



REPUBLIC OF KENYA



**Republic v Odhiambo (Anti-Corruption Case 29 of 2011) [2019] KEMC 9 (KLR)
(Anti-Corruption and Economic Crimes) (1 March 2019) (Judgment)**

Republic v James Odhiambo [2019] eKLR

Neutral citation: [2019] KEMC 9 (KLR)

REPUBLIC OF KENYA

IN THE ANTI-CORRUPTION MAGISTRATE'S COURT

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION CASE 29 OF 2011

F KOMBO, SPM

MARCH 1, 2019

BETWEEN

REPUBLIC PROSECUTION

AND

JAMES ODHIAMBO ACCUSED

JUDGMENT

1. James Odhiambo (Hereinafter 'the accused') is charged with two main Counts and one alternative Count.
2. The substance and details of the three Counts are as contained in the substituted charge sheet dated 22/9/2011.
3. In Count 1 he is charged as follows;

Knowingly giving a false document to one's principal contrary to section 41(2) as read with Section 48(1) of the [Anti-Corruption and Economic Crimes Act](#) of 2003

Particulars

James Odhiambo: On or about 4th June 2008 at Jogoo House "B" in Nairobi within Nairobi Province, being an Agent of the Ministry of Higher Education, Science and Technology, an officer charged with the management of public property to wit ksh. 2,263,440/- received by him vide imprest warrant number C806410, to the detriment of the said Ministry, knowingly gave false receipts to the said Ministry purporting that he had spent ksh 2, 263,440/- to carry out rehabilitation works at the Provincial Technical



Training Eastern Province Office in the period between 3rd April 2008 and 4th June 2008, documents which he knew to be materially false.

4. Section 41(2) of the *Anti-Corruption and Economic Crimes Act* ('The ACECA') provides as follows;
 41. Deceiving principal
 - (1)
 - (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.
5. Section 48 is the punishment section under Part V of the ACECA.
6. In alternative to Count 1, the Accused is charged with the offence of False Accounting by a public officer contrary to section 331(1) as read with 331(2) of the Penal Code.

Particulars to this Count are as follows;

James Odhiambo: On or about 4th June 2008 at Jogoo House "B" in Nairobi within Nairobi Province, being the Head of School Equipment and Maintenance Unit under the Ministry of Higher Education, Science and Technology, an officer charged with the management of public property to wit ksh. 2,263,440/- received by him vide imprest warrant number C806410, money intended for renovation and rehabilitation of the offices of the Provincial Technical Training Officer, Eastern province at Embu, knowingly furnished a false return of the money.

7. In Count 2, the Accused is charged with the offence of uttering a false document contrary to section 353 of the Penal Code.

Particulars in support of the charge are as follows;

James Odhiambo: On or about 4th June 2008 at Jogoo House "B" in Nairobi within Nairobi Province, being the Head of School Equipment and Maintenance Unit under the Ministry of Higher Education, Science and Technology, with intent to defraud, knowingly uttered a false a false document to wit, a letter reference number MST/EST/TT/18/1/29 dated 15th May 2008 to Samuel Erick Oreta, a Senior Deputy Secretary in the Ministry of Higher Education, Science and Technology purporting it to be a genuine letter written by F.M Macharia, the Provincial Technical Training Officer for Eastern Province.

8. The Accused denied both charges at plea initially on 11/7/2011 and later on 22/9/2011 following substitution of charge.
9. The record shows that the trial commenced on 23/2/2012 before Hon. (Mrs) L. Nyambura, PM (as she then was). Later it was taken over by Hon D. Mulekyo, SPM (as she then was) who proceeded until I took it over on 14/5/2015. By that point, a total of 14 witnesses had testified.
10. During pre-trial directions the defence elected that the matter proceeds to conclusion from the point previously reached by my predecessors.
11. I thereafter ruled on 3/8/2018 that a prima facie case had been established in all the charges against the Accused based on the evidence of 21 witnesses called by the State in support thereof.
12. Upon this finding, the Accused testified on his own behalf on 17/9/2018. He did not call any witnesses.



13. At close of trial, Ms Gateru for the State and Mr Were for the Accused filed written submissions which were orally highlighted on 13/12/2018.
14. From established facts in this case, the accused was an employee of the Ministry of Education, Science and Technology, (Hereinafter –‘the Ministry’) and the head of the Ministry’s School Equipment and Maintenance Unit (Hereinafter ‘SEMU’) located at Kabete area of Nairobi.
15. In his said employment capacity therefore, the accused falls within the definition of ‘agent’ in relation to the Ministry, for purposes of section 38 of the ACECA which provides;

38. Meaning of “agent” and “principal”

(1) In this Part—

“agent” means a person who, in any capacity, and whether in the public or private sector, is employed by or acts for or on behalf of another person;

“principal” means a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent acts.

16. On 3/4/2008, the accused addressed a memo (Pros Exh 1(a)) to Mr Samuel Erick Oreta (PW 20) who was a Senior Deputy Secretary and his line AIE Holder, seeking the approval of an Imprest to facilitate works by SEMU’s technicians, at the Provincial Technical Training Office (hereinafter ‘PTTO’) at Embu.

Part of the memo read as follows;

‘As per the request made by the above, our technicians have estimated the cost by the attached list.’

17. There was attached to the memo a comprehensive list of required materials or bill of quantities (Pros Exh 1(b)) all totalling to the sum of ksh 2,315,440/-. The materials were for carrying out sound proofing of three offices, grilling and metal works of the main office gate.
18. The request was approved, first by Mr Oreta (PW 20) as the line AIE Holder, then by the Ministry’s Chief Finance Officer Mr James Kimani Mugambi (PW 8).
19. In the course of his approval, the Chief Finance Officer adjusted some items, in the end, reducing the requested amount by ksh. 100,800/- thereby approving for further processing the amount of ksh. 2,263,440/-.
20. From there, the memo landed on the desk of the Ministry’s Chief Accountant Mr Kepha Oseko Mareri (PW 1) who directed the imprest accountant, to process an imprest in favour of the accused.
21. The imprest (Pros Exh 2) was processed in the approved sum of ksh 2,263,440/-. It was paid to the accused by the then ministry Cashier Perminus Kamau Njoroge (PW 17). Perminus testified that he paid the imprest amount in three chunks of ksh 700,000/- on 4/8/2008, 1,000,000/- on 8/4/2008 and the balance on 11/4/2008.
22. Later, through a Surrender Voucher (Pros Exh 3) the Accused accounted for the imprest. Pros Exh 3 shows on its face that the entire imprest amount of ksh 2,263,440/- was spent. It went through all necessary internal approvals and all relevant officials appended their signatures.



23. These Officials included Bernard Mujiza Ndoli (PW 2- Hereinafter Ndoli) an accountant who said he confirmed the arithmetic and identified a document he used as a Checklist (Pros Exh 6). This document s dated 30/5/2008 and is serial no. 003220.
24. The document shows items 1, 5 and 6 were availed to him with the voucher. Item number 5 includes S13, S11 documents. Item number 6 is a general item described as ‘any others’. The officer qualified it by endorsing ‘as per attached’.
25. Another Official who handled Pros Exh 3 was Ms Zuura Zainabu (PW 11) an examiner who also counterchecked the totals and signed the Voucher on 4/4/2008. She also identified another attachments checklist (Pros Exh 24) dated 3/4/2008, serial no. 002602.
26. Examination of this Checklist shows that it is also signed by Ndoli and is dated 3/4/2008.
27. Perminus Kamau the Cashier testified that the surrender voucher was properly surrendered and that he entered it into his cashbook.
28. Eva Wachuka Thinginih (PW 21), a forensic investigator based at the then Kenya Anti-Corruption Commission (Hereinafter ‘KACC’) however testified that her Commission received a complaint of fraud relating to the Imprest and launched an investigation which she was tasked with.
She collected documents from the Ministry which she analyzed.
29. From her evidence, she determined that SEMU had been involved in rehabilitation work for office space for the newly formed ministry. Procurement however had to be done at the Ministry. She further established that the Accused had initiated a requisition (Pros Exh 1(a) and received an Imprest for Ksh 2,263,440/- and further that the Accused did not undertake the works although he had visited Embu PTTO twice, first on 2/4/2008 and about a year later in February 2009, when he went with materials. The materials were rejected as there was no work to be done. At the time, the PS had written a Memo dated 29/1/2009 (Pros Exh 18) which was in place.
30. She further determined that the Accused had attached to his Surrender, Receipts- Pros Exh 4(a)-(f), a letter (Pros Exh 5) dated 15/5/2008 and Pros Exh 7(a) – (f) which are Counter Receipt and Issue Vouchers (S13).
31. She established from Mr Macharia (Francis Mwangi Macharia (PW 7) that he neither wrote nor signed the letter- Pros Exh 5. She also noted differences between the letter head and a sample (Pros Exh 12) provided by Macharia. Forensic Document examination had also shown that the Macharia had not signed the said letter and she concluded that his signature was forged.
32. As for the Receipts- Pros Exh 4(a)-(f), she established through forensic document examination that the writings on the receipts and the signature at the back of the documents were made by the Accused. She also established from Kenya Revenue Authority through her letter dated 1/3/2011 (Pros Exh 8) that PIN No. 011712284M and VAT No. 0133428K appearing on the receipts were not genuine. Through another letter dated 7/12/2009 addressed to the Postmaster Embu, she also established that the address on the Receipts namely P.O Box 253, Embu belonged to another person.
33. Through information from the Companies Registry, she ascertained the existence in Embu of a company known as Embu Agricultural Hardware Stores Ltd. She travelled to Embu and learnt through Pros Exh 8- a Rent Card that such a business had been a tenant at Mugo Holdings Co. Ltd and that its real postal address was Box 374, while its telephone number was 20600 and not 20061 as appears in the Receipts.



34. She therefore concluded that the business named in the receipts is not the same one that was a tenant at Mugo Holdings Co. Ltd in Embu.
35. The Investigator also found through forensic Document examination and witnesses that the Accused had been issued with the specific S13 booklet in which the series comprised in Pros Exh 7(a)-(f) is contained. Further, that he wrote the entries in the said exhibits and that P. Lichoti (Patrick Mwangi Lichoti- PW3) and Bernard Muema (Bernard Mwanzia Muema – PW 14) had neither received, nor issued the materials itemized in Pros Exh 7(a)-(f) in the SEMU Store, as purported in the documents.
36. She also learnt from Mr Macharia who provided Certified Copies of LSO (Pros Exh 13, 14 and 15) that the works at the Embu PTTO had been undertaken locally using office funds, and that the Accused did not undertake any works. She also confirmed that the PS had required the Accused to explain the same issue.
37. She identified and produced the bulk of the documents that she had referred to except MFI30- a photocopy list of materials dated 11/3/2010 whose production the Defence successfully objected to.
38. Under cross examination, she maintained that SEMU could not institute procurement which the Accused had done. She stated that Mr Oreta had told her that he had received a call from Macharia but insisted this was not the case. She denied the possibility that Mr Macharia's letterhead had changed or could change. She agreed that the date on Pros Exh 4(a) – (f) was 10/4/2008. She agreed that she had visited Embu where the materials were kept in a room. She had not assessed the value of the materials. She maintained that the Accused had attached Pros Exh 5 to his surrender.
39. Kepha Mareri Oseko (PW 1) the Ministry Chief Accountant testified that he approved Imprest Warrant No. C806410 signed by the Accused which was processed and paid. He also authorized the Surrender Voucher 003220 (Pros Exh 3) for the sum of ksh 2, 263,440/-. He identified documents that were attached to the Voucher as Pros 4(a)-(f), a letter dated 15/5/2008 from the PTTO confirming that work had been done and a checklist signed by Mr Ndoli (Pros Exh 6)
40. Under re-examination he stated as follows;

‘...the cash was taken by Odhiambo and he is the one who accounted for it...’
41. Bernard Mujiza Ndoli (PW 2) –an Accountant responsible for imprest surrender, also testified that he received an Imprest Warrant and documents from the Accused. His role was to prepare Surrender. Amongst the documents he received were receipts Pros Exh 4(a)-(f) and a ‘letter of authority’. He confirmed that the arithmetic matched. He stated that he did not verify whether receipts were genuine or not. He prepared a checklist (Pros Exh 6) showing the documents he checked.
42. Under cross examination, he maintained that the receipts were attached. He agreed that he did not mention them in his checklist, though they were critical documents.
43. Zuura Zainabu (PW 11), an Examining Accountant testified that she handled the Imprest Warrant both at processing and surrender stages. She identified Pros Exh 3 as the Surrender Voucher that she received. She identified Pros Exh 4(a)-(f) as receipts that were attached to the Voucher, as well as a letter dated 15/5/2008 (Pros exh 5) from the PTTO Embu- Mr Macharia, confirming that the work had been done. She also identified S13 Documents (Pros Exh 7(a)-(f) as further attachments. She described her role as counterchecking the documents, confirming the figures and signing the examination certificate which she did on 4/6/2008.



44. Kitemi Itonge (PW 5), an employee of Kenya Revenue Authority, Embu testified that he received a letter from KACC (Pros Exh 8) seeking to confirm PIN Registration 0117122841 E and VAT number 0133428 K. He found that both numbers did not exist in the KRA database.
45. Betty Kainyu Rucha (PW 9) an employee of Postal Corporation of Kenya, who at the material time was Regional Manager Eastern, testified that she was approached by KACC Officers and also received a request from KACC (Pros Exh 19), addressed to the Postmaster General, to confirm the ownership of Post Office Box No. 253, Embu. She was also shown Receipts pros Exh 4(a)-(f) which bore the address. She established from her records that the Post box had been rented by one Muchira Magu from 2006-2010. She produced pros Exh 23- a card showing the rental history of the post box.
46. Ruth Wanjiru Kariuki (PW 6) testified that she worked for Mugo Holdings Ltd- a family company involved in the business of leasing commercial and residential properties.
47. She recalled that between September 2003 and May 2004, the company had a tenant called Embu Agricultural Hardware. She produced a Rental Card (Pros Exh 9) showing a record of rent payments. She also produced a Notice dated 17/2/2004 (Pros Exh 10) of intention to terminate the tenancy, issued by the said client showing the client's postal address as Box 374, Embu.
48. Under cross examination, she stated as follows;
- ‘...The Embu Agricultural Hardware was a hardware shop selling agricultural implements...’
49. Patrick Mwangi Lichoti (PW 3) and Bernard Mwanzia Muema (PW 14) both testified that they were based at SEMU at Kabete. Lichoti was in charge of the electrical department while Mwanzia was charged with maintenance of offices amongst other duties. Both identified the Accused as their boss at the unit. They were both interviewed by KACC Officers in relation to Pros Exh 7(a) to (f), which are counter receipt and issue vouchers which they supposedly handled.
50. Both denied that they had received and issued the goods in the documents, nor signed them.
51. Under cross examination, Lichoti stated that requisition for materials would be made by the accused at headquarters. On his part Bernard Muema was shown his statement and denied the reference to him as an ‘inspector’ maintaining that he was a charge hand or artisan. His said statement was admitted herein as Defence Exh 5.
52. I have read the said statement and noted that the witness described himself as an ‘artisan’, as at the time material to these charges.
53. Thomas Kubende Lunani (PW 4) testified that he was an accountant charged with the issuance of accountable documents at the ministry between 2006 to 2011. He knew the accused person as the official in charge of SEMU and who used to collect S13 documents. He would record the issue in a register.
54. He was shown Pros Exh 7(a)-(f) and confirmed from the serial numbers, that he had issued the particular booklet to the accused who was known to him as the head of SEMU.
55. Francis Mwangi Macharia (PW 7) testified that he worked in Ministry as the Provincial Technical Training Officer (PTTO) in charge of Eastern Province since 2003. He had authority to incur expense (AIE) and described the process that would be followed by his Office in relation to works of refurbishment.
56. He testified that officers from KACC had visited his office and showed him a Memo (Pros Exh 1(a) written by Mr James Odhiambo , head of SEMU, to which was attached at list of 36 items (Pros Exh



- 1(b) costed at ksh 2,262,440/-. The letter requested the money for rehabilitation of his office. He was also shown an imprest warrant for the aforesaid amount.
57. He was also shown a letter dated 15/5/2008 (Pros Exh 11) addressed to the PS and purported to be authored by him.
57. He denied authorship and the signature on the letter. He identified a sample letterhead from his office (Pros Exh 12) in which he identified features that differed from those in Pros Exh
58. One of the features was the postal address which according to him, was misrepresented as 2330 instead of 1339. Pros Exh 11 did not also have a fax number as would be expected, and the filing reference in the letter was different.
59. I have examined Pros Exh 12- the sample letterhead and indeed it shows the postal address as 1339 and not 2330 on Pros Exh 5. It also has telephone and fax information which Pros Exh 5 lacks. It does not have the extra text 'Department of Technical Education' which is on Pros Exh 5.
60. Mr Macharia was also shown Receipts –Pros Exh 4(a)-(f) showing that they were issued by Embu Agricultural Hardware Store, an entity he said he had never heard about.
61. His further testimony is that his office had undertaken fabrication and installation of doors, window grilles and a metallic gate. He identified various LSOs (Pros Exh 13, 14, and 15) issued by his office in this regard. In his testimony none of these works had been done by the accused, and soundproofing was still a pending item.
62. It is also his testimony that the accused had visited his office twice first on 2/4/2008 and on 3/2/2009 when he had signed the visitor's book. He identified extracts of the same as Pros Exh 16 and 17.
63. An examination of the Visitor's Book extracts – Pros Exh 16 and 17 confirms this information. Under the comments part of the extracts, the accused indicated his visit on 2/4/2008 simply as 'official'. On 3/2/2009 he indicated the purpose as follows;
- 'On official duty for rehabilitating the PTTO's Office- Good reception'
64. According to Macharia on 3/2/2009, the accused had brought with him assorted items intended for padding his office, in a pickup, together with some technicians. He had however earlier received a circular (Pros Exh 18) authored by the PS then, Prof Chrispus Kiamba, which required SEMU no to be allowed to undertake any works without the written authority of the PS.
65. He further testified that he brought the contents of the circular to the accused, who did not have it, and thereafter the accused left the materials promising to return the following day with the required authority but never did.
66. That later, the Weights and Measures Department required their office space back, and he moved the materials to the servant quarters on 15/8/2008 in the presence of an officer from the Ministry of Works and the ministry's internal auditor. An inventory was also taken.
67. Under cross examination, Mr Macharia confirmed that the materials were still in the servants quarter under lock and key. He was shown pros Exh 1(a) and confirmed that it had been approved by the Senior Deputy Secretary. He maintained that the letterhead on Pros Exh 11 was not from his office and denied that his office letterhead had changed or could change. He further stated that he knew one Mr Gakungu had visited the office to audit the material brought by the accused. He had not seen a report recommending the lifting of the suspension of the accused.



68. He completed his cross examination by stating as follows;

...My office did not need refurbishment at that time. I do not know why Mr. Oreta authorized the Chief Finance Officer to release money, or why the Chief Accountant authorized the Imprest Accountant to release funds or why they changed vote head 831 to 726, or why the Chief Cashier released the money. Only they would know...”

Under re-examination, he stated as follows;

‘...In respect of MFI-1 and 2, we had not made any requisition as the user department...’

69. Prof Chrispus Makau Kiamba (PW 15) testified he was the Permanent Secretary (PS) at the Ministry from March 2006 to June 2013. He described SEMU as a unit in the Ministry responsible for repairs, maintenance and refurbishment of buildings. According to him the unit was not to initiate the works. This was to be done by the user department.
70. His further testimony is that the Ministry had received an audit report from the Comptroller and Auditor General regarding some works that the accused had done which the Ministry was required to respond to.
71. He had requested internal audit in the Ministry to investigate and report. He received a report dated 26/2/2009 from the Principal Internal Auditor (MFI 27) which concluded that the works had not been carried out. He further called a meeting of relevant officers where they further discussed the report of the Comptroller and Auditor General, and the team concluded that the works had not been done, and that the documents thereof were forged.
72. He took the action of writing a letter to the accused (Pros Exh 26) which required him to explain the forgeries of documents. According to him the Accused responded in a letter dated 18/2/2009.
73. Although this letter was in court, the defence successfully objected to the production in evidence.
74. It is the further evidence of the PS that he interdicted the accused by letter dated 20/2/2009 (Pros Exh 28) and that thereafter the accused was removed from employment in the Ministry.
75. He then briefed the Minister on the matter and the action taken through his internal memo dated 27/5/2009 (Pros Exh 29).
76. Under cross examination, the PS agreed that an AIE Holder could commit funds on his behalf but the amount involved should have been approved by him as PS.
77. Under re-examination, he stated that from the face of Pros Exh 1(a), the accused had initiated the process.
78. Francis Ng’ang’a Kabui (PW 12) testified that he was an auditor based at the office of the Auditor General’s Office in Nyeri, responsible for auditing the Ministry. He recalled that he was tasked to audit payments in respect of rehabilitation and refurbishment of the PTTO’s Office in Embu.
79. He collected documents including an Imprest Warrant (Pros Exh 2), receipts Pros Exh 4(a)-(f), payment voucher (Pros exh 3), counter receipts (Pros Exh 7(a)-(f), and a letter by Mr Macharia (Pros Exh 5). He also visited the office to confirm whether the work had been done. He met and spoke with Mr Macharia who gave him a letter dated 15/9/2009 (MFI 25) disputing that the work had been done, and stating that the work of soundproofing, burglar proofing and tiling had been done using AIE.



80. Further according to the witness, Mr Macharia also disputed the signature on the letter dated 15/5/2008 and the address. The witness prepared a report that he forwarded to the Ministry, and his parent ministry. He stated that his letter of 15/9/2009 was not signed, saying it was a file copy.

81. The record shows that the defence written objection raised an objection against admission of the letter-MFI25 as an exhibit, which was upheld.

The witness further stated as follows;

‘... My visit revealed no soundproofing had been done. Tiling had been done, but the PTTO said it was carried out by himself. Our conclusion is that surrender of the imprest was not proper, money had not been utilised for the proper use...’

82. Under cross examination, he confirmed that the request, the imprest and the surrender were all signed by the AIE Holder. He also confirmed that the internal auditor had approved the expenditure. He also stated that he had believed Macharia because he was able to back his assertion in writing.

83. Under re-examination, he stated that he had no reason to disbelieve Mr Macharia.

84. Eliud Munga Kiragu (PW 16) testified that he was the Principal Internal Auditor at the Ministry between 2006 to 2009. He confirmed that he was sent to PTTO Embu in February 2009 to check whether the money in Pros Exh 2 was spent.

He stated further follows;

‘... I found that the office had not been refurbished but I was shown a heap of materials in a store. I made a report to the PS. (Shown MFI 27). This is the report. I wish to produce it as an exhibit...’

85. I however upheld an objection by the defence against production of this report on the basis that it was secondary evidence, and no basis had been laid.

86. Sebastian Lameri Anampiu (PW 18) testified that between 2008 to 2010 he was based in Embu as the Officer in Charge, Building and Maintenance Depot, Ministry of Public Works.

87. He recalled a request by his boss to proceed to the Office of the PTTO where he went and met Mr Macharia and some officers from Nairobi. According to him, Mr Macharia asked him to assist in identifying materials in a store that had been earlier delivered to the office.

88. He was assisted by a colleague a Mr Kamau (not a witness) to identify and list the materials in an inventory. (MFI 30) He identified a copy of the document dated 11/3/2010, as the inventory that he personally prepared. He identified his signature on the document and his stamp.

89. According to him, the inventory was signed by Mr Macharia, a Mr Gakungu (not a witness), James Odhiambo and M. Kithuka.

90. The defence once again objected to production of the document, which was a photocopy which was also upheld.

91. Under cross examination, PW 18 stated that Mr Macharia had prepared the signature page, and only he could tell why indicated the date as 2/2/2009. He also stated that he did not know who when the materials had been delivered.

92. Owate Norman Wambai (PW 13) testified that he was a director of Technical Education at the Ministry and recalled that KACC officers went to his office with two documents namely Pros Exh 1(a) and Pros



Exh 5 and 11. They wanted to confirm whether the signature on Pros Exh 5 and 11 was that of Mr Macharia. According to him, the signature on the document differed significantly from that of Mr Macharia that was known to him.

93. Under cross examination, he stated that he was not aware of the release of imprest for refurbishment of the offices in Eastern. He further stated that it was not wrong for the Senior Deputy Secretary to authorise refurbishment of the eastern office without referring to him, but it was probably unwise, adding that they had been requesting for refurbishment of the offices.
94. Samuel Erick Oreta (PW 20) testified that he was the Senior Deputy Secretary at the Ministry for about 4 years since 2007. He stated as follows in relation to SEMU;

‘... In 2007 when I joined the Ministry, I found a policy. The ministry was using Kabete maintenance unit for repairs. An officer would make a request and I would ask the Kabete team to assess the repairs and estimate. They would then write the estimates which I would consider and approve. I would then send the document to the chief finance officer. I was the AIE Holder...’

He further stated as follows;

‘... In this matter, I recalled being shown a surrender imprest, receipts and a letter from the officer who had made a request for the job and surrender vouchers. I recall the requesting officer was Mr Macharia. When I was shown the documents then, I could see. The letter from Mr Macharia, was to the effect that the job had been done. I was also shown an imprest warrant. The imprest had been taken by Mr James Odhiambo...’

He stated further as follows;

‘...Mr Macharia initiated the job herein. He had called me on telephone. I relied on what the officer had told me. I approved as AIE Holder when the documents were brought to me. There were no Complaints.

95. The Document Examiner Police Superintendent John Muinde (PW 19) testified that his office received various questioned documents namely Pros Exh 1(a), 3, 4(a)-(f), 6, Pros 7(a)-(f), and 28, alongside known and sample signatures and writings of John Odhiambo, (Pros Exh 31-36 and 37 and 40), the sample signatures of Francis Mwangi Macharia (Pros Exh 38,), sample signatures of Samuel Erick oreta 9 Pros Exh 39), sample writings and signatures of Bernard Muema (Pros Exh 41 and 42), and sample writings and signatures of Patrick Lichoti (Pros Exh 43 and 44).
96. He received these documents via an exhibit memo (Pros Exh 46) forwarded by Eva Wachuka of KACC. The exhibit memo contains a number of questions that formed the basis of his examination.
97. The document Examiner undertook his examination and compiled a report (Pros Exh 45) containing his opinion on the questions forwarded to him.
98. In summary, his opinion is to the effect that Pros Exh 1(a) was indeed approved by Samuel Eric Oreta. It is also the effect that the writing and signature on the goods received certificate on the Voucher – Pros Exh 3 were by the accused.
99. The document examiners opinion is also to the effect that the accused made the writings on the receipts Pros Exh 4(a)-(f) and appended the signature the back of the receipts.
100. Finally the effect of the document examiners report is that Francis Mwangi Macharia did not sign the letter Pros Exh 5 (copy also marked as Pros Exh 11).



101. In his defence, the accused denied the charges and any allegation of misappropriation or improper utilisation of the imprest he took. According to him, the activity he undertook had been authorised by his bosses.
102. He maintained that he purchased materials, and identified MFI30 as the list of those materials. According to him the receipts Pros Exh 4(a)-(f) were genuine and from a genuine company. He acknowledged that he signed them at the back. He had not been approached by investigators to show them where the shop was.

He stated as follows in testimony in relation to the purchases;

‘... I delivered them in 2009. The date was 3/2/2009. The date of surrender of imprest was 4/6/2008. I delivered the goods in 2008. The visit in 2009 was for recording the materials to be bought (Shown Pros Exh 4(a)-(f). (reads date on receipt). The date is 10/4/2008. MFI30 was made when the Ministry realised that they did not have the list of the materials. I was dispatched there when we signed MF30...’

103. In relation to the letter Pros Exh 5, the accused denied writing such a letter and delivering it to the ministry. Instead according to him, the letter was on Mr Samuel Oreta’s desk, and that it is Samuel Oreta what forwarded it to surrender section. According to him, Mr Oreta had not explained where he got the letter from during his testimony.
104. It is also his testimony in this regard that a checklist Pros Exh 6 prepared by Ndoli did not show that the letter Pros Exh 5 was part of the documents he submitted.
105. His further testimony is that as the one was undertaking the work, it was him to write about completion of the work and that Mr Macharia could not do it. He had not written such a letter.
106. Further that Mr Macharia refused to receive the goods when he delivered them and had vowed to frustrate him out of a work-related grudge.
107. It is also testimony that the value of the goods was not ascertained.
108. Under cross examination by Ms Gateru for the State, he maintained that the words ‘as per attached’ on Pros Exh 6 did not show the letter Pros Exh 5. He was shown Pros Exh 1(a) and agreed that some of the works were soundproofing , metal works and grilling. He agreed that some of the works correspond to the contents of Pros Exh 5. He was shown the PTTO visitor’s book extract (Pros Exh 17) and agreed that the date on the document was 3/2/2009. He also agreed that the surrender had been done on 3/6/2008. He denied that the decision to take the materials to Embu was an afterthought. He was asked whether he had questioned Mr Macharia on the alleged threat to frustrate him and stated;

‘... I do not know whether Mr Ocharo put the question about the threat to frustrate me to Mr Macharia. I told him...’

He was shown Pros Exh 4(a)-(f) and insisted that there were genuine. He added as follows;

‘... The witnesses who disowned them panicked and said in court they did not sign MFI 7(a)-(f). I maintain that the witnesses signed Mfi(7(a)-(f)...’

He confirmed that he had the booklet where the receipts had come from.

109. I have carefully considered the evidence in its entirety alongside submissions by counsel.



110. The decision in this case in its broader sense narrows down to the question whether the accused properly accounted for the impress value of ksh 2,263,440/- which he does not deny he received.
111. The accused also does not deny that he accounted for the impress through a surrender voucher Pros Exh 3.
112. The surrender voucher had documents to support the expenditure. These documents include six receipts pros Exh 4(a)-(f) which on their face, were issued by a business known as ‘Embu Agricultural Hardware’ of P.O Box 253, Embu and telephone number 20061. The receipts also bear KRA PIN Certificate No. 011712284M and VAT No. 0133428K.
- These receipts are the subject of count 1.
113. Also attached to the surrender voucher were Six Counter Receipt and Issue Vouchers (Pros Exh 7(a)-(f). These on their face contain a handwritten list of items received at SEMU. The receiving officer is indicated as Bernard Muema while the same documents also show that the goods were issued by P. Lichoti. The names are followed by a signature and designation.
114. There was also attached to the voucher a letter dated 15/5/2008 (Pros Exh 5), copy of which is also marked herein as Pros Exh 11. The letter is addressed to the PS at the Ministry and reads as follows in its body text;

Rehabilitation of PTTO’s Office-embu

This is to inform you that the works have already been accomplished; This include;(sic)

* Soundproofing of PTTO’s Office

* Tiling of 3 officers and office corridors

* Burglar proofing of office doors and gate

We thank you for the above accomplished work.

(signed)

F.M Macharia

Provincial Technical Training Officer

Eastern Province

115. This letter is dated 15/5/2008. Its reference number is indicated as MST/EST/TT/18/1/29.
116. Other documents attached to surrender were Pros Exh 1(a), a Memo addressed by the accused to the AIE Holder- who was the Senior Deputy Secretary and an annexure of a list of costed materials. There is also a Checklist- Pros Exh 6, and a similar one Pros Exh 24 signed by Ndoli.
117. The voucher Pros Exh 3 shows that the surrender was done on 3/6/2008.
118. It is the evidence of Kepha Oseko-PW 1, the Ministry’s Chief Accountant, Ndoli (PW2)-an accountant and Zuura (PW11) –also an accountant, and who were all involved in the processing stages of the surrender voucher –Pros Exh 3, that the above documents were attached to it. The Accused acknowledges the surrender. He acknowledged the Receipts-Pros Exh 4(a)-(f), save that according to him, they were genuine and issued by a genuine company.



119. The Accused also acknowledges the Counter Receipt Vouchers- Pros Exh 7(a)-(f), but according to him the witnesses who testified about them panicked and for that reason denied signing them. He acknowledges that he was issued with the booklet from which Pros Exh 7(a)-(f) were contained.
120. A question that arises from the Accused's defence is whether indeed the Receipts Pros Exh 4(a)-(f) were genuine as he claims.
121. In this regard, an official from KRA -Kitemi Itonge (PW 5) confirmed in testimony that the PIN Certificate and VAT number on the six receipts- Pros Exh 4(a)-(f) did not exist in their database. Further, an official from the Postal Corporation of Kenya Betty Kainyu Rucha (PW 9) also confirmed that the address and the receipt did not belong to the named entity. In her testimony and according to Pros Exh 23- a record which she produced, the indicated postal box had been rented to one Muchira Magu who had renewed it from 2006-2010.
122. Tied to this testimony is that of Ruth Wanjiru Kariuki (PW 6) who testified that her company had leased premises in Embu to a company known Embu Agricultural Hardware Limited which vacated the premises in May 2004 after a notice. The postal address of this entity was Box 314, Embu and not 253, and its telephone number was 20600 and not 20061.
123. According to her its business in the leased premises was sale of agricultural hardware and implements.
124. I have examined the items listed in the receipts, which are building materials and clearly they are not the kind that would be found in a store selling agricultural hardware and implements.
125. On his part, the Document Examiner confirmed in his opinion, that the Accused had appended his signature on the back of the receipts. The Accused acknowledged in agreement with this, that the signature was his. The Document examiner however went further and opined that the writings on the receipts were also similar and indistinguishable to the samples from by the Accused, and from that opinion, the Court concludes that the Accused filled the details in the receipts. This essentially means that the Accused wrote himself the receipts!
126. From the foregoing, and absent any demonstration of grudge by these witnesses against the Accused, I have no difficulty concluding that the six Receipts which were part of the Surrender by the Accused were indeed forgeries and were never issued by the entity indicated on their face. They were written by the Accused himself and only he would know their real source.
127. The evidence of Mr Macharia (PW 7) is that he never wrote or signed a letter dated 15/5/2008 and which was identified by ministry witnesses as having been part of the Surrender. I have reproduced the text of the letter for effect, and it clearly purports to inform the PS that the works for which Imprest No. C 806410 was taken had been concluded.
128. The PS testified that he never saw the letter, although it is addressed to him.
129. The document Examiner opined in relation to this letter that the signature had no agreement with the signature and writing samples taken from Mr Macharia. Owate Norman Wambai (PW 13) who was familiar with Mr Macharia's signature equally stated that the one on Pros Exh 5 was different. This evidence is in agreement with Mr Macharia's testimony that he did not sign Pros Exh 5.
130. Mr Macharia also demonstrated features in the letter which I have highlighted that support his assertion that the letter had not originated from his office.
132. The Accused went to some length in trying to distance himself from this letter, first pointing out that the Checklist made by Ndoli (PW 2) which was Pros Exh 6 did not show that he delivered the letter



as part of his surrender. He also referred to the testimony of Samuel Oreta (PW 21) to the effect that the witness had testified that Mr Macharia had written the letter.

133. It is indeed true that Mr Oreta's testimony was to that effect, as seen from parts I have reproduced.
134. This creates a conflict between the testimony of Mr Macharia and that of Mr Oreta, a prosecution witness and the Accused.
135. To bring out the full picture and determine the conflict, I find it necessary to consider other evidence relating to the subject of the letter-(Pros Exh 5) namely whether or not the works were indeed undertaken as the letter purports.
136. In his evidence PS Chrispus Kiamba (PW 15) told the court that he commenced an investigation following receipt by the Ministry of a report from the Auditor and Controller General, relating the works allegedly undertaken by the accused at Embu PTTO's Office. He received a report (MFI 27) from Eliud Munga Kiragu (PW 16), the Ministry's Principal Internal Auditor, to the effect that the works had not been undertaken. This confirmed the findings earlier made by Francis Ng'ang'a Kabui (PW 12), who undertook an external audit on behalf of the office of the Auditor General. This audit was the result of the query to the Ministry, which the PS addressed.
137. Both Mr Kabui and Mr Kiragu visited the PTTO's Office in the course of their work. They were in agreement with Macharia's testimony that works that had been undertaken were done locally by Mr Macharia, who demonstrated it. Mr Kiragu stated under cross examination;

'...I could see that the refurbishment had not been done...'

Under re-examination, Mr Kabui stated;

'...In arriving at our conclusion, we did not only rely on what Mr Macharia had told us, but also counter-checked the same during our visit and found sound proofing had not been done but tiling and burglar –proofing had been done. I had no reason to disbelieve Mr Macharia...'

138. It was also Mr Macharia's evidence that sound-proofing was still a pending issue at the time of his testimony.
139. As a result of the findings, The PS and the Ministry concluded that the expenditure relating to the imprest had been supported by forged documents. It is for this reason that he took the action of requiring the accused to explain the forgeries through his memo Pros Exh 26.
140. According to the PS, the accused explained acknowledging the fact and for that he was suspended from duty (Pros Exh 28) and later removed from employment.
142. In his defence, the accused kept mum about the disciplinary process he underwent at the Ministry.
143. It is the accused's evidence that he bought materials and delivered them to the PTTO's Office, where they were rejected because Mr Macharia harboured a work-related grudge against him and had vowed to frustrate him. As the accused's testimony shows, he was not very clear exactly when he delivered the materials.
144. He sought to rely on MFI30- a Photocopy document that had been identified by prosecution witnesses as an inventory of the materials he had delivered at Embu PTTO on 3/2/2009, which was nearly a year after he had submitted his surrender of imprest. This document was not admitted as an exhibit because



- the Accused through his advocate successfully objected against it. He could therefore not purport to make reference to it in his defence.
145. Contrary to the claim by the accused that Mr Macharia had refused to accept the materials because of a grudge, Mr Macharia explained in court that the reason was because he had expended office funds to undertake the same works. In this regard he produced LSO's (Pros Exh 13, 14 and 15) to demonstrate the fact that the works the accused purported undertake had been done earlier. He was clear that the office did not need refurbishment and even questioned the rationale behind the Ministry's approval for the activity.
 146. It is also in the evidence that the Accused did not confront Mr Macharia with his claim of grudge when he testified in Court, which strongly points to this allegation being an afterthought.
 147. Having had regard to the evidence as seen above, I find the Accused's claim of grudge by Mr Macharia is wholly unsustainable. I find that Mr Macharia's testimony has sufficient corroboration both in documentary evidence before the Court and oral testimony of
 148. witnesses. Bearing this in mind therefore, it is my finding that as against the accused, Mr Macharia was a believable witness.
 149. Based on this finding, it is also my further finding therefore, that the claim by Mr Samuel Oreta (PW 20) that the letter Pros Exh 5 was authored by Mr Macharia is untenable.
 150. There's more reason to doubt the credibility of Mr Oreta in this matter. It is clear from the testimony of the PS, that he purported to approve an amount that the PS should have approved, or in the very least been made aware of. He also clearly kept away the forged letter- Pros Exh 5 from the PS, yet clearly the letter was addresses to the PS.
 152. It also seems that Mr Oreta who was a Senior Deputy Secretary not only kept the PS in the dark about the matter, he also kept the Technical Director, Owate Norman Wambai (PW 13) under whom the PTTO Office fell, in the dark about the matter as well.
 153. From the foregoing, I find that Mr Oreta was an incredible witness whose testimony cannot be believed.
 154. In relation to Pros Exh 7(a)-(f) which were also part of the surrender by the accused, the document Examiner opined to the effect that the writings on the document, were made by the accused. He also opined to the effect that neither Mr Lichoti, nor Bernard Muema, had signed for the receipt or issue of the items listed in the exhibits.
 155. This evidence therefore shows that once again the accused purported to receive using Pros Exh 7(a)-(f), the items he purported to have bought through Pros Exh 4(a)-(f) into the SEMU store.
 156. It is my finding in relation to Pros Exh 7(a)-(f), that the said documents are also forgeries by the Accused.
 157. It is now clear from the foregoing discussion that the accused forged Pros Exh 4(a)-(f), and also forged Pros Exh 7(a)-(f), purporting that the alleged purchase vide the forged receipts, had also been received and issued from the SEMU Store. It is notable that the dates on Pros Exh 7(a)-(f) fall between 12/5/2008 and 14/5/2008. The questioned letter Pros Exh 5 is dated 15/5/2008.
 158. I find it inescapable that the said letter Pros Exh 5, is also a forgery made by the accused in pursuit of his fraudulent scheme in this matter.
 159. It is interesting to note that whereas the accused insisted that he delivered the materials to Embu PTTO, which fact is clearly confirmed by witnesses herein, the documents available before court show that



- this happened only on 3/2/2009, a point when he had already purported that the works had been completed through his fictitious letter Pros Exh 5.
160. In view of these, I do not find that his defence that the value of the materials had not been assessed to hold any water in the circumstances, granted that it may show that a part of the imprest amount of ksh 2,264,440/- may have ultimately been recovered.
161. I consider the belated delivery of materials, whose type, and value the accused has not even disclosed in his defence, to have been a botched attempt at undoing the fraud he had already perpetrated earlier.
162. It is also immaterial that the activity had received approvals at the Ministry. As is evident, the role of Mr Oreta, who was the line AIE Holder and who first approved the activity is itself dubious. He not only approved an amount he was not authorized to, but also kept both the PS , Mr Macharia and the Director of Technical Education in the dark about the matter. He also approved an illegal activity as it is clear in the evidence that neither Mr Macharia nor the Directorate of Technical Education had initiated the same as the user department.
163. I now consider the individual charges against the Accused in light of the above.
164. As relates to Count 1, I find it proved beyond all reasonable doubt that the Receipts the subject of the Count- namely Pros Exh 4(a)-(f) were forged documents and therefore false. They were made by the Accused who therefore knew that they were false. The Accused used or gave them to his Principal- the Ministry in purported account for the imprest of Ksh 2,263,440/- which he received through imprest warrant no. C806410. (Pros Exh 3)
165. As such, Count 1 is proved against the Accused beyond all reasonable doubt.
166. I make no finding in relation to the alternative Count to Count 1.
167. As relates to Count 2, the key bearer of evidence that would have been necessary to prove it was Mr Samuel Oreta (PW 20). I have since found that he was not a credible witness and in any event, his evidence did not go anywhere near proving the said Count. It was in fact exonerating in effect. I therefore do not find that this Count is proved as required by law.
168. In the end, I convict the Accused in Count 1, and acquit him in Count 2 under section 215 CPC. I make no finding in relation to the alternative Count.

FELIX KOMBO

SENIOR PRINCIPAL MAGISTRATE

DELIVERED IN OPEN COURT THIS 1ST DAY OF MARCH 2019

