



**Osoro v Republic (Criminal Appeal 14 of 2021)
[2023] KEHC 1424 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 14 OF 2021
REA OUGO, J
FEBRUARY 28, 2023**

BETWEEN

MUSA OGARO OSORO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from Kisii Principal Magistrate Hon E A Obina on September 13, 2021 in Kisii Chief Magistrate's Court Criminal Case (EACC) No 2 OF 2019)

JUDGMENT

1. The appellant faced the following 3 counts before the trial court:

1 Count I: Giving False Information To A Person Employed In Public Service Contrary To Section 129 (a) Of The [Penal Code](#)

Particulars Of The Offence: On September 20, 2013 at Integrity Centre in Nairobi within Nairobi County, knowingly, for purposes of employment, provided false information to Patrick Owiny an employee of the Ethics and Anti-corruption Commission by stating that you had not been dismissed from employment which information you filled under part 9 (j) of the Self-Declaration Form dated September 20, 2013, information you knew to be false.

2 Count Ii: Giving False Information To A Person Employed In Public Service Contrary To Section 129 (a) Of The [Penal Code](#) Cap 63 Laws Of Kenya

Particulars Of The Offence: On January 27, 2014 at Kisii County Public Service Board offices situated at Mwalimu House, within Kisii County, knowingly for purposes of securing a job as an accountant I/II at Kisii County Government, provided false information to Rael Kwamboka Momanyi, a member of the Kisii County Public Service Board by stating that you



had not been dismissed from employment which information you filled under part 9 (j) of the Self-Declaration Form dated September 20, 2013, information you knew to be false.

3 Count Iii: False Declaration Contrary To Section 11 Of The [Oaths And Statutory Declarations Act](#) Cap 15 Laws Of Kenya

Particulars Of The Offence: On September 20, 2013 in Nairobi within Nairobi County, knowingly and wilfully made a false declaration under part 9 (j) of the Self-Declaration Form dated September 20, 2013, set out in the First Schedule of [Leadership and Integrity Act](#) 2012, in that you had not been dismissed from employment information you knew to be false.

2. He was arraigned before the subordinate court on May 16, 2019 where the charges were read to him and a plea of not guilty entered. The prosecution called 9 witnesses to prove its case.
3. Fred Nyakwara Miruka (Pw2) testified that he is a human resource manager at Wakenya Pamoja Sacco and the appellant was a former employee. The appellant was employed in August 2003 and confirmed in August of 2006. He was later dismissed for misconduct, that is, stealing Kshs 300,000/-. He also testified that criminal proceedings were instituted against the appellant in Nyamira, Criminal Case No 124 of 2013. On cross examination, he explained that because the appellant could not be traced his dismissal was published in the newspaper.
4. Joel Okerosi Ochako (Pw4) testified that on September 20, 2013 the appellant brought EACC forms to him and he commissioned them. Rachael Kwamboka (Pw3) testified that she worked at Kisii County Government from July 2013 to July of 2019 as a board member and vice chairperson of Kisii County Public Service Board. The applicant applied for employment and submitted his certificates and documents which included copies of self-declaration forms. He was shortlisted, interviewed and employed.
5. Patrick Owiny (Pw1), deputy director in charge of leadership and ethics department. He explained that part of his role involves receiving self-declaration forms for those seeking appointment to particular office for vetting. He testified that it was brought to his attention that the information that the appellant had provided in the form was not correct. Pw1 testified that he retrieved the appellant's self-declaration form. On cross examination, he testified that he is in charge of the documents while there are officers who receive the forms.
6. Abraham Arop Koko Lorot Mo 2015149 (Pw9) testified that he was the lead investigator in the case. He was looking into an allegation that the appellant was not fit to hold public office as he failed to meet the requirements of chapter 6. A report was made on May 14, 2015 at the EACC by an informer Rael Orina and advocates of Wakenya Pamoja Sacco Society. At the time of his investigations the appellant was an accountant working at Kisii County Government attached to the department of culture. In the self-declaration form submitted by the appellant, he indicated that he had never been dismissed from employment. At part 10 of the self-declaration form, he also failed to mention that he had worked at Wakenya Sacco. Pw9 after conducting his investigations formed an opinion that the appellant had provided false information. The appellant concealed information about his previous employment at Wakenya Pamoja Sacco. Pw9 took the appellant's statement and proceeded on transfer. Daniel Tipabe Loomu (Pw8) took over the investigations. He recorded statements from the CEO of Wakenya Pamoja Sacco and obtained documents from the sacco relating to the appellant's dismissal. He forwarded the self-declaration form and the appellant's application form to a document examiner.
7. Isaac Omwega Mongare (Pw6) testified that he is the CEO of Wakenya Pamoja Sacco. He received a letter from EACC requesting for information they held on appellant. Pw6 gave them the correspondences they had with the appellant over his course of employment including the appellant's



letter of employment and confirmation of his employment; his transfer letter dated August 8, 2005; and his dismissal letter. He also gave the EACC minutes of the board meeting held on February 11, 2013 and the notice of advertisement in the Daily Nation dated February 13, 2013. Wilfred Nyamweya Gutwa (Pw7) retired civil servant that worked as a senior assistant director human resource at Kisii County in 2014, testified that the EACC officers came to her office in September 2015 and requested for the appellant's documents. Pw7 after looking at the appellant's file forwarded his employment documents. The appellant was later interdicted.

8. The Forensic document examiner, Jacob Oduor (Pw5) testified that he holds a BSC Arts from Kenyatta University and has 11 years' experience as a document examiner. On April 12, 2019 he received documentary exhibits from Pw8 marked as follows:
 - i. Questioned document marked as B40 (i), (ii), (iii), (iv), (v), (vi) self-declaration forms.
 - ii. Known signatures of Musa Ogaro Osoro B11 (i)
 - iii. B21
 - iv. B37
9. He was requested to ascertain whether the signature indicated on the documents were by the same person. After conducting his analysis, he found that the signatures had similarities specifically the initial stroke. He further observed that the connective strokes were also similar and formed an opinion that the signatures were made by the same person.
10. When placed on his defence the appellant testified that he worked with Wakenya Pamoja Sacco Society from September 1, 2003 until February 13, 2013 when he was locked out of their offices. The sacco made criminal allegations against him and he was arrested and charged vide Nyamira Criminal Case No 124 of 2013. He testified that the case was concluded and he was found not guilty. He claims that he has never been dismissed for lack of integrity as he has never received a dismissal letter. He maintained that he did not make a false declaration.
11. At the end of the trial, the trial magistrate found that the prosecution had proved its case in regard to the 1st and 3rd count. On each count, the appellant was given an option to pay a Kshs 50,000/- on both counts failure to which he would serve a 2 year custodial sentence. The sentences were to run concurrently.
12. The appellant dissatisfied with the conviction and sentence filed his petition of appeal dated September 24, 2021 on the following grounds:
 1. The learned trial Magistrate erred in law and fact by convicting the Appellant against the weight of evidence.
 2. The Learned trial magistrate erred in law and fact by finding that the appellant was served with a dismissal letter contrary to the evidence.
 3. The learned trial Magistrate erred in law by relying on evidence of Pw6 which was not reliable.
 4. The Learned trial Magistrate erred in law by imposing illegal sentence.
 5. The Learned trial Magistrate erred by overlooking the Wakenya pamoja human resource policy and procedural manual as to a dismissal.
 6. The Learned erred by stating that the appellant would not be traced hence the advertisement on the newspaper.



7. The Learned trial magistrate erred by finding that the appellant was dismissed for account of lack of integrity contrary to the high court filing (sic) in Nairobi ELC 237/2013.
8. The Learned trial Magistrate erred by disregarding the Appellant evidence without giving reasons.
13. At the hearing of the appeal, parties were directed to file their respective submissions in support of their rival positions.
14. The appellant submitted that he was never served with a dismissal letter. In any event, the court in ELRC No 237 of 2013 found that the appellant's dismissal was unlawful and directed that the appellant be compensated. The appellant contends that the allegations against him were malicious and unfounded. The conviction of the appellant is in total disregard of his defence which was that the dismissal was a nullity as per the finding of the court in ELRC No 237 of 2013. The appellant withheld information about his previous employer, Wakenya Pamoja Sacco thus his answer to section 9 (j) of the declaration form was proper. He argued that his contract of employment is not classified under contracts of utmost good faith. In *Hoffman v Moni's Wineries Ltd* 1948 (2) SA 163 (C), the Supreme Court had to consider whether an employment contract fell under the genre of contracts in which the utmost good faith was required and the court held that contracts of employment are of utmost good faith and that therefore there was no duty on an employee to disclose their criminal record. The appellant argues that an employee is under no legal obligation to self-incriminate by disclosing misconduct in previous employment unless he is specifically asked about his conduct. The appellant faulted the trial magistrate for relying on the evidence of Pw6 who had no documentation to identify himself as the CEO and similarly for relying on the evidence of Pw3 who could not remember whether she interviewed the appellant.
15. The respondent submitted that the appellant was served with his termination letter via post and physically. Pw2 produced into evidence notice to show cause letter dated July 12, 2011 and was followed by the appellant's apology dated August 7, 2011. The appellant dismissal letter was dated February 11, 2013 and the ELRC case concluded on November 3, 2018, therefore at the time of making the self-declaration he stood dismissed. It was submitted that the proceedings before the ELRC were on dismissal and did not consider the issue of integrity.

Analysis And Determination

16. This being first appeal, it is the duty of this court to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the conviction while bearing in mind that the trial court had the advantage of seeing the witnesses (see *Okeno V Republic* [1972] EA 32).
17. The appellant was charged with 2 counts of giving false information to a person employed in the public service contrary to section 129 (a) of the Penal Code. The section provides as follows:
 129. Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service –
 - (a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him;
18. The prosecution was therefore required to establish the following elements in order to prove its case:



- a. The information given by the accused must be false;
 - b. The information must be given to a person employed in public service; and
 - c. The information misled the person employed in public service to do or omit that which he would not have otherwise done if the true set of facts were known to him.
19. The evidence by the prosecution established that the appellant had been employed at Wakenya Sacco from August of 2003 to February 11, 2013. This was supported by the evidence of Pw2 and Pw6. The prosecution produced into evidence the appellant's appointment letter and dismissal letter marked as Pexh11. Pw6 also testified that the appellant was served with 2 copies of the dismissal letter and that he physically collected one copy, while the other copy was mailed to him via post. There was also evidence that a public notice of his dismissal was made on the Daily Nation on February 13, 2013.
 20. The prosecution evidence is clear that the appellant was employed at Wakenya Pamoja Sacco and was aware of his dismissal. The next question is whether the appellant is the person who authored the self-declaration form? The Forensic Examiner, Pw5, was required to ascertain whether the signature in the self-declaration form was similar to the appellant's known signature captured in the appellant's application letter for the post of accountant dated October 1, 2013; his original apology letter addressed to the CEO Wakenya Pamoja Sacco Society Ltd; and his signature in the acceptance of employment dated August 18, 2003. Pw5 testified that he formed the opinion that the signatures were made by the appellant and his evidence sufficiently proves that it was the appellant who made the self-declaration in question.
 21. Thereafter the appellant applied for a position in the Kisii County government. The appellant's advocate at the time Pw4 testified that the appellant brought a self-declaration form under the Leadership and Integrity Act for commissioning. Pw4 signed and commissioned the document. The appellant may have secured his employment at the county government of Kisii based on the information submitted in his declaration form among other factors. The self-declaration form is dated September 20, 2013 while his dismissal letter from Wakenya Pamoja Sacco was dated February 11, 2013. It is clear that the information that the appellant gave at the time he submitted the self-declaration form was false. The vice chair at Kisii County Public Service Board, Pw3, testified that they received the appellant's application together with his self-declaration form. He was shortlisted and interviewed. Later, Pw7 deployed the appellant to Bomachoge Borabu. Pw7 believed that the appellant was offered the position on the belief that he must have satisfied all the conditions. The information that the appellant presented to Kisii Public Service Board was false and had the true state of facts in regard to the appellant's dismissal in Wakenya Pamoja Sacco Ltd been known, the appellant may not have been offered a position with the county government. Despite the evidence before the trial court, the trial magistrate in his judgment found that the prosecution failed to prove its case in count 2. However, no appeal was preferred by the respondent.
 22. I now turn to consider the charge under count 1 of the charge. The evidence in support of count 1 was the appellant gave false information to Patrick Owiny (Pw1). Pw1 testified that he was a deputy director in charge of leadership and ethics department. Pw1 testified that the appellant presented a self-declaration form to the Ethics and Anti-corruption Commission stating that he had never been dismissed from employment on account of integrity. I have found above that the information on the self-declaration form was false. I have also considered that Pw1 gave clear testimony that he is employed in the public service. However, there was no evidence led to prove that the false information provided by the appellant misled Pw1 to do or omit that which he would not have otherwise done if the true set of facts were known to him. Pw1 while explaining the role of the Ethics and Anti-corruption Commission testified that they receive applications and self-declaration forms



from applicants intending to secure jobs from public offices for purposes of vetting. It is not clear why the appellant was not vetted by Pw1's office despite his evidence showing that vetting fell within their mandate. There is also no evidence that the false information provided in the self-declaration form, is what influenced to Pw1 not to vet the appellant. If at all, applicant's are required to be vetted to verify if what they have declared is true and are compliant with provisions of chapter six of the Constitution. Instead, the evidence from Pw1 is that once they received the appellant's declaration form, they merely stored it and only retrieved it due to investigations by Pw8 and Pw9. Interestingly, the investigations were opened as a result of the complaint of Wakenya Pamoja Sacco Ltd. It is clear that Pw1 and its office were required to vet the appellant but neglected to do so. There was no report that was presented before court that was the results of the appellant's vetting process. Therefore, it is my finding that the failure by Pw1 and its office to carry out their mandate, which is, vetting candidates such as the appellant, was not due to the false information provided by the appellant as it is clear that the false information was not the reason why Pw1 omitted to vet the appellant. The lack of vetting of the appellant was simply a case of 'someone sleeping on their job'.

23. In regards to the third count, the appellant was charged with making a false declaration contrary to section 11 of the Oaths and Statutory Declaration Act. I agree with the respondent's submissions that despite the appellant clearing his name on the allegations levelled against him by his former employer in subsequent cases, the fact remains that at the time of making the statutory declaration, he had been dismissed from employment on account of integrity.
24. The appellant's former employer, Wakenya Pamoja Sacco had claimed that the appellant stole Kshs 300,000/- dismissed him and made a formal complaint with the police. As a result of the complaint, the appellant was charged with the offence of stealing by servant in Nyamira PMCCR Case No 124 of 2013 but was discharged on April 29, 2015 under section 82 of the Criminal Procedure Code. The appellant had also filed a case against Wakenya Pamoja Sacco before the Employment and Labour Relations Court, Nairobi ELRC Cause No 237 of 2013. The court rendered its judgment on November 23, 2018 and found the dismissal to be unlawful. However, both decision of the court in Nyamira PMCCR Case No 124 of 2013 and Nairobi ELRC Cause No 237 of 2013 were rendered after September 20, 2013 when the declaration had already been made. The finding by the 2 courts did not therefore inform the contents of the appellant's declaration. Therefore, the appellant knowingly made a declaration under oath that contained false statements contrary to section 11 of the Oaths and Statutory Declaration Act. Section 11 provides as follows:

Penalty for false declaration

If any person knowingly and wilfully makes any statement which is false in a material particular in a statutory declaration, he shall be guilty of an offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding two thousand shillings, or to both such imprisonment and fine.

25. The trial magistrate in his sentence, gave the appellant an option to pay a fine of Kshs 50,000/- and in default he was to serve 2 years in jail. However, the penalty under section 11 of the Oaths and Statutory Declaration Act calls for a Kshs 2,000/- fine. The sentence by the trial magistrate was therefore on the higher side in terms of the fine.
26. In the end, I find that the appeal is partly successful. The conviction and sentence under the 1st Count of "Giving false information to a person employed in public service" is hereby quashed and the sentence set aside. The conviction under the 3rd count of "False declaration contrary to section 11 of the Oaths and Statutory Declarations Act cap 15 Laws of Kenya " is upheld but the sentence in the 3rd count is set aside and is substituted with a fine of Kshs 2,000/- in default the appellant to serve 2 years



imprisonment. The appellant shall be refunded the sums paid as fine in count 1 and the balance paid in count no 3. It is so ordered.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF FEBRUARY 2023.

R E OUGO

JUDGE

In the presence of:

Mr Masolo h/b Mr Nyangwen'cha For the Appellant

Appellant Present

Respondent Absent

Aphine/ Wilkister C/A

