants were issued and funds taken sometimes on consecutive days.

40. The court also found that the appellant did not follow the laid down procedure for applying for imprest. The appellant had avoided the imprest control section, the vote book control, and he willfully failed to follow procedure by directing the cashier to *'pay and process later'*. The trial court also found that the appellant was in abuse of office as he had used his office to arm twist his juniors to part with cash in breach of the laid down procedure in order to benefit himself with public funds.

Analysis and Determination

41. Having considered the evidence presented before the trial court as well as the appellant's defence which I have set out in brief above, I now turn to consider the three issues identified by the appellant in his written submissions, and the responses thereto by the State.

Whether the Prosecution proved its case beyond reasonable doubt.

42. I start with the third issue identified- the question whether the evidence presented before the trial court established the prosecution case to the required standard. The appellant submits that the prosecution failed to do this, contending that its case had several inconsistencies and contradictions. According to the appellant, he had been charged under count 1 with unlawfully acquiring public property, to wit, the sum of Kshs 3, 804,931.00/= from the Makueni District Accountant's office. He further submits that different figures emerged after a detailed analysis of the evidence presented. He notes that George Mucheru Wathiru (PW7) had stated that the amount lost was Kshs 4, 389, 960/=; the District Internal Auditor- Joshua Makanda (PW 1) had testified that the amount was Kshs 2,354,650/=, while Martin Kivulu (PW4) and Peter Ndambuki (PW6), the cashiers who are alleged to have been advancing the appellant funds, testified that the amount lost was Kshs 4,393,465/=.

43. The appellant submits that these discrepancies were not considered by the trial court. In his view, even if he had written a note acknowledging the amounts, it is trite law that an accused person's self-incriminatory statements are inadmissible in law.

44. In its response, the State submits that the evidence it presented was overwhelming and it proved the two counts that the appellant was convicted of. It notes that PW1, the District Internal Auditor, discovered the unlawful acquisition of the subject funds after carrying out an audit of cash management at the Makueni District Treasury. He had discovered the irregularities by examining the cash book, warrants and registers.

45. It is also its submission that the prosecution through PW1, PW5 and PW7 had adduced the evidence on the applicable financial procedures that govern public funds which the appellant failed to adhere to. Its submission is that these witnesses had a good understanding of financial regulations requirements and treasury circulars governing management of such advances within government. The prosecution had also produced a memo (p-exhibit 43) written by PW5, the Chief Accountant at the National Treasury, which gave details of the required procedure with respect to imprest.

46. Regarding the discrepancies on the amount of money unlawfully acquired by the appellant, the respondent submits that the trial court duly considered it and decided to hold the appellant to account for Kshs 3,804,931.00. The court had arrived at this figure after considering the appellant's hand written letter dated 10th November 2009 (p-exhibit 40) The appellant had, in this letter, admitted that he had advanced himself Kshs 3,804,931.00. The respondent notes that the appellant had neither disputed writing the letter nor objected to its production in court. He was not, therefore, prejudiced in any way by the discrepancies in the amount he acquired unlawfully.

47. I have considered the respective submissions of the parties on this point. In its decision, the trial court stated as follows with respect to the discrepancies in the amounts:

> **"As to the extent of the amount acquired by the accused; I agree with the submissions of the defence that the testimonies of the prosecution witnesses varied. Whereas the District Auditor, PW 1, Joshua Wambua Makada put the sum personally being held by accused to be Kenya shillings 2,334,100 as out of the entire sum of Kshs. 5, 251, 600 overdrawn for cashbook per P. exhibit 3 as at 30/10/2009 which was an increase from Kshs. 5, 421, 443.20 which had been found overdrawn from the cash book as per his earlier report of 30/6/2009 per (P. Exhibit 2). On the other hand, the loss of cash report compiled by the two cashiers Peter Ndambuki Matheka (PW6) and Martin Kivulu (PW4) per P. Exhibit 42 quoted a sum of Kshs. 4,393,465 while the subsequent one compiled by the Deputy District Accountant (PW 7), George Mucheru Wathiru was Kshs. 4, 389,960/-(see P. exhibit 39).**
>
> **It was therefore accused advocate's submission that owing to those discrepancies, the exact amount alleged to have been acquired could not be proved beyond reasonable doubt.**
>
> **I would have been persuaded by this submission by the Advocate for the accused were it not for the letter by the accused to the Permanent Secretary (P. Exhibit 40). In the said hand written letter dated 10th of November 2009, referenced "GROSS MISCONDUCT", the accused states in paragraph 1 & 2 of the letter as follows:**
>
> > **"Your letter Ref. No. TEP: 1992051916(9) dated 13th October, 2009 on above subject matter refers.**
> >
> > **I wish to respond as follows:**

I accept that on various dates I advanced myself IOUs to the tune of Kshs.3, 804,931.20 and not 4,915,531.00 as stated in your letter. These I took for urgent pressing matters and I am ready to repay the same as and when I raise the same."

A reading of the accused above letter clearly reveals that at the time the disciplinary proceedings were being undertaken, the accused only disputes the higher amount of cash advances of which the Ministry was seeking his explanation but he readily acknowledges advancing himself Kenya shillings 3, 804,931.20/-. That is the amount of money captured in the charge sheet. To be fair to the accused, when he acknowledged this amount, there is no further evidence that the Ministry insisted on pursuing the higher figure that he disputed. Consequently, despite the prosecution's attempt to prove other amounts, those attempts must fail. I can only hold the accused to account to the extent Kenya shillings 3,804,931.00/- in the circumstances."

48. The trial court further observed as follows with respect to the appellant's letter:

"The accused did not dispute writing the letter nor did he object to its production when it was introduced in evidence by the prosecution. However, his advocate during cross-examination attempted to downplay the impact of the letter by asking PW 9, Kenneth Adhiambo Ayiulu, Acting Assistant Human Resources Director who offered it in evidence if the accused was cautioned that it could be used against him in criminal proceedings. In essence, Counsel was alluding to the fact that the letter should have been treated as a confession.

That cannot be a correct approach. To begin with no objection to its production was raised. No contest was made by accused as to its contents. Thirdly, at the point of writing the letter, the accused had not been formally charged with any criminal offence. In fact the letter by the employer requesting criminal investigation against the accused to be commenced was written about two years later, to wit 24/8/2011 (P. Exhibit 41). The employer therefore had no reason to issue such caution for it seems he was at that time relating with the accused as an employee in normal course of business of employee/employer relations. The fact that the accused incriminated himself in the letter does not make it a confession in the legal sense as he was not admitting to any criminal offence. He had not been formally charged with any crime. I would treat the letter as an important circumstantial piece of evidence to be considered alongside other evidence pursuant to section 11 (b) of Evidence Act. It is a relevant fact which by itself or in connection with other facts makes existence or non-existence of the fact in issue or relevant fact highly probable or improbable. In the present case, I find the letter by the accused important in settling the issue of the actual amount of cash advances he took."

49. I believe I need not say more with respect to the discrepancies in the amounts alleged to have been misappropriated by the appellant. The trial court, in very clear language, explored the various arguments raised with regard to the amounts and the letter from the appellant and reached a well-reasoned and lucid conclusion. It is my finding therefore that the prosecution did, as found by the trial court, prove its case against the appellant beyond reasonable doubt. No prejudice whatsoever was occasioned to the appellant by the fact that there were discrepancies in the amounts that he is alleged to have misappropriated.

50. I now turn to consider the appellant's arguments with respect to the sentence imposed on him.

Whether the Sentences should run concurrently

51. I will consider this issue alongside the second issue raised by the appellant, which is whether the sentence imposed on him should have been lenient given that he is a first offender and of advanced age.

52. The appellant submits that the sentences imposed by the trial court ought to run concurrently and not consecutively. He cites section 7 (1) of the Criminal Procedure Code (CPC) which empowers a magistrate's court to pass any sentence authorized by law. He submits, however, that in passing such a sentence, where the offences are so connected together by proximity of time, criminality, criminal intent and continuity of action and are of the same character, the sentences imposed ought to run concurrently and not consecutively. The appellant further cites section 14 of the CPC which provides for the circumstances in which a court can direct sentences to run concurrently or consecutively.

53. The appellant relies on the case of **Philip Thiga Ngamenya v Republic, High Court Criminal Appeal No. 23 of 2017** in which the court set aside the consecutive sentence imposed upon the appellant and substituted it for a concurrent sentence. He submits that in arriving at that decision, the appellate court considered that it was clear that the series of offences which the appellant faced were committed at the same time in a single transaction. Its view was that the trial court ought to have imposed a concurrent sentence.

54. The appellant further cites the case of **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97** in which the then Court of Appeal for Eastern Africa stated that where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, it is still good practice to impose concurrent sentences. He further relies on the Court of Appeal decision in **Peter Mbugua Kabui v Republic [2016] eKLR** in which the court held that:

"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment……"

55. The appellant submits that in **John Faustin Kinyua v Republic (2020) eKLR** where the appellant had been charged on three counts under ACECA, he was found guilty on all the three counts and sentenced to three years' imprisonment with the sentences to concurrently, and the conviction and sentence were upheld on appeal.

56. Finally, the appellant relies on the case of **Vincent Ngetich Kipkemboi v Republic (2017) eKLR** in which the court stated:

"…..I have also considered the Sentencing Policy Guidelines which contain specific provisions on whether a court should impose consecutive or concurrent sentences. The Guidelines provide as follows:

> **7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.**
>
> **7.14 The discretion to impose concurrent or consecutive sentences lies in the court.**

In this case, the offences charged in the two counts were committed in the same transaction, though against different complainants but at around the same time as the applicant was attempting to escape from the scene of his first offence. I am satisfied that in the circumstances, the trial court erred in imposing consecutive sentences. Accordingly, I hereby set aside the consecutive sentences and substitute the same with an order that the sentences shall run concurrently…."

57. It is also the appellant's submission that the sentence imposed by the trial court ought to have been lenient as he is a first offender and of an advancing age. He relies on the **Sentencing Policy Guidelines** which he states provides that one of the factors to be considered in sentencing is the fact that an accused person is a first offender. The appellant cites the case of **Millicent Wandia Murage v Republic, High Court Criminal AppealNno. 65 of 2017** in which the court reversed a sentence imposed by the trial court on the basis that it had failed to take into account the fact that the appellant was a first offender and held that:

"Sentencing is the discretion of the trial magistrate. As a general principle, imprisonment should not be imposed on a first offender except where the offence is particularly grave, aggravated or widespread in area……."

58. The appellant also cites the case of **R v Sher Showky 1912 CCA 28 T.L.R. 364** to submit that an appellate court will overturn a sentence if it is excessive, which he submits is the case with regard to the sentence imposed on him.

59. In its submissions in reply, the respondent submits that the sentence imposed on the appellant was very fair and within the law. It was in accordance with section 48 of ACECA which provided for a fine not exceeding Kshs one million or a term of imprisonment not exceeding ten years or both. That the section also provided for a mandatory fine when the accused obtained a quantifiable benefit.

60. The respondent submits that the sentence was fair as the appellant was given the option of a fine, and the court had also considered his mitigation and the fact that he was a first offender. It is its case further that the sentence was not excessive as the fine imposed on each count was very reasonable when the amount that the appellant had advanced himself unlawfully is considered.

61. The respondent cites the provisions of the Sentencing Policy Guidelines, 2016 which provide the objectives that a sentence imposed upon conviction must meet. It submits that since this is a corruption case and corruption is a vice which has had a very negative impact on our society, the sentence should meet the objectives of retribution, deterrence, rehabilitation, restorative justice and denunciation set out in the Sentencing Policy Guidelines.. In its view, the appellant deserves both a deterrent and retributive sentence as he had been found guilty of advancing himself public funds. The respondent notes that the court had, in sentencing the appellant, observed that he had acquired the public resources that he was supposed to protect with flagrant impunity.

62. The respondent further submits that the sentences against the appellant should run consecutively. It notes that the mandatory fine under section 48 is additional to the sentence which should be meted out on an accused person. Since it is an additional fine, the default sentence should run consecutively. It is its submission further that where there is an option of a fine in various counts, it is ideal that the sentences run consecutively.

63. The respondent submits that section 48 of ACECA provides for a term of imprisonment of upto ten years in each count so the appellant's default sentence which is six year cumulatively is within the law. It is also in compliance with section 14(3)(a) of the CPC which states that consecutive sentences of imprisonment should not be more than fourteen years in the aggregate or twice the amount of imprisonment which the court is competent to impose in exercise of its jurisdiction. The respondent cites the decision in **BMN v Republic (2014)eKLR** in which the court held that:

"If the accused commits separate and distinct offences in different criminal transactions, even though the charges are tried in one trial, it is not illegal to mete out a consecutive term of imprisonment."

64. The respondent further submits that consecutive sentences are provided for under the Sentencing Policy Guidelines, 2016 in paragraphs 7.13 and 7.14, which give the court the discretion to impose concurrent or consecutive sentences.

65. I have considered the submissions of the parties on these two issues. I note that the trial court found, a finding that I agree with, that the appellant had misappropriated public funds amounting to Kshs 3,804,931.00. He did this when he was the District Accountant in Makueni, flouting all the financial procedures relating to taking of imprest and issuing to himself imprest warrants which he applied for, authorized and received. He had also taken funds on the basis of IOUs, a practice that was patently unlawful and which he used by exerting his authority over his subordinates, as was so eloquently explained by PW6.

66. In my view, the sentences imposed on the appellant under the provisions of ACECA were neither harsh nor excessive. In addition, I am satisfied that the trial court properly exercised its discretion in directing that in default of payment of the fines, the sentences should run consecutively. The appellant, charged with the responsibility of ensuring that public funds were safeguarded and utilized in accordance with the law on financial management of public resources, basically converted the Makueni District Treasury into a personal ATM from which he could draw at will, without any regard to the public that paid the money into the District Treasury and depended on service delivery from

these funds. In the circumstances of this case, it is my finding and I so hold that the trial court properly directed that the sentences should run consecutively.

67. In light of my findings on the three issues raised by the appellant in this matter, I find that his appeal has no merit. It is hereby dismissed and the conviction and sentence upheld.

Dated Signed and Delivered at Nairobi this 15th day of October 2020

MUMBI NGUGI

JUDGE