



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ANTI-CORRUPTION APPEAL NO. 7 OF 2018**

**SAMUEL MICHIRA ONDIGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising from conviction and sentence in Nairobi Chief Magistrate's Court Anti-Corruption Criminal Case No. 3 of 2011 delivered by Hon. F. Kombo Principal Magistrate on 27<sup>th</sup> March, 2018)*

**JUDGMENT**

1. **SAMUEL MICHIRA ONDIGO** the appellant herein was charged together with one Mbarak Said Twahir with the offence of knowingly deceiving Principal contrary to section 41 as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. However, the said Mbarak Said Twahir was discharged under section 87(a) of the CPC upon prosecution withdrawing charges against him. Particulars of the charge were that, on 19<sup>th</sup> January, 2010, at the Ministry of Education in Nairobi, being a person employed by a public body, to wit, the Ministry of Education, knowingly gave false attendance registers, payment schedules and a fuel receipt No. 11385 to the Accounting Officer in the Imprest Section as surrender of imprest of Kshs. 763,000/= given to him to pay participants at the Steering Group Writing Workshop that was held at the Agricultural Resource Centre Hotel, in Egerton University from 14<sup>th</sup> to 23<sup>rd</sup> September, 2009.

2. The appellant was convicted and sentenced to pay a fine of Kshs. 300,000 under section 48(1)(a) of the ACECA or serve six months imprisonment in default. He was also ordered to pay an additional mandatory fine of Kshs. 564,000/= being the amount benefitted pursuant to section 48(1)(b) as read with section 48(2) (a) ACECA or in default to serve a further six months imprisonment.

3. Aggrieved by the said decision, he filed this appeal vide a petition of appeal dated 6<sup>th</sup> April 2018 citing the following grounds stating that:

*1. The learned magistrate erred in law and fact by delivering a judgment which was not reflective of the facts presented by the parties.*

*2. The learned magistrate erred in law and fact by failing to appreciate the law as it relates to burden of proof required in proof of criminal cases.*

*3. The learned magistrate erred in law by erroneously shifting the burden of proof to the Appellant contrary to the established principles in criminal cases that the burden of proof at all times lies with the prosecution.*

*4. The learned magistrate erred in law and fact by failing to appreciate that the offence the Appellant has been charged with had not been proved beyond reasonable doubt as against the Appellant.*

*5. The learned magistrate erred in law by failing to consider the Appellant's defence.*

*6. The learned magistrate erred in law and fact by failing to accord the Appellant his constitutional right to fair hearing protected under Article 50 of the Constitution, including the right to due process of the law and presumption of innocence.*

4. To prove their case to the required degree, prosecution called a total of 20 witnesses. Among the witnesses who testified was **Leah Kobil Rotich (pw1)** a civil servant and the Director of Basic Education at the Ministry of Education and the in charge of implementation of Basic Education, Early Childhood Education, Primary Education and Primary Teachers Training Colleges among other things. She testified that her responsibility was to ensure that investments programmes and planned activities thereof are actually implemented.

5. She explained that one way of implementing investment programmes was through a team leader preparing a budget covering the activities for that particular section out of funding from the government or development partners through the Ministry of Education.
6. That at all material times to this case, the A.I.E holder was the Director of Basic Education (herself) and alternate to her was Mbarak Twahir who is her deputy. She explained that the funds are accessed through imprest as officers are required to apply for the same according to the approved budget. Once the A.I.E holder approves by signing the relevant section of the imprest warrants, the same is taken through the accounts section and the person who applied for imprest can then access the funds.
7. The imprest holder then goes to cash section and is given cash or a cheque. She explained that once she signs the imprest, the rest goes through the procedures and it is not the duty of A.I.E holder to decide in what form the money is to be given.
8. It was her evidence that the imprest is supposed to be surrendered after the activities. She explained that the documents to be attached are the list of participants if it is a workshop, list of facilitators and payment schedule. In the event there is no money used, the same is surrendered to cash office and a receipt is issued to the person who took the imprest.
9. Thus according to her, the A.I.E holder has a role as a voucher is prepared and the head of section signs to show the activities that took place and the A.I.E holder also signs his portion and the surrender voucher goes through the procedure again.
10. In reference to the instant case, she testified to the court that imprest No.0609900 dated 10<sup>th</sup> September 2009(PEXB.1) worthy Kshs763,000 was filled by the Appellant for purposes of financing a steering group writing workshop which was to take place at Egerton University. The A.I.E holder was Mbarak Twahir that is her alternate A.I.E holder. ;
11. According to her, the imprest went through the requisite process with the A.I.E holder and the accountant in charge of Vote Book signing. The relevant sections were then filled. The surrender voucher (PEXB.2) number 005291 dated 22<sup>nd</sup> January 2010 was signed by the A.I.E holder the same day for a surrender of Kshs.763,000/. According to the imprest surrender documents dated 19<sup>th</sup> January 2010(PEXB3), the expenditure was Kshs.762,787/ and there was a balance for unspent imprest (PEXB.3) of Kshs.213/= . The surrender in this case was done by the Appellant who was an accountant in the accounts Department at the Ministry of Education.;
12. **PW2 Charles Murimi Kanja** works with Ministry of Education Headquarters in the Inservice Education & Training. In reference to this case, he was the Team Leader whose duties were to carry out needs assessment for teachers and prepare training materials so that they could organize training for Primary School Teachers.
13. His role was to prepare budget, facilitate the budget and request for funds from government through the PS and the director Basic Education or donor funding to facilitate the trainings.
14. In respect to this case, he recalled an activity called Steering Group Writing Workshop held at Egerton University between 14<sup>th</sup> 23<sup>rd</sup> September 2009. His role was to organize for activity. He ensured the participants were invited though he did not attend the workshop as he had another activity he was preparing for.
15. He prepared the budget and referred to a memo (PEXB.4) he had prepared addressed to Chief Finance Officer through Director basic education dated 8<sup>th</sup> September 2009. The memo was to request for a total of Kshs 1, 815,000 to fund about five activities the Steering Group Writing Workshop being one of them.
16. The Principal accountant was directed on what account to charge and the person to issue the imprest and carry the money. They then identified the appellant herein to take the imprest which he did. He recalled that there were three activities to be carried on to which, he prepared the schedule.(Steering Group writing workshop expenditure breakdown)(PEXB.5).
17. He further testified that it was the duty of the accountant (appellant) to ensure that he paid for the activities – participants and accounts for everything. As per the document, he was to get Kshs.20,000/= as allowances and another Kshs.35,000/= making a total of Kshs.55,000/=. He explained that some money was not to come to him directly as it was for accommodation i.e.Kshs.35,000/=. Kshs.20,000/= was payable to him directly as it was for writing allowance.
18. In reference to the document which was a payment schedule (PEXB-6) for the workshop, the names of the workshop participants (PEXB.7) were listed and although his name is included he was not in that workshop. According to the payment schedule, he was allegedly paid Kshs.4,000/= for 10 days a total of Kshs.40,000/=. He confirmed that he did not sign it. He also confirmed that he did not know who signed on his behalf. He identified the Appellant as the person who took the imprest.
19. **PW4 Rosemary Akinyi Okoko** works for National Bank of Kenya Harambee Avenue Branch and was the officer in charge of customer service. She recalled that on 24<sup>th</sup> May 2004, the Appellant went to the Bank intending to open an account. That she assisted him in opening account No.0124305166800 after being introduced as a civil servant working with the ministry of Education. She produced the account opening document as exhibit (PEXB.8).
20. **PW4 Esther Gakii Mbaabu** is a lecturer at Meru TT college. She recalled that in the year 2009, she worked at Meru TT college. In reference to (PEXB.6), she confirmed her name was there as No.7. That against her name she had purportedly been allocated and paid Kshs.8,000/= Per Diem, Kshs.20,000/= allowance and travel refund of Kshs.4,000/= totaling to Kshs.59,000/=. /
21. However, she confirmed that she had not been invited for that workshop and that the last time she attended a workshop was on 16<sup>th</sup> -20<sup>th</sup> May 2009 at Mbagathi College. She further confirmed that her Id No is 9750734 and not No. 120389 as indicated in the payment schedule.

That her TSC Number was 305089 and not 120389 reflected in the false payment Register. The same applied to her telephone No which was different from her actual No.

22. In reference to the steering working group workshop attendance register (PEXB.7), she confirmed that she did not attend but her name appeared as No.27 and that the signature appended as her's was forged.

23. **PW5 Agnes Anne Cheronu Kosgey** is a cashier at National Bank Nakuru Branch whose duties include receiving cash deposits, cheque deposits and paying out customers. For purposes of this case, she identified the saving debit slip (PEXB.9) being a withdrawal slip filled by the Appellant on 22<sup>nd</sup> September 2009 in respect of Account No.0124305166800 domiciled at Harambee Avenue. On that day, the Appellant withdrew Kshs.650,000/= and signed for it. He also withdrew Kshs.5,000/= separately after filling a withdrawal receipt dated the same day (computer generated PEXB.10). It is worth noting that as at 22<sup>nd</sup> September, 2009, the Appellant's account (PEXB.11) had Kshs. 763,329/20 but after the withdrawal, it remained with a balance of Kshs.113,227/20.

24. **PW6 is Pamela Mumbi Mugo** working at the Ministry of Education Directorate of Quality Assurance Standards. She told the court that she was familiar with a workshop on Steering Working Group on social Studies headed by PW2.

25. With regard to the attendance register (PEXB.7), she confirmed to the court that her name was there but she did not attend the workshop. That the personal number indicated against her name as 78131809 is not hers. She gave her correct personal number as 84140905. She disowned the telephone number 0721-567810 given as hers. She stated her correct cell phone number is 0722 734073. Referring to the payment schedules (PEXB.6), she confirmed that she did not receive Kshs. 36,000 and that the signature appearing was not hers.

26. **PW7 Miriam Owano Maganga** worked with the Ministry of Education as at December 2010. She testified that she was secretary to the Director Basic Education and used to type and receive visitors for her boss. She recalled the workshop for steering group held in Egerton University from 14<sup>th</sup> -23<sup>rd</sup> September 2009. Apparently, she had been selected to do secretarial work during the workshop by PW2. Unfortunately, she could not attend as she did not have a house girl to leave at her home.

27. In reference to P. Exhibit 5 , she confirmed that her name appeared as having been allocated and received Kshs. 61,000/= being the attendance allowance a fact she denied . Touching on the payment schedule (PEXB.6), she confirmed her name appeared as No.5 and she was supposed to get Kshs.25,000/=made up of Per Diem. However, she did not receive that money and that the signature appended against her name was a forgery.

28. **PW8 John Chakaya Limosi** an Education Consultant working with DFID was at the material time based at the Ministry of Education working as a consultant. His duties were to provide technical support to the Ministry of Education. He recalled coordinating with pw2 a training workshop held on 14<sup>th</sup> -23<sup>rd</sup> September 2009 at Egerton University.

29. He played the role of training material development to be used by trainers of trainers. His role was to provide technical advice by giving sessions and making presentations. He attended the workshop and when he arrived in the evening, he got a call that his son was admitted in hospital.

30. He left the workshop to attend to his sick son in Nairobi. After attending to his sick son, he went back for the final two days but he did not attend the workshop.

31. In reference to the workshop expenditure breakdown, (P exhibit 5), his name appeared as No. 8 and from the document, he was entitled to Kshs.61,000/= tabulated as follows:-

- Writing allowances Kshs.20,000/=
- Travel refund Kshs.6,000/=,
- Accommodation Kshs.35,000/=

32. However, he denied receiving the amount as he did not attend the workshop. He explained that when he went to the venue, he used a GK vehicle but used public means to travel back when he was told his son was sick. He confirmed that he was not paid travel allowances or any allowances for the seminar.

33. **PW9 Franco Munene Njeru** is based at Kenya Institute of Education as an Assistant Director. His duties are Curriculum Development and Supervision of Development of Science Curriculum. In reference to PEXB.6 (payment schedule) he testified that he was familiar with that training as he came to know of it when it was brought to his attention by an officer from KACC who wanted to find out if he had attended the workshop.

34. He further confirmed that he was not aware of it although the name and personal number reflected was his save for the signature which he claimed was not his. He also confirmed that his ID number was 0718948 and not No. 137709 and his job group is 'P' and not 'N'.

35. However, he denied ever receiving any amount as he was not at the workshop nor did his name appear in the rooming list(P.EXB.12). In reference to the attendance register (PEXB.7) and the expenditure break down,(PEXB.5) his name did not appear in any of them.

36. **PW10 Lydia Nyambura Kimemia** working as a secretary at Ministry of Education testified that her duties were to type correspondences and dispatch letters. She recalled the Steering Group Workshop held at Egerton University between 14<sup>th</sup> -23<sup>rd</sup> 2009. She took part in the workshop with her duty being typing all that transpired.

37. In reference to the attendance register(PEXB.7), she confirmed that her name was there and her signature. She stated that she knew PW2 as he was their team leader though he was not present during the training. She confirmed that she received Kshs.2,000/= per day for 10 days totaling to Ksh.20,000/=. However, she denied receiving travelling allowance as they used a GK motor vehicle.

38. **PW12 Winrose Chepkoech Rono** works with Kenya Institute of Education (K.I.E) as the Assistant Director. She testified that she joined KIE in the year 2008 and her duties are to develop curriculum. She denied ever attending a steering group writing workshop in Egerton.

39. In reference to (P EXB 5), she saw her name as No.6 indicating that Kshs.59,000/= was allocated to her. She denied receiving the said amount as she was not invited to the workshop in the first place. In reference to(PEXB.6) she confirmed that her name was there and she was paid Kshs. 24,000/= being Per Diem for 8 days. The list also showed that she acknowledged receipt of the money but she did not receive such an amount as she denied signing for it. In reference to the attendance register (PEXB.7), her name appeared as No 25 and her TSC No. indicated as 02929 instead of 1047. To her surprise, her station was indicated as Taita a station she had never worked in. That the signatures appearing for five days in attendance register and mobile number 0726725255 were not hers. With regards to (PEXB.12) the rooming list of Agriculture Resource Centre of Egerton University her name did not appear.

40. **PW13 Agnes Gathoni Muya Githaiga** a teacher by profession working at Murang'a TTC confirmed that she received a letter(PEXB.13) from the Director of Basic Education dated 8<sup>th</sup> September 2009 inviting her to attend Steering Writing workshop at Egerton University scheduled for 14<sup>th</sup> -23<sup>rd</sup> 2009 .

41. However, she did not attend the workshop as she was just newly posted to the station. Apparently, by the time she got the invitation letter, she called the coordinator and told him she could not attend. In reference to PEXB.14, her name appeared as No.8. There was no heading of where the workshop was held and instead it was just written Kamwenja TTC and Kshs. 59,000/= was written next to it. However, she did not receive any amount.

42. In reference to the attendance register (PEXB.7), her name appeared at number 11 with her personal number reflected as 216441 instead of 206693. She disowned a cell phone number 0721735645 given as hers instead of 0722892608. She also denied signing the register. In reference to the payment schedule PEXB.6), it was indicated that she was paid Kshs.20,000 and she signed for it which was not true. In addition to this, on page 12, it shows she claimed bus fare of Kshs.1,300/= and the money had been signed for. She denied signing for the same.

43. **PW14 Kipkorir Amdanyi** -an accountant at Kobil Petrol Station in Eldama-Ravine whose duties are to summarize daily sales, supervise the staff and stock the refuel produced a document i.e a cash sales receipt no.11385 dated 23<sup>rd</sup> September 2009. According to the receipt, it was issued by Flexilink Co ltd for GK A656R. However, they did not issue that receipt as the receipt did not emanate from their Petrol Station i.e the word Kobil is in capital letters while theirs is in small letters, their cash sale number is at the bottom while the other one is at the top, and the telephone and fax are also different. Hence, the receipt (PEXB.15) did not come from their petrol station.

44. **Pw15 Richard Kipngetch Samoei** an employee of Egerton University was the acting manager of ARC Hotel – Agriculture Resource Centre from 2003-2011. In reference to the instant case, he recalled that between 14<sup>th</sup> and 23<sup>th</sup> September 2009, they had 30 guests from Ministry of Education. He explained that for the first day, they charge for what is in the LSO and subsequently, they charge the actual number of participants.

45. In the instant case, he explained that they have not been paid fully, although a down payment was made. That he charged them about Kshs.700,000/= as down payment and produced a document of ARC rooming list(PEXB.12).

46. **PW16 Suleiman Migiri** works in the Teachers Advisory Tutor office (TAC Tutor) in Marigat. His duties include assisting teachers to discharge their duties in schools. In reference to the steering Group Writing workshop held at Egerton University between 14<sup>th</sup> and 23<sup>th</sup> 2009, he did not attend that workshop but his name appear in the attendance register(PEXB.7). His personal number appeared as 110461 instead of 221884. However, the contact number indicated as 0724914991 was his although his signature was forged having not attended the workshop.

47. In reference to Steering Group Writing Workshop payment schedule (PEXB.6) he confirmed that his name appeared in the payment schedule as No.3 .He disowned the rest of the personal particulars given which are not his i.e the ID card number was indicated as 110461 instead of 0240649. However, he neither received the amount indicated nor signed for it as he did not attend the Training.

48. **PW17 Viola Chepkoech Tanui** working for National Bank of Kenya teachers Service Commission Branch recalled that 15<sup>th</sup> September, 2009, she was based at Harambee Avenue Branch serving as a teller when she received a cheque in favour of the Appellant being cheque number 17-3376 for Kshs.763,000/=. She posted the entry after examining the cheque, confirmed the names and the cheque number which were tallying.

49. She further confirmed that it bore the account name of the Appellant, the account number, the cheque(PEXB.17) number, the drawee bank, the amount, the amount in words and the bank stamp.

50. **PW18 Justus Mogaka Ndubi** works for the TSC, Headquarters as a Deputy Director in charge Teachers Management. In reference to the in service programme held at Egerton University between 14<sup>th</sup> – 23<sup>rd</sup> September, 2009 he confirmed that he did not participate in the programme hence did not receive payments indicated in the payment schedule(PEXB.6)

51. He was surprised that his name appeared in both the attendance register and payment schedule in which his personal particulars like the ID card, job group, TSC No. were incorrectly indicated and his signature forged. His name did not appear in the rooming list which was

sufficient proof that he did not attend the workshop.

52. **PW19 No. 217401 Emmanuel Kenga ACP Forensic Document Examiner** recalled that on the 16<sup>th</sup> September 2010, they received exhibits from Mr. Mutiga of EACC. These were, A1 – A13, the questioned documents, B1 – B57 specimen signatures of a list of officers, C1 and C2 known signatures of Mbarak Said Twahir, C3 – C4, known signatures of the Appellant. They were to establish the signatures on the questioned documents. The exhibits were accompanied by an exhibit memo form (PEXB.18). Specimen signatures B1 – B 57. (PEXB,19), C1 and C2 [ refer to PEXB.1& 2)], C3 – C4 marked (PEXB.20).

53. He examined and compared the questioned signatures compared with orange arrow marked A1 on exhibit A with standard signatures on B1 – B3 and known signatures on C1 and C2 indicated by orange arrows and found some similarities which led him to the conclusion that the signatures were similar and indistinguishable and had been made using the same hand. In addition to this, he also examined the questioned signatures indicated by orange and green arrows on exhibit marked A with standard signatures on B4 – B57 and found no agreement between the said signatures. He used image enhancement video spectral equipment, infra red filters for better visibility amongst other techniques. He then prepared his report (PEXB.21) which he signed on 29<sup>th</sup> December 2010.

54. **PW20 Wilfred Mutiga** is a Senior Forensic Investigator at EACC since 2007. He is a trained Forensic Investigator who testified that this case was assigned to him on 15<sup>th</sup> March 2010. He then set out to establish; whether the workshop was actually there; whether the imprest workshop was applied for and; whether it was approved. He collected documents from Ministry of Education, the Agricultural Resource Centre and witnesses. He also collected sample signatures and known signature from witnesses and obtained relevant documents from the Bank.

55. He established that an imprest was sought and a cheque banked by the Appellant i.e cheque for Kshs.763,000/= in an account belonging to the Appellant ( Acc. No. 0124308166800 National Bank of Kenya). The cheque was deposited on 15<sup>th</sup> September 2009. He also established that the Training took off on 14<sup>th</sup> to 23<sup>th</sup> September 2009.

56. He obtained this information from the rooming list, workshop attendance schedule/list.(PEXB.7) and a payment schedule (PEXB.6) indicating how much each of the attendees were paid as out-of-pocket allowance and signed for the same.

57. In reference to the payment schedule (PEXB.6), the Appellant was the imprest holder and Managed the funds. He sought to find out whether every person listed in the schedule attended the workshop and was paid as indicated but was shocked that most of the persons indicated in the payment schedule had neither been paid nor signed for the money indicated.

58. He then took specimen signatures of the persons indicated as having received the money (who are witnesses in this case) and recorded statements. He also referred the specimen signatures and known signatures to the Documents Examiner. His report was that the said alleged participants had not signed for the payments. He then obtained the Appellant's bank statement (PEXB.11) and discovered that before the imprest cheque was deposited, the account's balance was Kshs.10,609/20 as at 14<sup>th</sup> September 2009. When the cheque was banked, the balance was Kshs.773,609/20.

59. On 20<sup>th</sup> September 2009 the workshop had ended and he expected the imprest money to have been used but there was still some money in the account. Thus he established that only Kshs.398,340/= was genuinely paid to participants. A sum of Kshs.282,300/= was paid to non-participants and money surrendered was Kshs.213/= by the Appellant. Hence, there was Kshs.82,147/= in the account of the Appellant after the workshop.

60. He concluded that the Appellant had mis-appropriated a total of Kshs.364,447/= i.e Kshs.[282,000 + 82,140] as he ought to have surrendered this amount. In reference to the surrender form (PEXB,12) signed by the accused, he indicated that the Appellant surrendered Kshs.213/= to which he obtained a receipt MFI- No.A4396083 dated 19.1.2010. That an imprest warrant (PEXB.11) which the Appellant applied for, was approved by the Appellant's Departmental Head as No.0609901 for Kshs.763,000/=.

61. Therefore, upon conclusion of the investigations, he was convinced that the Appellant had deceived his employer. In reference to the fuel receipt (PEXB.15) for Kshs.6,000/= for motor vehicle No. GK 656 R, he obtained the receipt allegedly from a Petrol Station in Bomet, which is way far from the workshop venue in Njoro. The Petrol Station denied issuing the receipt [shown as MFI-16]. In reference to the cheque deposit slip (PEXB.16) for the imprest cheque, he obtained it from National bank of Kenya, Harambee Avenue Branch [PEXB- 17] where he was given a certified copy of the cheque (PEXB.18) No.73376 for Kshs.763,000/= [shown MFI-18].

62. Having concluded his investigations, he was of the opinion that the Appellant had misappropriated part of the money for the workshop and recommended the charges he was facing.

63. Upon close of the prosecution case, the appellant was put on his defence. In his defence, he opted to give unsworn evidence. He did not call any witness. He testified that in September, 2009, he was called by the Principal Accountant, to apply for a temporary imprest for payment of Workshop participants at Egerton University. He confirmed that he attended the Steering Group Writing Workshop, took the imprest for Kshs.763,000/=, was given a vehicle and a driver.

64. He stated that he was in the company of Mr. John Limosi the co-ordinator and Lydia Kimemia, a Secretary. He also confirmed that he was given the imprest in form of a cheque which he banked in his Account. That when he received the vehicle, the transport officer Paul Langat told him that the vehicle was due for service. He explained that as the cheque was to take about 7 days [ back in 2009] he had to use his own money. He had a matatu business thus he used the money to service and fuel the vehicle as he waited for the cheque to mature.

65. Apparently, the cheque took Thirteen days. In reference to the receipts issued by Flexi Link Company Limited (PEXB.15) dated 23<sup>rd</sup> September 2009 he confirmed that the same was signed at the back and that the servicing was done by the driver. He also confirmed that he

received receipts dated 23<sup>rd</sup> September 2009 and another one dated 17<sup>th</sup> September 2009 issued by Quick Call Service Station.

66. That the receipt dated 23<sup>rd</sup> September 2009 showed that they fueled the vehicle on return journey to Nairobi. He explained that he used part of his own money to fuel and service the vehicle; that a balance remained in his account which reflects what he had spent. He stated that it was Lydia Kimemia who prepared the attendance Register.

67. He further explained that his role was to extract payment schedule from the names in the Attendance Register and pay.

68. According to him, the Seminar proceeded well and he paid all those who attended. He explained that he made payments in cash having withdrawn the money from his account in the Bank. In reference to the payment schedule (PEXB.6) he stated that he was not familiar with the document. That he had not heard of any issues about payment from those who attended and when the workshop ended, he returned to the Ministry and prepared a surrender voucher. He stated that he attached genuine surrender documents i.e surrender imprest(PEXB.21) and took the document with attachments to examination where the same were examined by Mr. Robert Muteti- an Examiner, who would sign and stamp the document if the documents are genuine.

69. Later the AIE Holder Mr. Mbarak signed the document. The payment voucher was authorized by an Accountant- Mr. Ayah. It was his defence that neither Mr. Mbarak, Mr. Muteti nor Mr. Ayah testified. He further testified that the documents were further subjected to Internal and External Audit and there were no issues raised by those officers.

70. He expressed his surprise that he was the accused in this case yet everything that was given to the Ministry Machinery was okay. According to him, nothing had been raised by his employer concerning the surrender voucher. However, in January, 2011, he was telephoned by officers from EACC who interviewed him about the payment voucher.

77. Later, he was informed that he would be charged. He recalled that he was not interviewed about anything else except the payment voucher. According to him, he accounted for everything under the voucher,; that he did not know the persons he was paying and that he only paid on the basis of the Attendance Register and the persons who were paid confirmed receipt by signing.

72. Lastly, he stated that if his voucher had an issue, it could have been picked by all the officers who handled it. In reference to the rooming list (PEXB.12) he contended that he did not know anything about it. He further contended that he was in court by mistake as he was innocent of the crimes alleged against him.

73. During the hearing, Appellant's counsel in his submission on grounds 1,2 and 3 submitted by quoting section 41 of the Anti-Corruption and Economic Crimes Act which provides:-**"Deceiving Principal"**

**(1) An agent who, to the detriment of his principal, makes a statement to his principal what he knows is false or misleading in any material respect is guilty of an offence.**

**(2) An agent who to the detriment of his principal, uses or gives to his principal, a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence.'**

74. Counsel thus submitted that for the prosecution to establish the offence of deceiving principal, they must first establish that it is the accused who made the statement to his principal that is false or misleading and secondly, that he gave or used a document to the detriment of the principal that he knew contained something that was false or misleading in material respect.

75. On Ground 4 on whether EXB. 6,7 and 15 contained false or misleading information, counsel submitted that the trial court erred in law and in fact in failing to weigh the credibility of prosecution witnesses thereby, allowing unmerited evidence to form basis of the conviction. It was the counsel's submission that the trial court convicted the Appellant on uncorroborated, insufficient and contradictory evidence.

76. On Ground 5, counsel submitted that the trial court failed to consider the Appellant's defence as it failed to consider the evidence that would exonerate the Appellant from the charges he was facing e.g no forensic examination on the Appellant's finger prints was undertaken to establish whether he was the author and the source of Exhibits 6, 7 and 15 the basis of the charge. Furthermore, the trial court failed to acknowledge that during the material time a cheque took 7 days or a week hence, failed to consider the logical explanation that money used for purposes of the workshop before the cheque matured and the probable source of the money.

77. On ground 6, counsel submitted that the accused was denied sufficient opportunity to call his witness after his defence by giving him a last adjournment.

78. The Respondent's counsel in his submission on whether the prosecution proved its case beyond reasonable doubt submitted that the Appellant was an employee of the Ministry of Education thus making the Appellant the agent while the Ministry his employer was the principal. He opined that, the Appellant knowingly gave false attendance registers, payment schedules and a fuel receipt no. 11385 to the accounting officer in the imprest section as surrender of imprest of Kshs. 763,000/=given to him to pay participants at the Steering Group writing workshop that was held at the Agricultural Resources Centre Hotel in Egerton University from 14- 23<sup>rd</sup> September 2009.

79. Counsel further submitted that the Appellant in this matter deceived the Ministry of Education by giving misleading information that the attendance register (PEXB.7), the payment schedule(PEXB.6), and the receipt from Kobil (PEXB.15)were genuine. That he concealed the true status of the money recipients in that, the people who were alleged to have signed the payment schedule and the said documents not being genuine documents. The Appellant went ahead and attached them to the surrender voucher. It was thus the counsel's submission that the Appellant surrendered the said documents knowing they were false.

80. On whether the court shifted the burden of proof to the Appellant as the burden of proof lies with the prosecution, it was Respondent's counsel's submission that there was prima facie case made against the Appellant and by the court shifting the burden of proof was in conformity with Section 111 of the Evidence Act.

81. On whether the court considered the prosecution's defence, counsel submitted that the trial court upon analyzing the entire evidence adduced before it considered the defence of the Appellant and found that the documents attached to surrender voucher were not genuine documents.

82. As to whether the Appellant was accorded a fair hearing under Article 50 of the Constitution including the due process of the law, counsel submitted that the trial court accorded the Appellant a fair trial under Article 50 as is evident from the proceedings. Hence the Appellant's rights were also well catered for as he was well represented by an advocate who was versed with the law.

### **Analysis and Determination**

83. I have considered the petition herein together with the grounds of appeal stated therein, trial court's record and submissions by both counsel. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record as a whole and make its own decision. I am alive to the fact that an allowance must be given owing to the fact that the appellate court did not see nor hear any of the witnesses. The Court of Appeal in the case of **Okeno v Republic 1972 E.A 32** had this to say of the duty of a first appeal court:

**“The first appellate court must itself weigh conflicting evidence and draw its own conclusions.(Shantilal M. Ruwala v. R., [1957] E.A 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958]E.A. 424.”**

84. Similarly, in the case of **Kiilu and Another vs R (2005) IKLR 17** the court had this to say:

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

**(See also Patrick & Another vs R (2005) 2KLR 162).**

85. The appellant's appeal is premised on six grounds which I shall address as hereunder.

**Grounds 1,2,and 3. The three grounds are basically intertwined as they focus principally on the alleged magistrate's failure to appreciate the law as to the burden of proof and erroneously shifted the same to the accused person.**

86. There is no dispute that the appellant did receive an imprest from his employer for purposes of facilitating a steering group writing workshop held at Egerton University between 14<sup>th</sup> to 23<sup>rd</sup> September 2009.

87. The imprest warrant in question was duly signed by the AIE holder one T. Mbarak and the appellant as a Ministry of Education official in his capacity as an accountant and imprest holder. The said imprest was issued in the form of a cheque worth 763,000/= which the appellant deposited in his personal account No. 0243051668 opened sometime on the 24<sup>th</sup> May 2004.

88. It is also common ground and indeed admitted by the appellant in his defence that after paying all participants who took part in the workshop, he surrendered documents reflecting an expenditure of Kshs 762,787 leaving a balance of Kshs 213/= being a balance of unspent imprest (See P.EXB-3 surrender documents). The only point of departure is that some of the participants whose names and particulars appeared in the attendance register, payment schedule and rooming list attached to the imprest surrender documents denied ever attending the workshop and even receiving the amount allocated against their names (PW1, PW4, PW6, PW7, PW8, PW9, PW10, PW12, PW13, PW16, PW18). Apparently, the document examiner's report (PEX8) revealed that the analysis subjected to their handwriting and specimen signatures did not reveal any similarities thus corroborating their testimony that their signatures were forged.

89. According to the appellant, he only made payment based on the extract of the attendance register (PEXh7) prepared by one Lydia Kimemia hence was not in a position to know whether the names were correct or not. Regarding payment schedule (PEXh.6) and the rooming list he denied preparing the same.

90. Having admitted making payment as per the attendance register and payment schedule whose authorship he denied, the appellant claimed that he cannot be alleged to have deceived principal as all the documents he relied on were genuine and nobody complained of nonpayment nor did the internal and external auditors raise any query. He contended that Robert Muteti (not a witness) in charge of examination accounts department and AIE holder, Mr. Twahir Mbarak did not question the surrender documents.

91. He claimed that, prosecution had not proved the ingredients and or elements constituting the offence of deceiving principal.

92. The appellant was convicted of the offence of deceiving principal contrary to Section 41 of ACECA. The said Section provides:

**(1) An agent who, to the detriment of his principal, makes a statement to his principal that he knows is false or misleading in any material respect is guilty of an offence.**

**(2) An agent who to the detriment of his principal, uses or gives to the principal a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence.**

93. The question that begs for an answer is whether the appellant knowingly did make and give to the principle a false statement or information which was misleading or containing misleading or false material or information.

94. Who prepared the payment schedule (PEx6) and attendance register (PEXh7) upon which payment was made to people who have denied receiving the money indicated against their names and their personal details including personal numbers, signatures, job groups, ID numbers or phone numbers which were either forged or falsified? Who submitted that information being the imprest surrender documents to the ministry of Education as the principal for purposes of this case?. Having admitted preparing the imprest surrender documents based on the attendance register which is questionable and disowned by the purported payees, the appellant is deemed to have prepared the contents contained in the payment schedule and attendance register. It does not matter whether the handwriting therein is his. If he sought help from somebody else to prepare the attendance register it is for him to confirm not the prosecution. Unlike responsibility, accountability cannot be delegated. It was the duty and responsibility of the imprest holder (appellant) to take full charge in authenticating the people rightfully entitled to receive payment by taking their identification details or documents among them an ID card to verify the actual payee.

95. Having tendered imprest surrender documents inter alia attendance register, containing forged signatures, false ID numbers, phone numbers, the burden will automatically shift to him under Section 111 of the Evidence Act. The fact that the AIE holder (Twahir) and examination officer Mr. Muteti or internal audit did not question the authenticity of the surrender documents does not exonerate the appellant from liability. The examination officer and AIE holder had no means of knowing whether the imprest surrender documents were filled by somebody else other than the appellant. They had no means of knowing whether they were falsified or forged. Nothing stops or limits other sources of information including whistle blowers in lodging a complaint or questioning the genuineness of the documents and illegal payment made. The source of the complaint is immaterial.

96. The key point is that, a number of witnesses PW2, PW4, PW6, PW7, PW8, PW9, PW10, PW12, PW13, PW16 and PW18 denied either attending or receiving the amount of money listed against their names. This fact was corroborated by the document examiner's report after analyzing their purported signatures appended against their names in the attendance register. Equally, the rooming list (PEXB 12) did not contain their names thus corroborating further their evidence that they never attended the workshop.

97. If the appellant acted in collusion with other individuals, jointly prepared a false attendance register and payment schedule, it is upon him to explain. He was under obligation to pay participants of the workshop which he does not deny paying. Who did he pay if about 10 witnesses denied ever receiving the money?. The ten officers had no grudge against the appellant hence had no reason to frame him by denying receiving payment. The appellant was accountable to the employer the Ministry of Education as the principal by supplying accurate and correct supporting documents while surrendering the imprest as an agent (**See Elizabeth Kaloki v R (2017) eKLR**).

98. Nobody else was expected to surrender the imprest. The documents attached were not genuine. They were therefore false and a forgery of signatures to which only the imprest holder (appellant) and the person who submitted them can explain their source. The failure to call the AIE holder one Mr. Mbarak and Mr. Muteti the incharge voucher examination who allegedly examined the attendance register and other imprest surrender documents is not prejudicial to the prosecution case as they were not bound to call people who were not the imprest holders. The absence of their evidence does not adversely affect the strength of the prosecution case. Nothing stopped him from cross examining Lydia kimemia (pw10) on the issue of preparation of the attendance register. The appellant did not put a single question to Lydia on the issue regarding preparation of attendance register. If he thought her evidence would have changed the position which I doubt, he should have put such questions to Lydia.

99. In this case, there is adequate evidence even without calling Mbarak and Muteti that the documents submitted by the appellant in surrendering the imprest were false thus misleading the principal (Ministry) hence the ingredients of Section 41 of ACECA have been met. Lack of the witnesses' evidence is inconsequential to the prosecution case. In the case of **R vs George Anyang (2016)eKLR it was held that, "where the evidence cited is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution"**. In the instant case, that principle is not applicable in the circumstances.

100. The trial court at page 12 of its judgment aptly and ably analysed what the words principal and agent refers to under Section 38 of ACECA. He correctly held that the appellant was an agent and the ministry as the principal for purposes of Section 38 of ACECA. At page 13 of the said judgment, the learned magistrate found that PW2, 4, 6, 7, 8, 9, 12, 13, 16 and 18 denied receiving any payment. Therefore, it is not true that the trial court did not appreciate the law and facts of the case thereby shifting the burden of proof to the accused. The existence of other workshops alluded to by counsel for the appellant is irrelevant as the imprest in question and surrender documents are quite specific on the actual workshop intended and payment made.

101. Regarding the fuel receipt No. 11385 (PEXh15) the same was attached by the appellant to the surrender imprest. Pw 14 Kipkorir Amdanyi an accountant at Kobil petrol station Eldama Ravine where the said receipt was allegedly issued disowned the same stating that the receipt does not have their receipt features and particulars e.g the word Kobil in the fake receipt is in capital letters while theirs is in small letters, the cash sale no is at the top while theirs is at bottom. The fax and telephone numbers on the receipt is also not theirs.

102. It is however questionable how the appellant spent his own money (KShs.6000/=) and ended up submitting a fake receipt. The only and most logical conclusion is that, such fuel was not drawn as alleged by the appellant hence submission of false documents and or information to principle.

**Ground 4: Trial court erred in law and in fact in failing to weigh the credibility of prosecution witnesses and thereby causing and allowing unmerited evidence to form the basis of conviction.**

103. Under this ground, the appellant argued that the evidence of PW2, 4,8,9,10,12,13,16,17 was not tested against a possibility that there would have been either persons blaming or sharing similar names. As stated elsewhere in this judgment the aforementioned witnesses did

not receive the amount money indicated against their name and signatures which were forged. Their evidence is further corroborated by the document examiner's report which confirmed that the signatures appended on the attendance register and payment were not theirs. Their testimony was quite consistent and well corroborated.

104. Any allegation of the existence of some people elsewhere having been paid is a fertile imagination proffered by the appellant without basis and therefore farfetched and a mere academic exercise or thought. These witnesses had nothing against the appellant. They could not have conspired against the appellant who was their colleague. This ground is without basis hence I do dismiss it.

**105. Ground 5: The learned magistrate erred in law by failing to consider the appellant's defence and submissions.**

I have perused the judgment of the trial court at page 9, 10 and 11.

The same has appropriately captured what the appellant stated in his unsworn statement and submissions by the defence. It is therefore not true that he did not take into account the appellant's defence and submissions.

106. Whether he arrived at a wrong or correct analysis or not is a matter for the court to determine after considering both the prosecution and the defence case. The fact that the appellant is not satisfied or agreeing with the trial court's finding, is not synonymous to the court having not considered the defence or submissions.

**Ground 6: Failure to award appellant his constitutional right to fair hearing under Article 50 including the right of due process and presumption of innocence.**

107. This ground is anchored on delayed prosecution of the case. Secondly, that the appellant was denied a right to call witnesses and the evidence tendered by the prosecution was not sufficient to convict and that the appellant ought to have been given a benefit of doubt.

108. From the record, the appellant was arraigned before the trial court for plea on 11<sup>th</sup> January 2011 and judgment delivered on 27<sup>th</sup> March 2018. It is clear that the case took about 7 years to be concluded. The case was handled by three magistrates. The first magistrate was M/s Nyambura now a Judge. After her promotion M/s Mulekyo took over but later got transferred and then Mr. Kombo took over. During the pendency of the case, several adjournments were occasioned by both the prosecution and defence who were in one way or the other not prepared. Each participant in this case did contribute to the delay. The blame cannot wholly be apportioned on the court. There was good reason given for each adjournment.

109. Regarding denial for an adjournment for the appellant to call witnesses, the appellant was put on his defence on 23<sup>rd</sup> August 2016.

The same was fixed for 16<sup>th</sup> September 2016 to fix defence hearing. On that day defence was fixed for 28<sup>th</sup> November 2016. On 28<sup>th</sup> November 2016, accused was absent as he was said to be sick. Defence hearing was deferred to 27<sup>th</sup> December 2016. On that day, the trial court was not sitting. Defence was rescheduled to 13<sup>th</sup> April 2017. Again, on 13<sup>th</sup> April 2017, the trial court did not sit. Defence hearing was fixed for 21<sup>st</sup> July 2017 when the appellant testified. After testifying, the appellant sought for adjournment to call one witness which was granted but marked last adjournment. On 8<sup>th</sup> September 2017 the defence was not ready and they opted to close their case.

110. From this chain of events, I do not see how the court curtailed the appellant's rights of fair hearing. It is clear from the record that the defence was not ready and they closed their case without seeking any further adjournment. I find this ground not sustainable hence I do dismiss it.

111. The upshot of it is that, I find that the appeal herein lacks merit and the same is hereby dismissed and the conviction and sentence of the lower court upheld and sustained.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MARCH, 2019.**

**J.N. ONYIEGO**

**JUDGE**