



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wario v Republic (Criminal Appeal E016 of 2021) [2023] KEHC 18662 (KLR)  
(Anti-Corruption and Economic Crimes) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 18662 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES**

**CRIMINAL APPEAL E016 OF 2021**

**PM NYAUNDI, J**

**FEBRUARY 28, 2023**

**BETWEEN**

**HASSAN WARIO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from conviction and sentence imposed on Hassan Wario Arero in Nairobi Anti-Corruption Case No. 45 of 2018 (Republic Versus Hassan Wario Arero & 5 Others) on 15th and 16th September 2021 at the Chief Magistrate's Court by Hon. E. Juma)*

**JUDGMENT**

**Introduction**

1. The Appellant aggrieved by conviction and sentence meted out to him has preferred this Appeal vide Amended Petition of Appeal dated October 12, 2021 which is premised on 22 grounds and which seeks that the court allow the appeal, quash the conviction, set aside the sentence imposed on the Appellant and order a refund of the fines paid by the Appellant.
2. The Appellant was the 1<sup>st</sup> accused in the trial court. He faced 4 Counts in relation to charges related to the alleged loss of public funds during the Rio Olympics held in Brazil in the year 2016.

' Count 1

Engaging In A Project Without Prior Planning Contrary To Section 45(2)(c) As Read With Section 48(1) Of The [Anti-Corruption And Economic Crimes Act](#) No 3 Of 2003

Particulars



Hassan Wario Areo 2. Richard Titus Ekai 3. Haron Komen Chebet 4. Stephen Kiptanui Arap Soi 5. Francis Kinyili Paul: Between March 30, 2016 and August 25, 2016 at the Ministry of Sports, Culture and the Arts offices within Nairobi County being members of the National Steering Committee for Team Kenya to RIO 2016 Olympic and Paralympic games jointly engaged in a project namely preparation for team Kenya to participate in RIO Olympic without prior planning.

Count 2

Abuse Of Office Contrary To Section 46 As Read With Section 48(1) Of The Anti - corruption And Economic Crimes Act No 3 Of 2003

Particulars

Hassan Wario Arero: on the July 20, 2016 at the Ministry of Sports, culture and the Arts offices within the Nairobi County being the Cabinet Secretary of the said ministry used your office to improperly confer a benefit of Adan Omar Enow by including him into the RIO 2016 Olympic Games Kenyan Delegation Team To Travel To Brazil An Act That Resulted To The Loss Of Public Funds

Count 3

Abuse Of Office Contrary To Section 46 As Read With Section 48(1) Of The Anti - corruption And Economic Crimes Act No 3 Of 2003

Particulars

Hassan Wario Arero: on the July 20, 2016 at the Ministry of Sports, culture and the Arts offices within the Nairobi County being the Cabinet Secretary of the said ministry used your office to improperly confer a benefit of Richard Abura by including him into the RIO 2016 Olympic Games Kenyan Delegation Team To Travel To Brazil An Act That Resulted To The Loss Of Public Funds

Count 4

Abuse Of Office Contrary To Section 46 As Read With Section 48(1) Of The Anti - corruption And Economic Crimes Act No 3 Of 2003

Particulars

Hassan Wario Arero: On The July 20, 2016 at The Ministry Of Sports, Culture And The Arts Offices Within The Nairobi County Being The Cabinet Secretary Of The Said Ministry Used Your Office To Improperly Confer A Benefit Of Monica Nkina Sairo By Including Him Into The Rio 2016 Olympic Games Kenyan delegation team to travel to Brazil an act that resulted to the loss of public funds.

3. The Appellant was acquitted on Count 1 and convicted on Counts 2, 3 and 4 and sentenced as follows;

Count 2

- i. Under Section 48(1)(a) fine of Kshs 300,000- or 1-year imprisonment
- ii. Under Section 48(1)(b) fine of Kshs 900000- or 1-year imprisonment

Count 3

- i. Under Section 48(1)(a) fine of Kshs 300,000- or 1-year imprisonment
- ii. Under Section 48(1)(b) fine of Kshs 900000- or 1-year imprisonment



#### Count 4

- i. Under Section 48(1)(a) fine of Kshs 300,000- or 1-year imprisonment
  - ii. Under Section 48(1)(b) fine of Kshs 900000- or 1-year imprisonment
4. The Appeal is opposed. The Parties agreed to canvass the Appeal by way of written submissions. The Appellants filed submissions and Reply to Respondent's Submissions dated October 17, 2022 and February 13, 2023 respectively. The Respondents submissions are dated November 17, 2022.

### Submissions

#### Appellants Submissions

5. The Appellants submits that the offences were not proved to the required standard as the evidence adduced did not support the conviction. With regard to Count 2 it is submitted that no evidence was adduced to support the charge that the Appellant authorised the travel of Adan Omar Enow.
6. The basis of Count 2,3, and 4 was PEX28 and PEX29 being a memo dated July 29, 2016 in which the Appellant authorised Abdi Ali Guyo, Sairo Monica and Richard Abura to be given per diem and the list of delegates plus handwritten instructions of the Appellant for the inclusion of the 3.
7. The Appellants further submitted that the Trial Magistrate erred in law and in fact in concluding that the Appellant did not have the authority to approve the travel of 3 individuals as per his instructions on PEX29, notwithstanding the evidence of witnesses who said he could do so. Further that the Magistrate erred in conferring upon the steering committee a mandate that was not supported by any legal instrument and in so doing misapprehending the authority of the Appellant as a Cabinet Secretary.
8. The Appellants further contended that it was important for the 3 to be on the contingent as they were the security to the Cabinet Secretary and responsible for Public Communications.
9. That having demonstrated that the Cabinet Secretary had the Constitutional and administrative mandate to authorise travel and further that the individuals had clear roles in Rio the charge of Abuse of office could not lie as the individuals being out of country on official assignment were entitled to Per diem.
10. The Appellant reiterated that Ali Guyo and Adan Enow are separate and distinct individuals. And that to the extent that Count 2 referred to Adan Enow, whereas PEX29 referred to Ali Guyo, the charge must fail.
11. The Appellant relied on the following cases;
  - i. [\*Pius Arap Maina v Republic \[2013\] eKLR\*](#)
  - ii. [\*Ann Wangeci Mugo & 6 Others vs Republic \[2022\] eKLR\*](#)
  - iii. *Stephen Kiptanui Soi vs Republic ACEC Appeal No E020 of 2012*

#### Respondent's Submissions

12. The Respondent contends that the prosecution discharged its burden of proof. With regard to Count 1 the Respondent relies on the decision in the case of [\*Bernard Ombuna vs Republic, Criminal Appeal No 27 of 2018\*](#) and submits that the defect in the charge sheet did not prejudice the appellant to the



extent that he was not aware of or at least he was confused with the charges preferred against him and as a result he was not able to put up an appropriate defence.

13. The Respondent submits further that the late inclusion of the 3 names by the Appellant caused a loss of public funds and the action was also in excess of the powers of the Appellant. The Respondent also faulted the Appellant for failing to present the names for consideration by the steering committee.
14. The Respondent argued that the Appellant was a member of the Steering committee, and he should have issued guidelines to avert loss of funds.

### **Analysis And Determination**

15. Having analysed the record, the Petition of Appeal and the respective submissions, I frame the issues for determination as
  - i. Whether the Prosecution proved the case against the Respondent beyond reasonable doubt as required by law.
  - ii. Whether this court should interfere with the conviction and sentence meted out by the trial court
16. This being a first appeal and guided by the dicta in *Okeno V R [1972] EA 32* on the responsibility of the first appellate Court it is the duty of this court to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind, that it didn't see the witnesses as they testified and give due allowance to that.
17. The Prosecution called a total of 22 Witnesses, the Appellant was the sole defence witness.

### **Whether the Prosecution proved the case against the Respondent beyond reasonable doubt as required by law.**

18. The Respondent was required to discharge its obligation to prove its case beyond reasonable doubt as stated in the case of *Woolmington Vs DPP [1935] AC 462.*
19. With regard to Count 2, the conviction must fail. The Appellant was charged with authorising the travel of Adan Omar Enow , who testified as PW13. In her judgment the learned trial magistrate did convict the Appellant for authorising the travel of Adan Omar Enow. He was a trustee of the Sports fund. His travel was organised by the sports fund and not the Ministry.
20. PEXH 29 is clear that what was relied on by the Prosecution does not have the name of Adan Omar Enow, there was therefore nothing to show that he authorised the travel of Adan Omar Enow.
21. With regards to Count 3 and 4 as correctly stated by the trial Magistrate the elements that must be proved are
  - i. That the accused should an employee of a public body or Government
  - ii. The accused performed the arbitrary act.
  - iii. The act was prejudicial to the interests of his employer and
  - iv. The arbitrary act was one in abuse of his authority.
22. The issue turns on the mandate of the steering committee and the powers of the Cabinet Secretary. The Evidence of the Appellant, vide DEX49, that he appointed the Steering Committee was



uncontroverted. The role of the steering committee was primarily to lead in the planning for the country participation at Rio and this included vetting the delegates.

23. As correctly pointed out in the absence of a legal instrument conferring on the Steering Committee the role assigned it by the Learned Magistrate, I must find that the conclusion that the decisions of the Appellant had to receive the sanction of the steering committee erroneous and not founded on evidence adduced in court.
24. Apart from PW22 the investigating officer, the other prosecution witnesses did not challenge the authority vested in the Appellant to nominate the individuals he did to travel. It was also not challenged that the 3 people nominated by the Appellant to travel were his Security (Ali Guyo) and 2 Public relations/ Communication officers from the ministry)
25. It is evident from the foregoing that given their roles, the action by the Appellant to include them was not arbitrary. Further the act was not prejudicial to the employer as the Communications team played an instrumental role in keep in the public informed of the performance of the team in Rio, especially in the face of negative publicity. It follows also that the nomination was not in abuse of the authority of the Appellant.
26. PW3, testified that the imprest was within budget and that all the requests and payment were within the budget which was drawn by the Steering committee. Having determined that the individuals subject of Count 2 and 3 were properly included on the list to travel it follows that they were entitled to per diem.
27. From the foregoing it follows that the prosecution failed to prove the case to the required standard and consequently I am compelled to quash the conviction and set aside the sentence.

### **Conclusion**

28. The upshot of the foregoing is that the appeal succeeds, the conviction on all the counts is quashed and the sentences are set aside.
29. The Appellant be refunded the fines paid into court.
30. No order as to costs.

It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

**P M NYAUNDI**

**JUDGE**

**IN THE PRESENCE OF: -**

Court Assistant D Karani

Mr. Sagana for Appellant

.....for Respondent

