



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC APPEAL NO. 3 OF 2018

CHARLES KIZITO WANJALA MASINDE.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment and conviction of the Chief Magistrate's Court (Hon. Felix Kombo SPM) at Nairobi Milimani Law courts delivered on 8th February 2018).

JUDGMENT

1 Charles Kizito Wanjala Masinde the Appellant was charged and convicted of the offence of abuse of office contrary to section 46 as read with section 48 (1) of the Anti Corruption and Economic Crimes Act 2003 (ACECA). The particulars were that the Appellant on diverse dates between the month of February 2005 and 1st July 2005, in Nairobi are within Nairobi Province, being a director of Kenya Wines Agencies Limited, use his office to improperly conferred a benefit of Kshs 600,045/- on himself by not remitting the said amount which was an outstanding debt owed by Koitany Limited to Kenya Wines Agencies Limited.

2 Upon conviction he was fined Kshs 500,000/- in default six(6) months imprisonment under section 48(1)(a) ACECA. Being dissatisfied with the judgment he filed this appeal premised on the following grounds:-

- (i) *The learned magistrate erred in law and fact in convicting the Appellant in the absence of any evidence to support the charges against the Appellant that Koitany Limited gave Kshs 600,045/- to the Appellant*
- (ii) *The learned magistrate erred in law and fact in convicting the Appellant in disregard of the Appellant's evidence that the amounts paid into the Appellant's bank account by Jeniffer Kathure Arithi (PW6) was for repayment of loans owed to the Appellant by PW6, and not any amount meant for Kenya Wines Agencies Limited (KWAL), the complainant.*
- (iii) *The learned magistrate erred in law and fact in convicting the Appellant on evidence that contradicted the charges against the Appellant by failing to consider the Appellant and PW6's overwhelming evidence on the existence of the said loans advanced by the Appellant to PW6.*
- (iv) *The learned magistrate erred in law and fact in failing to appreciate that PW6 paid into the Appellant's account 643,490/- and during the same time paid similar amounts to KWAL towards the alleged Kshs 600,045/- owed to KWAL by Koitany Limited.*
- (v) *The learned magistrate erred in law and fact in failing to appreciate DW2's evidence that PW6 had paid to KWAL an amount over Kshs 250,000/- towards the alleged Kshs 600,045/- owed to KWAL by Koitany Limited.*
- (vi) *The learned magistrate erred in law and fact in finding that that the Appellant did not disclose the existence of the loans advanced to PW6 in his recorded statement when it was not in question at the material time.*
- (vii) *The learned magistrate erred in law and fact in finding that PW6 was a truthful witness contrary to the weight of the evidence on record.*
- (viii) *The learned magistrate erred in law and fact in finding that the evidence adduced by the prosecution was sufficient to convict the Appellant contrary to the weight of the evidence on record.*

3 The prosecution stated its case by calling twelve(12) witnesses. A summary of its case is that Kenya Wines Agency Limited (KWAL) a State Corporation until 2014, was a supplier of wines and spirits to Koitany Ltd among others. The directors of Koitany Ltd are (i)

KipseremArap Maritim (PW2), (ii) Joan Chelimo Maritim. The dealings between KWAL and Koitany Ltd were purely on cash basis or bankers cheques payment.

4 The directors of Koitany Ltd allowed one Jeniffer Kathure Arithi (PW6) and her partner Janet to obtain products from KWAL using its account. It's not clear when this was but according to PW6 this operation did not last for long. The terms remained cash operational.

5 Later after the account had become dormant for 6 months, she was introduced to the Appellant by their common friend called Paul Omingo. The Appellant was a director with KWAL and he promised to assist her get credit facilities with the company. She made the request in writing (EXB6) and the same was approved. The request was for a credit facility of Kshs 250,000/-

6 The letter (EXB6) was accompanied by her cheque of Kshs 250,000/- which she handed over to the Appellant who handed them to Yobesh (former 2nd accused who was acquitted who then sent her to Mohammed (PW3). Approval was done and she collected her goods after signing for them(EXB7). She collected the goods in two batches (EXB8a & b).

7 Thereafter PW6 and the Appellant entered into an agreement which was to the effect that PW6 would be depositing cash into the Appellant's account while the Appellant issues his personal cheques to KWAL as payment. Based on this understanding she deposited Kshs 250,000/- into the Appellant's account. She then applied for another credit facility of Kshs 350,000/-. Her goods were for Ksh 250,000/- while those of Yobesh would be Kshs 101,000/- and the same were collected. She however claimed that the documents in respect to this delivery were stolen from her shop and she suspected the Appellant to be the prime suspect. She however never reported the matter.

8 The deposits she made amounted to Kshs 645,490/90, the demand was for Kshs 645,030/31 while the charge in count 1 is for Kshs 600,045/00. It was her evidence that besides herself there were several other persons who deposited money on her behalf. As far as she was concerned she had no pending bill at KWAL.

9 After all this, the Appellant took to her a demand letter (EXB12) for Kshs 645,030/-. That's when she went to the Managing Director and explained her story. She denied taking any loan from the Appellant. She recorded her statement and investigations started.

10 PW2 confirmed that when he received the demand notice he protested to KWAL because he had not operated a credit account with them. He also protested to PW6 and demanded that she clears the sum outstanding. She did not clear the debt and instead closed shop and disappeared.

11 The credit facilities had been authorized by Yobesh who was acquitted. This was confirmed by the Document Examiner (PW8) No 230925 Chief Inspector Jacob Oduor who testified that the writings on EXB6 were by the said Yobesh Amoro who also admitted the same.

12 The Appellant in his sworn defence denied the charge. He said he was a director at KWAL since 2003 for three(3) years. He denied being involved in the day to day running of KWAL since he was a non -executive director. He confirmed that as a director he used to be paid allowances. He admitted knowing PW6 after being introduced to her by one Paul Amingo. He also knew her husband and son. He stated that PW6 deposited money into her account and it was unrelated to KWAL. It was for a loan of Kshs 787,275/28 given to them as a family.

13 He testified saying that he was not aware that Koitany Ltd owed KWAL any money. That he only learned of it through the charge sheet. He contended that there would have been no reason for PW6 to deposit Kshs 643,490/90 into his account if what she owed KWAL was Kshs 600,045/-. He stated that he only did what he did to assist PW6 and her family and to promote business for KWAL. He further stated that the debtor was Koitany Ltd and he was not that company.

14 Both Counsel for the Appellant and the State filed written submissions which were highlighted during the hearing of the Appeal on 1st November 2018.

15 Mr Kilonzo for the Appellant submitted that PW2 testified that his company Koitany Ltd did not owe any money to KWAL. Further that PW6 was not a director or shareholder of the Koitany Ltd. He submitted that since there was no money owing to KWAL, the Appellant could not have received money and failed to remit. There was therefore no abuse of office.

16 He submitted that there were financial deals between PW6 and the Appellant. He argued that the deposit of a much higher sum than what was allegedly owed should have raised a doubt in the trial court's mind. That the deposit was obviously for something else.

17 Counsel contended that Koitany Ltd did not give any money to the Appellant. This was supported by the evidence of PW2 and PW10 (investigating officer) and PW6. He argued that PW6 did not at any time state that she had given the Appellant money for onward transmission in particular when confronted by PW3 Alawi Mohammed about the pending debt on Koitany's account. He submitted that the failure to disclose appropriately confirmed that her later statements were not truthful. He said witnesses like PW4 **Jacob Njeru Munyi** and PW5 **Doris Thagei** who were Chief Accountant and Company Secretary and legal officer at KWAL respectively did not know anything about these deposits etc.

18 It was his submission that failure by the trial court to deal with the issues about the excess money deposited led him to make conclusions and findings based on speculations and conjecture. He referred to the case of **Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 Others [2014] eKLR** where the court expressed itself as follows:

“Evidence is the basic building block of valid judicial inferences; and courts of law ought to appreciate the probative value of evidence presented before them they should avoid all inclination towards conjecture.”

He submitted that PW6 had paid to KWAL an amount over Kshs 250,000/- towards the admitted debt.

19 Counsel asked the court to find that PW6 Jeniffer Kathure Arithi was not a trustworthy witness, and her evidence was therefore not reliable. To support this submission he cited the case of **Mohammed Swale Kaeze v Republic [2005]eKLR** where the Court of Appeal Stated:-

“The credibility of a key witness is so important that the Court of Appeal in the case of NDUNGU KIMANYI vs. REPUBLIC 1980 KLR 282 held;

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

20 Counsel faulted the court for not making a determination on PW6’s credibility yet he had found that she had admitted making a number of false statements. He added that in fact the learned trial magistrate Hon. F. Kombo could not make a determination on the credibility of PW6 since he was not the one who took her evidence. He referred to the case of **Ndegwa v Republic 1985 eKLR 534** as quoted in **Joseph Ndungu Kagiri v Republic 2016 eKLR** where the Court of Appeal stated:

“i. No rule of natural justice, statutory protection and evidence of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.

ii. The statutory and time honored formula to the Magistrate making judgment should himself see, hear and assess and gauge the demeanor and credibility of witnesses should always be maintained”.

21 Again in **Peter Maina Njeri v Republic [2016]eKLR** the Court of Appeal further held as follows:

“Where a witness is found to have been insincere or untruthful in parts of her evidence then her entire evidence is placed in doubt. A witness cannot be found truthful in certain aspects but untruthful in others. The veracity of her entire evidence is placed in doubt.”

22 On the final issue as to whether the prosecution had proved its case beyond reasonable doubt, counsel submitted and quoted several authorities. He also referred to section 107 of the Evidence Act which provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Relying on the following cases namely:

(i) Duncan Mwai Gichuhi v Republic [2015]eKLR

(ii) Republic v Philemon Chemas [2014]eKLR

(iii) Republic v Lifchus [1997]3SCR 320 as quoted in Philip Muiruri Ndaruga v Republic [2016] eKLR

Counsel argued that the material presented to the trial court could not justify a conviction at all.

23 In opposing the Appeal Mrs Aluda referred to the evidence adduced by the witnesses. She submitted that the Appellant was a Public Officer by virtue of section 2 of ACECA and section 2(c) of the State Corporations Act Cap 446 Laws of Kenya having been a director with KWAL. She said Koitany Ltd is an approved KWAL distributor holding account No 10024570 (EXB1). That Koitany’s director (PW2) came to know PW6 who operated a wines and spirits shop in Nairobi West and started supplying her with KWAL products. He later authorized her to use his account to buy products directly from KWAL (EXB5).

24 The arrangement was that payments would be by cash. During the subsistence of this arrangement PW6 came to know the Appellant and Yobesh Amoro and agreed to a side arrangement whereby PW6 would obtain KWAL products on credit on the strength of postdated cheques. She obtained goods worth Kshs 600,000/- in the name of Koitany Ltd which have not been paid for.

25 The Appellant a director of KWAL had arranged with PW6 to be remitting money to his account and he would forward it to KWAL which he never did. PW1, PW4 and PW7 noticed the non payment by PW6. A letter was written to her on the same and investigations started. PW9 **Vincent Opanga** the Managing Director of KWAL was notified and he called PW6. It is at that point that it was noted tht the Appellant was receiving money and not remitting it.

26 Counsel submitted that the Appellant has not denied receipt of the money. She further submitted that the State had proved that the Appellant was a Public Officer and received the money on behalf of KWAL but never remitted it to KWAL leading to a loss by virtue of his

conduct. She referred to section 46 of the ACECA which provides:-

“A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.”

27 She contended that there was no grudge between the Appellant and PW6. Further that the difference in figures did not go to the root of the case. On sentence she submitted that the Appellant ought to have been sentenced under section 48(1)(a) and (b) of ACECA since the evidence was watertight and the Appellant benefitted while KWAL lost. She therefore prayed for enhancement of the sentence as a Notice had been filed and served on the Appellant.

28 In a rejoinder Mr. Kilonzo submitted that the Appellant was not an Executive director or debt collector for KWAL. He asked the court to look at the charge sheet and consider it alongside the evidence on record.

29 This being a first Appeal the court has a duty to reconsider and

re- evaluate the evidence adduced and come to its own conclusion. It must bear in mind that it did not see or hear the witnesses and give an allowance for it. The Court of Appeal in the case of Patrick & Anor v R [2005]2 KLR 162 held thus:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. It is not the function of 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 conclusion.”

Further in Muthoko & Anor v Republic [2008] KLR 297 it held:

“It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that”

30 I have therefore considered the evidence on record, grounds of appeal, the written and oral submissions by both counsel and the authorities cited. The issues which I find falling for determination are as follows:-

- (i) Whether Koitany Ltd owed Kenya Wine Agency Ltd the sum of Kshs 600,045/-
- (ii) Whether the Appellant’s conduct resulted in KWAL’s loss of Kshs 600,045/-
- (iii) Whether the Appellant used his office as a director with KWAL to enrich himself with Kshs 600,045/-.

31 Section 46 of ACECA under which the Appellant was charged provides as follows:

“A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence”.

32 For an offence to be established under section 46 ACECA it must be shown that:-

- (i) The person accused was a state officer occupying a public office within the meaning of Article 260 at the time of commission of the offence.
- (ii) The person accused must have used his/her office to confer a benefit and that the nature of the benefit must be disclosed.

33 A public officer is defined by section 2 of ACECA as:

“public officer” means an officer, employee or member of a public body, including one that is unpaid, part-time or temporary;

It further defines a public body to mean:

- (a) the Government, including Cabinet, or any department, service or undertaking of the Government;**
- (b) the National Assembly or the Parliamentary Service;**
- (c) a local authority;**
- (d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or**

(e) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition;

34 There is no dispute that KWAL was a Government Agency at the time of the alleged commission of this offence. It is also not disputed that the Appellant was appointed by the then Minister for Trade Dr. Mukhisa Kituyi as a director of KWAL from 15th July 2003 for a period of three(3) years. His term if not renewed came to an end on 15th July 2006. The offence complained of is said to have been committed between the month of February 2005 and July 2005 a period within the three(3) year term. He was therefore a public officer.

35 PW2 **Kipserem Arap Maritim** was one of the directors of Koitany Ltd, which used to sell wines and spirits. He said the Company had two directors i.e him and his wife. He explained that at no time did his company obtain any credit facility for wines and spirits from KWAL. Their account was a cash or bankers cheque account. PW2 introduced Janet and Jeniffer Arithi (PW6) to KWAL through the sales Manager for purposes of directly collecting products from there but on his account. His account being a cash only account it was expected that PW6 and her partner would run it on those terms.

36 It was not until PW2 received a demand notice for payment of Kshs 600,045/32 in respect to the statement (EXB1) that he realized his account had been used as a credit account. This was not by his wife nor himself. He demanded for an answer from KWAL and Jeniffer (PW6). The latter told him of a director who had assisted him get credit facilities and that she had paid him money. She did not reveal the identify of the director to him at all. When he demanded for answers and payment by PW6 the latter closed shop and disappeared.

37 From the evidence of PW3 **Alawi Mohammed**, who was the customer service assistant manager at KWAL Nairobi Jeniffer (PW6) came with an application letter from Koitany Ltd (EXB6) plus a postdated cheque of Kshs 250,000/-. She was requesting for credit facilities. The same was cleared by the Finance manager "Yobesh Amoro" who had been charged alongside the Appellant but was acquitted under section 215 Criminal Procedure Code. PW6 personally collected the goods vide dispatch notes (EXB7 & 8, 8a,8b & 8c). This was on 14th and 17th February 2005.

38 PW6 returned in April 2005 with a note dated 7th April 2005(EXB9) from Mr. Yobesh directing him to supply goods to her. The goods were released vide dispatch notes **EXB 10, 10a-c**. Ten KWAL invoices were produced as **EXB11(a)-(j)**. The goods were worth Kshs 350,000/-.

39 He prepared a statement for Koitany Ltd and found it to be in arrears of Kshs 600,000/- and the amount owing was Kshs 645,000/31. He referred the matter to the accounts and even called PW6 who told him she had paid Mr Yobesh the Finance Manager. This witness insisted it was not the Appellant's name but Yobesh's name mentioned as the person who had been paid.

40 To answer issue No (i) the court has to consider the evidence of PW2,PW3, PW6 and Yobesh Amoro. PW2 and his wife introduced PW6 to KWAL. The Distribution Application Form (EXB5) signed by PW2 and his wife provided the name of Jeniffer Arithi as one of the persons authorized to collect goods from KWAL on behalf of Koitany Ltd. It therefore means that whatever products PW6 took through this account were credited onto PW2's account with KWAL.

41 A letter dated 1st February 2005 was produced as (EXB6). The letter was by Jeniffer Arithi PW6 who did the letter as a director of Koitany Ltd. The wording of the letter shows that she was one of the directors of the company a fact she knew was false. In cross examination she admitted to have done this without the knowledge and approval of the real directors of Koitany Ltd. She was then given credit facilities by KWAL which is the subject of this matter.

42 A tabulation of instances where credit issued other than those given by Yobesh Amoro on account of Koitany Ltd was produced as **DEXB 1a-c**. These exhibits show the debt as Kshs 600,045/- yet they were not approved by Yobesh Amoro. Those approved by Yobesh Amoro and which are the subject of this case involved two cheques i.e Kshs 250,000/- and 350,000/- totaling Kshs 600,000/-. The prosecution did not rebut this evidence by the said Yobesh Amoro who was the Appellant's co-accused.

43 Furthermore, the Koitany Ltd statement with KWAL produced as **EXB13** for the period 21/1/03 to 27/05/05 shows cash payment between 1st February 2005- 27th May 2005 to total Kshs 330,220/-. Who is it that was paying this and what was it for? Was it part of the approved credit facility? PW2 denied having taken any products in fact it was PW6 who was running the show. According to Yobesh Amoro who testified on oath, PW6 had paid the credit of Kshs 250,000/- and continued to make payments into that account (**EXB13**). Could KWAL have allowed for approval of the Kshs 350,000/- when the Kshs 250,000/- credit remained unpaid? Yobesh Amoro who did the approvals was cleared by the trial court.

43 It is therefore clear that if KWAL was owed any money it could not be the Kshs 600,045/- claimed since a substantial bit of it was paid, as is confirmed by the evidence of **EXB13** and Yobesh Amoro. Even if the entries of the products taken went into Koitany's account the dispatches indicate who collected the said products. It was Jeniffer Arithi (PW6) and she has admitted as much.

44 The Appellant has not denied that PW6 deposited money into his account. In his defence he admitted knowing PW6 and that he had given her and her husband a number of loans amounting to Kshs 787,275/28. He said whatever she deposited was towards repayment of the said loans. He denied that the payments had anything to do with KWAL. Further that as a director he was not a debtor collector for KWAL.

45 Besides PW6 there is no prosecution witness who stated that indeed PW6 gave the Appellant money to pay to KWAL. Infact PW3 **Alawi Mohammed** stated that when he called PW6 to inform her about the pending bills she told him that she had paid the said money to Yobesh. The prosecution's evidence was that PW6 deposited postdated cheques for Kshs 250,000/- and 350,000/- with KWAL before the credit was approved. KWAL's evidence is that the money was never paid.

46 On the other hand KWAL did not produce before the court the said post dated cheques. Were the cheques ever taken to the bank? If not

where are they to confirm that indeed there were postdated cheques issued by PW6?. PW6 in her letter to KWAL (EXB6) states:

“As part of our effort to grow business with yourselves we are applying for 30 days terms of payment guaranteed by the directors’ postdated cheques of Kshs 250,000/- (Two Hundred and Fifty Thousand Only)”

47 In whose name was this cheque? Was it in PW6’s name or in the name of Koitany Ltd?. Nobody knows as the said cheques were not produced. In her evidence PW6 testified that the Appellant had asked her to deposit money into his accounts and he would issue her with personal cheques. In her statement which was produced as EXB19 she states:

“It is true I owe KWAL 600,000/- which I was given sometimes in February. I wrote a cheque of Kshs250,000/-and later another of Kshs350,000/- which were all withdrawn by a Mr. Charles Masinde and he asked me to pay the same through his account because KWAL had a problem with personal cheques which are not guaranteed.”

48 From these statements there is no evidence that the Appellant wrote her (PW6) any cheques after she deposited the money. She apparently raised no issue with that. She also alleged that the Appellant withdrew her cheques. Where then are the cheques? KWAL which was supposed to be the custodian of the said cheques has remained silent over the whereabouts of these cheques.

49 PW3 **Alawi Mohammed** and PW4 **Jacob Njeru Munyi** and the I.O (PW10) never told the court anything about these cheques. Did the Appellant who was not in the active management of KWAL withdraw these cheques? If he did from whom did he withdraw them?

50 The final issue I will address is the credibility of PW6 as a witness because everything started with her. A credible witness is trustworthy and believable. Credibility includes those qualities of a witness that makes their testimony believable. In the case of **Kiilu and Anor v Republic [2005]1 KLR 174** the Court of Appeal stated this of such a witness:-

“The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

51 I will consider a few instances already mentioned which tell a lot on the credibility of PW6.

(i) she lied vide **EXB6** that she was a director of Koitany Ltd

(ii) Through **EXB6** she obtained a credit facility for herself without PW2’s approval and even without their knowledge.

(iii) It is not clear who issued the postdated cheques. Was it PW6 or Koitany Ltd as stated in **EXB6?**

(iv) She claims to have been paying KWAL’s debt through the Appellant’s accounts yet at the same time she was making cash payments to KWAL(**EXB13**). Why then was she depositing money for KWAL into the Appellant’s accounts when she could have paid direct to KWAL?.

(v) When PW2 demanded she clears the outstanding debt she closed shop and disappeared.

(vi) PW6 was recalled and gave further evidence in chief. She was never cross examined by the defence on the recall. In spite of several adjournments for her to come back for cross examination she never turned up. She was to be cross examined on the deposits she made into the Appellant’s accounts.

(vii) The prosecuting counsel on 15th January 2016 in addressing the court on the issue of this witness stated thus at page 196 Record of Appeal.

“We are ready to proceed with the investigating officer in court. Summons were issued against one witness Jeniffer. She is yet to be served by Interpol. We have intelligence that the witness was in Kenya in early December last year but did not bother to communicate. In these circumstances and in view of the long history of this matter we are ready to proceed with the next witness.”

(viii) The last time PW6 had testified in court upon recall was on 17th May 2013. The court had been patient with her upto 15th January 2016 when it gave up on her. Her evidence on recall was therefore incomplete.

(ix) She claimed that of the products she took from the Kshs 350,000/- she gave to Yobesh Amoro products worth Kshs 101,000/-. When asked about any supporting documents she said the same had been stolen from her shop but she never made any report. In fact it was an entire file that was allegedly stolen. She believed for reasons best known to her that it was the Appellant who had stolen the file. In spite of this belief she never reported the matter.

(x) The defence kept on asking why PW6 deposited a total Kshs 643,490/- in the Appellant’s account instead of the Kshs 600,045/- she owed KWAL. The evidence of the investigating officer (PW10) was that there was a possibility that the banking would have been for another purpose. There was no explanation as to why PW6 deposited more than what she owed KWAL.

52 With all the above enumerated instances I have come to the conclusion that PW6 was not a credible witness. She was not reliable nor trustworthy.

53 The bottom line is that PW6 obtained goods valued at kshs 600,045/- some of which appears to have been paid for. Secondly, whatever arrangement that was there between the Appellant and PW6 is known only to the two of them and they should resolve it just the way they started it.

54 It is also clear that what PW6 obtained from KWAL was obtained by way of false pretence and not on behalf of Koitany Ltd. She should pay for it if not already paid for.

55 This case was prosecuted based on a lot of assumptions which were not fully investigated nor proved by the State. Had they taken time to act on PW10's recommendations the debt may have been paid. All in all after analyzing the evidence I find that the prosecution did not prove its case to the required standard and I allow the Appeal.

56 The conviction is quashed and sentence set aside. The fine paid shall be refunded to the Appellant.

Orders accordingly.

Dated, signed and delivered this 5th day of December 2018 in open court at Nairobi

.....

HEDWIG I. ONGU'DI

JUDGE