



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI.

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ANTI-CORRUPTION APPEAL NO 32 OF 2019

WILLIAM ASHAEL OSORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Milimani Chief Magistrate's Court Anti-Corruption Case No. 40 of 2018 (Hon. T.W. Murigi (CM) dated 12th November, 2019)

JUDGMENT

1. The appellant was charged with two offences in Anti-Corruption Court Criminal Case No. 40 of 2018. At count I, he was charged with the offence of abuse of office contrary to section 101 (1) as read with section 102A of the Penal Code. The particulars of the offence were that between 1st September 2013 and 25th April 2018 in Nairobi City within Nairobi County, being a person employed in the public service to wit a Senior Principal Administrative Officer in the Office of the Director of Public Prosecutions (ODPP), in abuse of the said office, arbitrarily directed the use of fuel card Number 1122003953 for the purchase of fuel, lubricants and pit stop services valued at Kshs.7,902,250.28, an act which was prejudicial to the office of the DPP.

2. At count II, the appellant was charged with the offence of stealing by a person employed in the public service contrary to section 280 of the Penal Code. The particulars of the offence were that between 1st September 2013 and 25th April 2018, within the Republic of Kenya, jointly with others not before court, being a person employed in the public service to wit a Senior Principal Administrative Officer in the Office of the DPP, he stole fuel lubricants and pit stop services valued at Kshs. 7,902,250.28, the property of the office of the DPP which came into his possession by virtue of his employment.

3. The appellant pleaded not guilty to the offences and after a full trial, he was convicted in count I and sentenced to pay a fine of Kshs. 600,000/= in default four (4) years imprisonment. He was acquitted of the charge under count II under section 215 of the Criminal Procedure Code.

4. Dissatisfied with both his conviction and sentence, he has filed his Petition of Appeal dated 25th November 2019 in which he raises twelve (12) grounds of appeal, which essentially relate to the nature of the evidence adduced before the trial court. He argues, first, that the Learned Trial Magistrate erred in law when she held that the appellant had custody of the fuel card at issue since 2013 when there was no evidence to support such finding. The court had also erred in placing reliance on clearly inadmissible secondary evidence of incompetent witnesses to conclude that the appellant irregularly obtained the said card, a finding he contends caused a miscarriage of justice. In his third ground, he contends that the trial court erred in law in finding that he had failed to record usage of the card in a register to the prejudice of the ODPP. His contention on this ground is that there was no such obligation or duty placed on him.

5. The appellant charges the trial court with a failure to properly appraise the evidence before it, and by reason of such failure, reached a wrong conclusion and dismissed his defence. The court also failed to take into consideration that the prosecution case had material inconsistencies which were consistent with his innocence.

6. The appellant further contends that the trial court failed to warn itself that the evidence of PW10 comprised secondary evidence that was unsatisfactory and unsafe to maintain a conviction on such a serious charge. It had also failed to resolve in his favour any doubts regarding entries not made in the fuel register by PW5 and PW6 regarding the said fuel card. The appellant further argues that the court erred in law in failing to consider the contradictions in the evidence of PW6 that were material and went to the root of whether the fuel card was obtained by the appellant since 1st September, 2013 or July 2015, which failure occasioned a miscarriage of justice.

7. The court had also erred in law in making conclusions without taking into account material considerations or by taking into account immaterial considerations. The appellant argues that the apparent contradictions in the prosecution case that the card was used to perform some official functions while for others it was abnormal was never resolved satisfactorily and should have been resolved in his favour. It is his contention that the trial court erred in law in arriving at a conviction based on conjectures and surmises, and against the weight of the evidence. The court had also erred in law in disregarding evidence in his favour, and such failure occasioned a miscarriage of justice. The appellant asks the court to allow his appeal and quash his conviction and sentence.

8. This is a first appeal. Accordingly, I am required to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I must bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing- see **Okeno v Republic (1972) E.A. 32**.

9. The prosecution evidence was presented through 14 witnesses, the majority drawn from the office of the Director of Public Prosecutions where the appellant was an Under Secretary in charge of transport and administration. According to PW1, Paul Kago Mbugua, a Chief Internal Auditor at the ODPP, he had proposed preparation of a work plan for the period 1st July 2016 to 30th June 2017. One of the activities to be implemented under the work plan was a transport and fuel management audit. After the audit, a report on transport and fuel management for the period June 2016 to March 2017 addressed to the DPP was prepared. The report (exhibit 1A and 1B) noted some issues in the management of transport and fuel.

10. PW1 had spoken to the appellant and had requested for work tickets from January 2016 to March 2017, fuel statements from the fuelling stations and other documents relating to the transport audit. In the final report, it had been noted that there were some unauthorized journeys by ODPP staff and vehicles and different fuel brands consumed by the same vehicle. It further noted that there were supposed to be two fuel cards, specific and general, for use in the ODPP. A specific card was supposed to be used by a particular vehicle while a general card was supposed to be used by any motor vehicle in the pool. The cards were issued by fuel stations on the instructions of the ODPP, whose vehicle were supposed to fuel at National Oil Corporation (NOC) petrol stations.

11. According to PW1, the audit report also revealed fuel intake exceeding tank capacity, while there was double fuel consumption within seconds or minutes by the same vehicle. The audit revealed missing work tickets and it recommended that the general fuel card be done away with as accounting for it was not possible. The report was given to the then DPP, Keriako Tobiko, who directed the Secretary, Public Prosecutions, to see that the issues raised in the report were addressed within two weeks.

12. After the new DPP, Noordin Haji, took office and all the reports done prior to his arrival were submitted to him, he inquired whether the recommendations in the audit report had been implemented, and whether the general fuel card was still in use. It transpired that one of the general cards was lost, and that one general card was in use. PW1 had written to Mr Kimuyu (PW2) a Deputy Director, Central Facilitation, indicating that in the audit report, the audit committee had come across two cards and had been informed that one card was lost. From the statements from NOC that were received by the ODPP, there were three general cards, not two. One card that was not in the report had been in use from 2013-2018. It emerged in cross examination that card number 1122003953 was not captured in the audit report. PW1 did not have access to the card or to its statements.

13. PW2, Kennedy Katanzu Kimuyu, a Deputy Director and Head of Central Facilitation Services at the ODPP had been asked by the DPP about the implementation of the transport and fuel management report. He had been asked to appoint a team to come up with recommendations. The team, appointed by letter dated 19th April 2018, comprised 5 members. It had the objective of receiving the audit report, preparing a comprehensive report within 10 days, identifying areas of misconduct or recklessness, identifying culpable officers and the level of action to be taken.

14. PW2 had called the appellant and Mary Asava (PW3) to confirm by statements how much fuel the ODPP had remaining. From the statements obtained from NOC that he was given by Mary Asava, PW2 saw that general card number 1122006698 (hereafter 6698) had a total consumption of Kshs 280,696.60 while card number 11220003953 (hereafter 3953) had a consumption of Kshs 1,053,266.94. The consumption on card number 3953 raised an alarm as average fuel consumption was Kshs 400,000 per month as the consumption indicated was for January when there were not too many activities at the ODPP. When asked about the whereabouts of the two fuel cards, Mary Asava said she was aware of only one card, 6698 which she was operating. She was not aware of the other card.

15. PW2 stated that they looked at the statement of account and turnover for card number 3953 for 1st July 2017- 30th June 2018 and were struck at the rate at which the reloading of the card was being done, the rate of consumption and the station where the fuel was being consumed. Vehicles were being fuelled at the Ngara NOC petrol station while ODPP vehicles normally fuelled at Times Towers NOC. Further, that one does not expect many activities on 2nd January 2018 but fuelling was done on the 3953 card on that day at rapid intervals. PW2 noted that 127.7 litres were purchased at 6.51 a.m., PW2 observing that such consumption was for a big vehicle, either a bus or lorry. There was a refuelling on the card after every minute: at 6.52 a.m., 108 litres was discharged; 6.53 a.m. 57 litres. After a few days the cash on the card was finished. There was also a withdrawal of Kshs 100,000, and the consumption trend continued till it reached over Kshs 1 million.

16. It was PW2's evidence that no-one at the ODPP seemed to know about card number 3953. He had called the appellant to inquire about the card and at first the appellant said he was not aware about the card. Later, the appellant surrendered card number 3953 (p. exhibit 9) to PW2, while Mary Asava (PW3) took card number 6698 (p. exhibit 7) to PW2. He also inquired from NOC and they confirmed that card number 3953 had been issued in 2013 while card number 6698 was issued in 2016. NOC also sent PW2 a statement for card number 3953 from 13th September 2013 which showed total consumption of Kshs 7,902,250.28. He handed the information relating to the cards to the team appointed by the DPP and the team made a recommendation that the matter be handed over to the Directorate of Criminal Investigations (DCI) for investigations. After carrying out its investigations, the DCI recommended the arrest and prosecution of the appellant.

17. PW2 stated in cross-examination that in the period of the year between January-March, there were not many activities at the ODPP to warrant the usage of fuel. He stated further that the issue of tracking devices had come up at a meeting between PW2, the appellant and the

DPP. The DPP had sought to know why a tracking system had been installed without his knowledge, and he had instructed that the system be removed, and that the DPP could not trust the appellant with his vehicle.

18. PW2 was not aware that the appellant had not applied for the card, which may have been applied for by the ODPP. He conceded that he had used an official vehicle to take his child to school in Kapsabet. The ODPP had also hired two buses from the National Youth Service at the close of 2017 for a conference at Kenya School of Government. PW2 did not know whether card number 3953 had been used to fuel the buses. He stated in re-examination that the handover report did not talk of card number 3953, though it indicated that there were two general cards. Card No 3953 had been handed over to him by the appellant.

19. Mary Mudemba Asava (PW3), a Principal Administration Officer at the ODPP, had the duties of, *inter alia*, coordinating transport and transport management at the ODPP. Her evidence was that vehicles at the ODPP headquarters were fuelled at NOC petrol stations, that the fuel is prepaid, and that each vehicle was issued with a fuel card. PW3 explained the process of obtaining fuel and approval for the payment of the fuel. When the cards were depleted, PW3 and her colleagues would write an email to NOC requesting for top up. All the vehicles at the ODPP headquarters would fuel at the Haile Selassie NOC petrol station and would be issued with a receipt which would be brought to the office. The vehicle fuelled, the receipt number and how much in terms of litres has been fuelled would be entered in the fuel register. The purpose of the fuel register was to help in monitoring fuel usage and curb misuse.

20. According to PW3, the ODPP used specific cards and general cards which could be used when the specific cards were depleted. The cards were placed under the custody of the administration office where PW3, Kagwe (PW6) and Muhanji (PW5) were the main custodians of the cards. They were allocated duties by the appellant, who was their supervisor.

21. In April, 2018, PW3 had done a brief, at the request of PW2, regarding the use of fuel as there had been concerns about misuse of fuel. She had requested for a statement from NOC and in discussing the brief with PW2, they had noted from the statement that there was a card, which was the highest consumer of fuel that was not accounted for. This was card number 3953. PW3 had surrendered card number 6698. PW2 had noted on the memo she sent to him that the appellant had surrendered card number 3953.

22. PW2 had requested her to get further details on card number 3953. She did another brief for the period July 2017- April 2018, giving a breakdown of fuel consumption for the period. The card was still in use and had the highest consumption. PW2 had sought to know who the custodian of the card was. Neither PW3 nor her colleague, Kagwe and Muhanji, knew its whereabouts. Through a letter dated 20th April 2018 from PW2 to NOC, the ODPP inquired whether the card had been rightly placed in the ODPP statement, to whom and when it was issued, and whether it was still active.

23. The response from NOC was that card number 3953 was issued on 13th September 2013 and that requests for its top up were being made by the appellant. On the instructions of PW2, PW3 requested for the card to be suspended because of misuse, and both card numbers 3953 and 6698 were blocked. A statement in respect of card number 3953 from inception to the date it was blocked showed that it had a consumption of Kshs 7,902,250.28. Her evidence in cross examination was that she had no reason not to believe that the appellant had applied for card number 3953. She, however, confirmed that his name was not on the application form for the card, which had the name of Mr Muroki as the contact person. She did not know of the existence of the card. She confirmed that she had used an office vehicle without authority.

24. James Mungai Warui (PW4), a Senior Assistant Director of Public Prosecution, was appointed by the DPP by letter dated 19th April, 2018 as Chairman of the 5 member team set up to analyse a report prepared by internal auditors which had shown certain discrepancies in the use of fuel by ODPP vehicles and other vehicles leased by the Treasury. He confirmed the evidence of PW1 regarding the duties assigned to the team that included the identification of any culpable officers and recommendations of action to be taken.

25. Their analysis of the internal auditor's report revealed the glaring discrepancies in the usage of fuel. He stated by way of illustration that a vehicle with a capacity of 50 litres would take 60 or 65 litres; a vehicle would be fuelled at 11.36 a.m. and refuelled again at 11.40 a.m. PW4's team had the fuel printout for one card. It was not satisfied with the explanation given in the audit report by some drivers that they would exceed capacity. PW4's team recommended to the DPP that he should forward the matter to the DCI as it had noted some acts that amounted to fraud in the usage of the general and specific fuel cards.

26. The team had noted that they did not have a print out for card number 3953. Upon inquiry, they were informed that it was in the possession of the appellant. They were supplied with material on the card by PW2 by a letter dated 3rd May 2018. They noted that on 2nd January 2018, the card was used several times for fuelling at NOC Ngara petrol station. They were informed that the office of the DPP did not have a vehicle with a capacity of 127 litres. There was also a withdrawal of Kshs 100,000 and his team could not understand why the card was withdrawing money at Ngara petrol station. They recommended that the matter be referred to the DCI for investigation.

27. PW4 stated in cross-examination that the appellant was in charge of the general card that was being used to fuel at Ngara NOC petrol station. They had been informed in the memo from PW2 that card number 3953 was in the possession of the appellant. Card number 6698 was in the possession of PW3, Kagwe or Muhanji.

28. Like PW3, Muhanji Ambani (PW5), was a Senior Administrative Officer at the ODPP, working under the appellant. He was in charge of transport services and testified about the number of vehicles in use by the ODPP, some of which were hired by the National Treasury. He confirmed that ODPP vehicles were fuelled at NOC and the drivers would take the receipt and work tickets to the office, where the details were entered in a fuel register. He confirmed also that they had specific and general cards. General card number 6698 was accessible to the appellant, PW3, Kagwe and PW5. They had been using this general card number 6698 until 2018 when they got information that there was another general card in use. PW5 knew nothing of general card number 3953, the only card he had ever interacted with being 6698.

29. PW5 conceded in cross examination that there were certain vehicle services obtained by the ODPP that were not in the fuel register, including a battery for a new vehicle in Malindi in the purchase of which card number 3953 was used on 9th January 2018 and pit stop

services for another vehicle for Kshs 12,365 which was also not in the register. The general card was meant for fuel and pit stop services. He did not know that one can get cash upon presentation of the general card. He also conceded that he had made an unauthorized journey by deviating to Eldoret while on an official journey to Baringo. He also confirmed that it was government policy to install tracking devices in its vehicles. PW5 had given instructions to remove a tracking device for GKB 184E Toyota Prado. He did not know whether the appellant had given instructions for installation of a tracking device on the vehicle. He stated in re-examination that he came to learn of card number 3953 when he was summoned to the DCI.

30. Danson Muchoki Kagwe (PW6), a Chief Clerical Officer at the ODPP, worked in administration with the appellant, PW3, and PW5. He had joined the ODPP in 2012 when the Director of Administration was a Mr. Nduati and his assistant Mr. Bett. The appellant had joined the ODPP as the in-charge of transport after Bett and Muroki left. PW6's duties related to receiving receipts from drivers for top ups and repairs and following up with payments processing for various garages. He would also allocate assignment to drivers and deal with fuel cards which were issued by NOC. Where a specific card for a vehicle did not have sufficient funds, payment would be made from the general card. The card that they used was card number 6698.

31. He explained the process of fuelling at the petrol station. The driver would give the card to the petrol station attendant and it would be fed into the system and a print out of how much fuel is remaining is given. After fuelling, the closing balance is shown, which the drivers would take to the office to be recorded in the fuel register. PW6 produced the fuel register which was in respect of card number 6698. Fuelling had been done at the Times Tower Haile Selassie NOC petrol station. The application for NOC fuel cards had been done when Mr. Muroki was the Assistant Secretary in charge of transport.

32. According to PW6, hired vehicles were issued Total (K) fuel cars of 450 litres per month. PW6 had learnt from PW3 (Asava) in April 2018 that there was another fuel card in use. He learnt that this card, 3953, was under the appellant. In cross-examination, he noted that from an internal memo dated 11th April 2014 (defence exhibit 8) a handing over/taking over report stated that there were 25 specific cards and 2 general cards, and that the cards referred to in the memo were card numbers 6698 and 3953. He had been informed by PW3 about card number 3953, which was unknown to him. The appellant had not given them any statements with respect to the usage of card number 3953. He also confirmed that certain pit stop services on card number 3953 were not captured in the fuel register.

33. Mark Kibet Kimutai (PW7) a Senior Economist at ODPP, was a member of the team appointed by the DPP to review the internal audit report on transport and fuel management. The team had received additional information relating to the use of card numbers 6698 and 3953. The cards were intended to fuel leased vehicle whenever they exhausted their allocation of 450 litres per month and ODPP vehicles whenever their specific cards are depleted and top up requests had not been effected. The cards could also be used for minor repairs of vehicles and for fuelling vehicles hired from other agencies when there was an activity.

34. PW7's evidence was that only card number 6698 was serving the above purposes. It was managed by the administration office collectively. Card number 3953 was said to be in the possession of the appellant, and other officers were not aware of its existence. PW7 confirmed the evidence of PW4 with regard to the anomalies noted on the use of card number 3953 and the team's recommendation that investigations should be undertaken by the DCI.

35. Joshua Amangu Ochungu (PW8), a driver at ODPP, testified with regard to the fuelling of vehicles. He would fuel the vehicle he was using at NOC, Haile Selassie. When fuel was exhausted, he would call PW6, PW5 or the appellant and he would get a note to take to the petrol station, or a call would be made to the petrol station. He had heard about the general card which was said to be with the appellant. He had never fuelled at any station other than Haile Selassie. He was driving one of the vehicles leased by the DPP, which were Peugeots which had been allocated 450 litres per month by Treasury. If their fuel was exhausted, they would ask the transport officer, the appellant, PW3, PW5 and PW6 and they would be directed to NOC. At the petrol station, he would talk to the supervisor who would write an invoice which would then be taken to the office and recorded in a counter book in the transport office. At Total petrol stations, they would use the fuel card and would be issued with receipts which they would take back to the office. The details would be recoded in a book.

36. PW9 Andrew Murunga Ringera was working at the National Oil Corporation (K) as an Assistant Manager, Credit Control, at the material time. His duties were to open customer accounts upon approval and receipt customer accounts payments upon confirmation that payment had been deposited in the NOC account. In August 2018, he was requested to provide a statement giving the account details and schedule of payments made to NOC by the office of the ODPP. From 5th September 2013 to 3rd July 2018, NOC had received Kshs 33,917,000. In cross-examination, he stated that he did not know the appellant, nor had he processed the ODPP account. The fuel card was not operated as a cash card nor was he aware that it could be presented at a fuel station and one obtain cash.

37. PW10, Mohammed Abdul Raqman Mohammed, was the Fuel Card Manager at NOC and was in charge of fuel card activities. His department had received an inquiry from DCI on information relating to transactions with the ODPP. He testified with regard to the issuance of card number 3953 in 2013, with Moses Muroki as the contact person and Danson Kagwe (PW6) as the second contact person. Card number 3953 and 6698 were issued in 2013 and 2016 respectively. Card number 6698 was a replacement of a card that was a replacement of card number 5216, a general card created on 28th July 2014 with the appellant as the contact person. Card No 3953 was issued on 13th September 2013 and stopped on 23rd April 2018. The contact person for the card was the appellant. The statement for card number 6698 from 1st April 2014 to 29th August 2018 showed consumption of Kshs 2,390,672.50. The consumption for card number 3953 for the period 1st September 2013 to 29th August 2018 was Kshs 7,902,250.28. The two cards had been blocked by the time Mohamed joined the NOC card centre in July 2018.

38. PW11, Joshua Kiogora, was the station manager at NOC Ngara petrol station responsible for supervision and co-ordination of services at the station. He had been asked to give information regarding card number 3953. He noted a transaction on 31st December 2013 in which the card drew fuel amounting to 462 litres. He confirmed that there had been fuel consumption by the ODPP on the said card on 2nd January 2018 of Khss 11,800,502.2 litres for Kshs 50,000 and 572 litres for Kshs 6000. On 4th January 2018, there was consumption on the card of Kshs 11,320 for 122 litres. There was also consumption on 8th, 15th and 22nd January 2018. The card that was recorded in the transactions was a general card.

39. Maurice Koome (PW12), a Manager at Times Tower petrol station, an agent of NOC, noted that customers used specific cards for specified vehicles and general cards for any vehicles as it does not indicate the registration number of the vehicle. He confirmed that card number 3953 and 6698 were general cards. The station had offered fuel and pit stop services to the ODPP.

40. The evidence of Hilda Gatwiri Kaaria (PW13), a Director, Supply Chain Management at the ODPP, was that fuel at the ODPP was obtained from NOC petrol stations using fuel cards.

41. The investigating officer, No 70649 PC Daniel Gathiare Kairu, testified that the DCI had received a letter from the ODPP to conduct investigations relating to fuel management at the ODPP. The DCI had written to NOC requesting for information on fuel card issuance to the ODPP, money allocated to the cards, list of vehicles fuelled, amount of money allocated to the cards, number of litres allocated to each card, number of litres drawn from each card and the fuel stations at which the fuel was drawn. The DCI further sought information from NOC on card number 3953 and 6698. DCI established that card number 3953 had been issued by NOC, had been drawing fuel, and the contact person was the appellant. The card had been received by PW2 from the appellant. From the date of issuance to the date it was blocked on 23rd April 2018, the card had consumed fuel of over Kshs 7,902,250.28.

42. When placed on his defence, the appellant elected to give an unsworn statement in which he denied the charges against him. He stated that it was Mr. Moses Muroki who had applied for the fuel cards, and the ODPP could fuel at NOC stations anywhere, not just Times Tower. The appellant denied using the card to obtain pit stop services for vehicles other than ODPP vehicles. He had personally taken charge of card number 3953 around July 2015, and it was drivers and officers who misused the card, noting that PW2 and PW3 had admitted using ODPP vehicles for personal journeys.

43. According to the appellant, he had been charged because he had authorized the installation of car track devices on the DPP's vehicle, not because he stole fuel or abused his office. He also alleged that PW2 and PW3 were trying to fix him.

The Submissions

44. The parties filed written submissions in support of their respective positions on the appeal.

45. In his submissions, the appellant argues that there was no corroboration of the evidence adduced against him by the prosecution. He cites the decision in **Dusara v. Rep. (1981) KLR 139**, where a conviction on a charge of corruption was quashed and the sentence set aside. It is his submission that the court held in that case that it is desirable that there should be corroboration in corruption cases, though there is no rule of law requiring such corroboration. He contends that uncorroborated evidence supporting a corruption charge is unreliable as it is hearsay and therefore inadmissible, and it is not sufficient to sustain a conviction. He also cites **Clynes (1960) 44 Frim, App. R 158, 161** in further elaboration of the argument on the need for corroboration.

46. In further submission on the question of corroboration, the appellant argues that there was no corroboration whatsoever of the evidence of Mr. Mohammed of NOC (PW10) that the appellant was the contact person for card No. 3953 since 1st September 2013. He contends that Ms. Asava (PW3) and Kimuyu (PW2) could not corroborate the evidence of PW10 as they joined the ODPP at the end of 2015 and 2013 respectively. It is his submission further that one Margaret of NOC, who wrote the email relied on by PW 10, was never called as a prosecution witness. The appellant argues that no-one knows where the said Margaret got the information that the accused was the initial contact person for card 3953 since 1st September, 2013.

47. The appellant submits that PW6 confirmed that card number 3953 was obtained by Moses Muroki in September, 2013, and PW6 received it from the said Moses Muroki in mid-April, 2014 when Muroki left the ODPP on transfer. He therefore submits that the trial court was wrong to assume that since 1st September 2013, the appellant had the 'unauthorized possession' of card number 3953 and 'abused' its usage. According to the appellant, there is clear uncontroverted evidence that after Moses Muroki left ODPP in mid-April 2014, one Mr. Bett took over his duties in transport matters. The said Bett left in July 2015 when he gave the card number 3953 to the appellant.

48. The appellant notes that all the prosecution witnesses, notably PW2, PW5, PW6, PW8, PW9, PW10, PW11 and PW12, admitted reluctantly that the said card No. 3953 was always used to fuel ODPP vehicles. He submitted, however, that PW6 had expressly admitted, when confronted with the fact, to fuelling National Youth Service hired vehicles with the said card in April, 2014 for use during an ODPP convention at Kenya School of Government. His submission was that if the use of the card was abuse of office, PW6 should have been charged since he is the one who used the card at the Ngara NOC Service Station on 14th -20th April 2014.

49. The appellant also faults the trial court for accepting the evidence of the investigating officer, Daniel G Kairu (PW14), that the appellant should bear the blame for all the shortcomings in the transport section in ODPP. He noted that PW6 allegedly had duties to record usage of cards in the fuel register, but he failed to give reasons for his failure to record consumption of fuel using card number 3953 between 13th - 20th April 2014 for the National Youth Service vehicles. PW5, Muhangi, could also not give any reason why he failed to record purchase of a battery for vehicle GKA 782M in February 2018 which was obtained using card number 3953 in the company of the appellant. The appellant alleges that PW5 had feigned ignorance about this card, even after admitting that he had obtained a battery for GKA782M using the said card.

50. The appellant further submits that although PW5 dispatched the battery by courier from Nairobi to Malindi where GKA 782M had stalled, he had not recorded the purchase in the fuel register. It was his submission that to assert that he was guilty because the transaction does not appear in the register was a gross error of law as none of the witnesses asserted that it was his duty to maintain the fuel register. Such duty, according to the appellant, lay with PW5, who had admitted that his duties included maintaining the register.

51. According to the appellant, Kiogora (PW11) and Koome (PW12) respectively, were certain that their stations served only ODPP vehicles using card number 3953. His submission was that such usage was not shown to have been in 'abuse of office' or to the prejudice of ODPP.

He observed that Mbugua (PW1) had established that once ODPP vehicles obtained fuel using the fuel cards, the drivers and officers misused the fuel to go on unauthorized errands, but none of them had been charged or admonished. From the evidence, various officers had misused the ODPP vehicles, citing Mary Asava (PW3) who had undertaken an unauthorized journey from Nairobi to Eldoret where the vehicle GKB 293M was involved in an accident and had to be repaired at great cost. His submission was that his inquiries into the incident had resulted in bad blood between him and PW3.

52. The appellant further submits that Kimuyu (PW2) had, in January 2018, used the GK Peugeot 508 to take his son to school in Kapsabet Boys High School. PW7 had taken a GK X-Trail SUV GKA378Y to travel for three days to North Rift. There was no evidence, however, that he had fuelled or used pit stop services or any vehicles on any occasion.

53. The appellant further submits that the reports of the Auditor General for the relevant period were categorical that no public funds had been misused in the transport section of the ODPP, and that all the public funds had been applied lawfully. In his view, an internal auditor could not purport to 're-audit' the findings of the Auditor General, whose reports for the relevant period are conclusive, reliance for this submission being placed on Article 229 of the Constitution.

54. The appellant further faults his conviction on the basis that the prosecution did not produce work tickets. He submits that according to the evidence of PW2, 3, 4, 5, 6 and 14, the vehicles had work tickets as a further safeguard against misuse of vehicles and fuel. Not a single work ticket was produced in this case in respect of a large fleet of about 100 motor vehicles. It was his submission that these vehicles, even where they had individual fuel cards, invariably used general cards whenever their allocation had been exhausted or the individual card had not been topped up.

55. It was his submission that it had emerged from the evidence of PW2, 3, 5, 6 and 8 that after obtaining fuel on a general card, the drivers were supposed to take the receipts from the petrol stations and record them in the fuel register or give it to the transport office. However, according to PW1, the registers were inaccurate. The appellant's submission was that there was no evidence that he personally attended at the petrol station for drivers to obtain fuel, and that a note or phone call or e-mail was sufficient. It was not his fault that there was a failure to record the receipts in the fuel register, and such failure would not constitute an offence of abuse of office.

56. The appellant further submits that no regulations were placed before the trial court showing either the manner in which fuel cards were to be handed over or used. Further, there was no evidence showing the manner in which a forensic audit was done, and whether any written demand for supporting documents was made to him and his response thereto. It was his submission therefore that it was improper for the court to rely on uncorroborated evidence of a single witness, PW1, that the accused defaulted in following unwritten procedures. His submission was that one cannot be guilty of a code that is unknown in law.

57. According to the appellant, he was charged for following government regulations in installing and uninstalling car tracks on two cars from the office of the DPP.

58. The appellant argues that the trial court was wrong to infer that on 2nd January, 2018, the usage of the card was in abuse of office or that it caused prejudice to ODPP. His submission was that allegations that there was not much work amount to nothing when no report or work tickets for that day were filed or placed before the court to show that there was non-movement of all ODPP vehicles. The court could therefore not draw an inference that there wasn't much activity on that day and base a conviction on such inference. The appellant asks the court to review card number 6698 and it will find that consumption on that card occurred within minutes on many dates yet the prosecution finds it in order.

59. The appellant submits, finally, that any inconsistencies in the prosecution case create doubts regarding the merits of the charge. He supports this contention by submitting that in his evidence, PW10, a senior NOC manager, was insistent that card number 3953 was the only general card issued in September, 2013 to ODPP, and it was always in use until card number 6698 was issued in late April, 2016. He submits that when PW6, Danson Kagwe, admits existence of a general card in 2013 but denies that that card is number 3953, he cannot be telling the truth.

60. The appellant further submits that exhibit No. 24 shows that Moses Muroki and Danson Kagwe (PW6) were the contact persons for card number 3953. PW6 was therefore not being truthful when he stated that he did not know of the card yet he had fuelled NYS buses to the tune of Kshs. 200,000/= using the card in April 2014. He further terms as untrue the evidence of PW10, in the face of exhibit 24, that the accused was the initial contact person of the said card. It is his case that these inconsistencies should be resolved in his favour, and it would be dangerous to rely on evidence of such inconsistent witnesses to find him guilty. He asks the court to find that his conviction is erroneous and set it aside.

Submissions by the DPP

61. The DPP filed submissions dated 29th June 2020 in which he supports the appellant's conviction and sentence which he asks the court to uphold. The DPP submits that the prosecution proved its case against the appellant to the required standard and the appellant's grounds of appeal lack merit. He submits that the allegation by the appellant that the charges against him were due to the fact that he had authorized the installation of car track devices in vehicles used by the DPP was not substantiated and had no connection to the issue of the card he had been charged with misuse of. It is his case that the evidence of the prosecution witnesses was corroborative, and while the appellant had, in his unsworn statement, alleged a grudge with PW2, he had not brought this out in cross-examination of the witness.

62. The DPP submits that the prosecution had proved its case against the appellant on the offence of abuse of office as provided under section 101 (1) of the Penal Code. There were several omissions and commissions attributable to him as a person in authority that amounted to abuse of office. He submitted that the evidence showed that the appellant was at all material times the custodian of the card number 3953. He was not transparent in the manner that he carried out his duties at the ODPP, did not supply the internal auditor with the card or the accountable documents touching on it, and the usage of the card was not accounted for. His actions were arbitrary and in violation of Article

63. With regard to the appellant's contention that the evidence of PW10 was not corroborated, the DPP submits that PW10 was a Fuel Manager from NOC. He had produced an email sent to him from one Margaret from the card centre. According to the DPP, the email was a record kept in the ordinary course of business and it therefore confirms the nature of the transactions entered into. The said email was admissible under section 33 (b) and section 80 of the Evidence Act, and all that was needed was a certified copy. The DPP submits that the appellant did not object to the production of the said email, and he had an opportunity to cross examine the witness on the said email.

64. To the appellant's argument that there was a motive for framing him, the DPP submits that motive is not an ingredient of the offence that the appellant was charged with under section 8 of the Evidence Act. It is the DPP's submission that the duty required of the DPP was to prove the *actus reus* and intention. That motive is only relevant when it relates to the conduct of the accused person himself under section 8(2) of the Evidence Act. According to the DPP, if motive relates to the conduct of the prosecutor, it is neither relevant nor admissible.

65. As for the appellant's arguments relating to the car track devices, the DPP submits that such arguments are not relevant to the case as it was not related to the card in question.

66. Regarding submission by the appellant that the internal audit at the office of the DPP was second guessing the findings of the Auditor-General, the DPP submits that the purpose of the internal audit is to help management oversight by verifying internal controls. An external audit, on the other hand, is to determine whether, in the Auditor's opinion, the financial statements presented show a true and fair view of the organization's financial position, operating results and cash flows. The DPP submits that the appellant's assertion that the internal auditor purported to re-audit the findings of the Auditor General is misconceived because the scope and objective of the two audits would be different.

67. On the assertion that the card at issue was used for the benefit of the ODPP in very few cases like the purchase of the battery which was allegedly purchased by PW5 and not recorded in the fuel register, the DPP submits that the appellant concealed the card's major use by failing to enter any transactions in the register kept at the ODPP or to ensure that such entries were made by his juniors since he was the officer in charge of transport. It is the DPP's submission that the appellant bore the greatest responsibility because of the large and numerous transactions on card number 3953. The DPP asserts that this was a classic case of abuse of office and all the ingredients of the offence of abuse of office were proved.

Analysis and Determination

68. I have considered the record of the trial court, the appellant's grounds of appeal, and the respective submissions of the parties. The appellant was convicted of the offence of abuse of office contrary to section 101(1) as read with section 102(A) of the Penal Code. These sections provide as follows:

101(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony."

102(A) A person convicted of an offence under sections 99, 100, 101 or 102 of this Part shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding 10 years or to both.

69. The charges against the appellant arose in relation to the use of card number 3953, a general card issued by NOC for fuelling of ODPP vehicles. From the evidence before the trial court which I have summarised above, it is not disputed that the appellant was, at the material time, an employee of the ODPP where he was a Senior Administration Secretary in charge of transport. He had joined the ODPP in 2012. The evidence produced by PW2, 3, 5 and 6 was that ODPP vehicles would fuel at NOC, using fuel cards issued by NOC. Two types of cards had been applied for in 2013 – specific card for use in specific vehicles, and general cards for use when specific cards were depleted or for hired vehicles.

70. The evidence further shows that Moses Muroki applied for the cards in 2013 and was the first and second contact respectively, with Danson Kagwe, PW6, for card number 3953. The email presented by PW10 dated 12th September 2018 confirms that card number 6698 was created on 8th April, 2016. Given that the email was from the NOC records, I am satisfied that it was properly admitted by the trial court in evidence. No objection was raised to its production by the appellant.

71. The evidence of PW2, PW3, PW5 and PW6 shows that the general cards are kept in the administration office which the appellant was in charge of. According to PW3, card number 6698 was accessible to her, the appellant, and her colleagues, PW5 and PW6. PW4 and his team had established that the general cards were kept in the administration office. PW8 testified that when the specific cards were exhausted, they would request the appellant, PW3, PW5 and PW6 for fuel to be procured using the general card. The card that was in use and known to PW3, PW5, and PW6 was number 6698.

72. The appellant concedes that he was the contact person for card number 3953, but from July, 2015. From the evidence of PW3, PW5 and PW6, card number 3953 was in the sole possession of the appellant. The statement from NOC obtained by PW3 showed that the appellant was the contact person for the card. The card was not available when PW1 was carrying out the internal audit. PW2 had requested the appellant for the card. While the appellant initially said he was not aware of the card, he was the one who eventually produced it and handed it over to PW2.

73. The trial court found that from the evidence of PW10, the appellant was the contact person for card number 3953, and that it was the appellant who made the requests for top up of this card. This evidence was corroborated by the evidence of PW2, whose testimony was that it was the appellant who gave him card number 3953. This evidence, coupled with the email from NOC which identified the appellant as the contact person for the card leads to the conclusion reached by the trial court, rightly in my view, that it was the appellant who was the contact

person and was in custody of card number 3953. His juniors in the office did not know about the card.

74. The evidence before the court indicates that card number 3953 was used in the period 1st July 2017 to 30th June 2018 (exhibit 5) in a manner that caused concern that fraud was being committed. This emerged from the evidence of PW2, who testified that they were struck, on an examination of the statement for the period, by the rate at which the card was being used. The consumption on the card for the period 1st January 2018 to 31st March 2018 was Kshs 1,033,266.94 yet, according to PW2, the monthly consumption by the DPP was Kshs 400,000.

75. The consumption rate is illustrated by the consumption on 2nd January 2018 when the card was used to purchase fuel at Ngara NOC petrol station at 6.51:44 a.m., 6.52:29 a.m., 6.53:54 a.m, and 6.54:31 a.m. The purchases in these single-minute intervals in the early morning of 2nd January 2018 was 127, 108, 57.63 and 57.15 litres. The evidence of PW2, PW3, PW5 and PW6 was that ODPP vehicles fuelled at the Times Tower NOC, but the consumption on 2nd January 2018 was at the Ngara NOC. The evidence also shows that these purchases of fuel were done on card number 3953. The card was also used to withdraw cash of Kshs 100,000. It is difficult to find another explanation for these activities on and use of card number 3953 other than arbitrary use by the appellant.

76. The appellant stated in his unsworn statement that he took over the card on 7th July 2015. The activities on the card set out above were on a single day in 2018. Similar purchases were observed on 4th, 5th, 6th and 8th April 2018. In my view, the trial court properly found that the appellant, in abuse of his office arbitrarily directed the use of card number 3953 for the purchase of fuel, fuel lubricants and pit stop services to the detriment of the ODPP. It was the appellant who was in sole custody of the card. It was the appellant who applied for its top ups. He received the card in July 2015, and though PW6 was aware of its existence in 2014 when Muroki handed over the cards when leaving the administration office, none of the appellant's juniors in the administration office utilized the card from the time the appellant took it over to the time it was stopped in April 2018. When requested for it by PW2 he denied having it, then surrendered it later. The email from NOC stated that it was the appellant who requested for top ups on the card. Contrary to the appellant's contentions, the evidence before the trial court was consistent and corroborative.

77. The appellant's defence and his arguments before this court is in three limbs. First, that he was charged because he had installed a tracking device on the vehicle used by the DPP. I observe that the audit that unearthed the problems with fuel management had started during the tenure of the previous DPP. It was the team appointed to make recommendations on the audit report that noted the discrepancies in fuel management and recommended further investigation by the DCI.

78. The appellant alleges that PW2 and PW3 testified as they did because they had differences, and they had a grudge against him. Had this been the case, rather than being raised at the defence stage, it would have been raised in cross-examination of the two witnesses. The third argument, as I understand it, is that since other officers at the ODPP also made improper use of ODPP vehicles by taking unauthorized journeys or failing to register purchases in the fuel register, the appellant should not be the only one charged with a criminal offence. I do not believe that this can be a defence to his own criminal conduct. The trial court observed that the DPP should endeavour to take the necessary action against the officers who made unauthorized journeys and failed to produce work tickets. That other officers also failed to observe internal processes or misused government vehicles does not exonerate the appellant from culpability for his abuse of office in the arbitrary use of the fuel card.

79. In the result, I find no merit in this appeal. It is hereby dismissed and the conviction and sentence upheld.

Dated Delivered and Signed at Nairobi this 14th day of October 2020.

MUMBI NGUGI

JUDGE