



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC Appeal No. E003 Of 2021**

**ELIZABETH OYWER.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(CONSOLIDATED WITH E002 OF 2021)**

**DUNCAN MUISYO KIVUITU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal against the Judgment of the Learned Senior Resident Principal Magistrate Hon. F. Kombo (Mr.) sitting at the Milimani Anti-Corruption Magistrates' Court at Nairobi in Criminal Case No. 11 of 2016 on the 3<sup>rd</sup> day of February 2021)**

**JUDGMENT**

1. The Appellants Elizabeth Oywer and Duncan Muisyo Kivuitu (hereinafter the 1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively) were convicted of corruption related offences in *Milimani Chief Magistrates Court Criminal Case No.11 of 2016 Republic v Elizabeth Oywer and Duncan Muisyo Kivuitu David*. The offences were:-

- Count 1: Conspiracy to commit an offence of an economic crime contrary to **Section 47(A) (3) as read with Section 48(1) of the Anti-Corruption and Economics Act, 2003.**
- Count 2: Abuse of office contrary to **Section 46 as read with Section 48(1) of the Anti-corruption and Economic Crimes Act.**
- **Alternative charge:** Fraudulent acquisition of public property contrary to **Section 45(1) (a) as read with Section 48 (1) of the Anti-Corruption and Economics Act, 2003.**
- Count 3: 2<sup>nd</sup> Appellant: Abuse of office contrary to **Section 46 as read with section 48 (1) of the Anti-Corruption and Economics Act, 2003** and an alternative count of fraudulent acquisition of public property contrary to **Section 45(1) as read with Section 48 (1) of the Anti-Corruption and Economics Act, 2003.**
- Count 4: the 2<sup>nd</sup> Appellant: Failure to comply with a written notice to produce records contrary to **Section 28(9) of the Anti-Corruption and Economics Act, 2003.**
- Count 5 knowingly using a misleading document to one's principal contrary to **Section 48(10) of the Anti-Corruption and Economics Act, 2003.**

2. After the close of the prosecution's case, in a Ruling dated 2<sup>nd</sup> October 2019 the trial magistrate acquitted the 2<sup>nd</sup> Appellant on Count 4 **under Section 210 of the Criminal Procedure Code** but made a finding that a case had been sufficiently made out against both the Appellants in Count 1, 1<sup>st</sup> Appellant in Count 2 and the 2<sup>nd</sup> Appellant in Counts 3 and 5. The Appellants were accordingly put on their defense. At the end of the trial and by its Judgment dated 3<sup>rd</sup> February 2021 the trial magistrate convicted both Appellants in Count 1, the 1<sup>st</sup> Appellant in Count 2 and the 2<sup>nd</sup> Appellant on the alternative charge to Count 3 and sentenced them as follows:-

- Count 1, each Appellant to pay a fine of Kshs. 1,000,000 in default to serve imprisonment for a term of 3 years;
- Count 2 The 1<sup>st</sup> Appellant to pay a fine of Ksh., 500,000/= or one year imprisonment.

- Alternative Count 3, the 2<sup>nd</sup> Appellant to pay a fine of Kshs. 500,000 or in default to serve imprisonment for one year;
- Under **Section 48(1) (b) as read with section 48(2)(a) of the Anti-Corruption & Economic Crimes Act**, the 1<sup>st</sup> Appellant to pay an additional mandatory fine of Kshs. 5,340,000 and the 2<sup>nd</sup> Appellant to an additional mandatory fine of Kshs. 10,030,000 or in default to serve 3 years imprisonment.

3. Being aggrieved, the 1<sup>st</sup> Appellant preferred an appeal against the judgment and sentences in **H.C ACEC Appeal No. E002 of 2021 Duncan Muisyo David Kivuiti v Republic** and the 2<sup>nd</sup> Appellant filed **H.C ACEC Appeal No. E003 of 2021 Elizabeth Oywer v Republic**. The two appeals were subsequently consolidated as directed by this court on 21<sup>st</sup> September 2021 with **H.C ACEC Appeal No. E003 of 2021** being the lead file.

4. The 1<sup>st</sup> Appellant grounds of appeal are:

**“1) That the Learned trial magistrate erred in law and fact in convicting the appellant to pay a fine of Kshs.6,900,000 or in default serve 7 years imprisonment and failed to consider the strong evidence of the defence;**

**2. That the Learned trial magistrate erred in law and fact in convicting the appellant to pay a fine of Kshs. 6,930,000/= or in default serve 7 years imprisonment yet the prosecution failed to prove whether the appellant benefited from the alleged unaccounted funds which fact the trial magistrate failed to address;**

**3. That the Learned trial Magistrate erred in law and fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction;**

**4. That the Learned trial Magistrate erred in law and fact by shifting the burden of proof to the appellant;**

**5. The Learned trial Magistrate erred in Law and facts in conducting the Trial in total violation of the Appellants constitutional right to fair hearing under Article 50(2)(k);**

**6. The Learned magistrate misdirected himself in fact and law by violating the provisions of Section 215 of the Criminal Procedure thus rendering the proceedings a mistrial;**

**7. The Learned trial Magistrate erred in law and fact neglecting the evidence of DW3 and therefore arriving at an unreasonable decision;**

**8. The Learned trial Magistrate erred in fact and in law in failing to consider the submissions and authorities cited by the Appellant in her defence.**

**9. The Learned trial Magistrate erred in fact and in law in failing to analyse the evidence presented before him before arriving at a conclusion;**

**10. That the learned trial magistrate erred in law and fact by relying on the insufficient evidence of the prosecution;**

**11. That there is much doubt in the case, the benefit of which was not given to the Appellant;**

**12. In the circumstances miscarriage of justice was in terms of article 50(2)(k) of constitution; and**

**13. The sentence imposed was wrong in principle, manifestly excessive, harsh and irregular considering the fact the Appellant was only discharging her duties.”**

5. The 2<sup>nd</sup> Appellant’s grounds of Appeal are that:

**“1) THAT the learned trial magistrate erred in law and in fact in convicting the Appellant basing his judgment on assumptions and not credible evidence.**

**2. THAT the learned trial magistrate erred in law and in fact in convicting and sentencing the Appellant in spite of the inconsistencies in the evidence tendered by the prosecution.**

**3. THAT the learned trial magistrate erred in law and in fact by shifting the burden of proof from the prosecution to the appellant which led to miscarriage of justice.**

**4. THAT the trial magistrate erred in law and fact to convict the appellant without considering that PW 16, PW 18 and PW 5 evidence was inconsistent, contradictory and doubtful as to the circumstances leading to the charges herein, they failed to refer to any financial policy or guidelines put in place.**

**5. THAT the trial magistrate erred in law and in fact by relying on the Investigating Officers evidence in light of the discovery of the existence of DEF Exh 10, 11, 12 & 13 which she had alleged were missing and could not be traced.**

6. THAT the trial magistrate erred in law and fact to convict the appellant without considering the evidence of DW 3 and more particularly the fact that his statement was not taken by the Investigating officer and neither was he asked the whereabouts of DEF Exh 10, 11, 12 & 13.

7. THAT the learned trial Magistrate erred in law and fact by failing to evaluate appellant's defence vis-viz the evidence that the prosecution adduced thereby causing miscarriage of justice.

8. THAT the trial magistrate erred in law and fact to convict the Appellant as evidence by prosecution witnesses was doubtful and not prove of the elements of the charges preferred against the Appellant;

9. THAT the trial magistrate erred in law and in fact by convicting the appellant in alternative to count 3 despite the production of DEF F1xh 9 a document supplied to the defence by the prosecution.

10. THAT the trial magistrate erred in law and in fact by failing to consider DEX Exh 3 where the Nursing Council of Kenya absolved the appellant of any wrong doing after carrying out investigations.

11. THAT the trial magistrate erred in law and in fact by failing to appreciate that the defence carried out investigations for the prosecution vide the courts order of 14th October 2019 by making available DEF Exh 10, 11, 12 & 13 that the investigating officer alleged they were missing.

12. THAT the trial magistrate erred in kw and in fact by failing to consider the appellants defence and exhibits relied upon thereby occasioning the appellant an unfair trial.

13. THAT the charges against the Appellant were defective in total and the prosecution evidence did not support and/or warrant a conviction.

14. THAT the conviction and sentence is a miscarriage of justice hence the same should be quashed and set aside.”

6. The Appeals which proceeded by way of written submissions were vehemently opposed.

#### Submissions of the 1<sup>st</sup> Appellant

7. Counsel for the 1<sup>st</sup> Appellant framed two broad issues for determination namely whether the trial magistrate erred in law and in fact in convicting the appellant when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining a conviction and whether the learned trial Magistrate erred both in law and fact by shifting both the burden and incidence of proof to the appellants in breach of **Sections 107 and 108 of the Evidence Act**.

8. Submitting on the two issues Learned Counsel for the 1<sup>st</sup> Appellant stated that in criminal proceedings, the burden of proof lies strictly with the prosecution to adduce evidence to convince the court that indeed the offence was committed by the accused person failure to which then the court must find the accused person innocent. Counsel stated that in reaching such a decision, the court must consider the following factors:

- i. The court ought to first and foremost make a proper interpretation of the charge as defined in the relevant section of the Penal Code;
- ii. The court ought to analyze the evidence that has been adduced in order to arrive at a just decision;
- iii. The court ought to assess the credibility of the witnesses, their demeanor and conduct as a whole;
- iv. The court ought to put into consideration only those relevant factors relating to the occurrence of the alleged offence; and
- v. The court ought to direct itself justifiably by subsequently issuing a sentence concurrent with the nature of the offence committed if at all proven.

For the above proposition Counsel relied on the case of *Gordon Omondi Ochieng v Republic [2021] eKLR*, the case of *Woolmington v DPP (1935) E.A 462* and the case of *Republic v Silas Magongo Onzere alias Fredrick Namema (2017) eKLR*.

9. Counsel submitted that the prosecution did not prove both the intent and the criminal act committed by the 1<sup>st</sup> Appellant. Counsel stated that in respect to Count 1, the key prosecution witness **Elizabeth Ngige (PW23)** confirmed during cross examination that the Nursing Workforce Account which was the subject of the charges was properly opened and was not a secret account; That Elizabeth Ngige (PW23) did not give evidence of where the alleged stolen funds came from and could not break down the amount reflected in Count 1; That the particulars of the charge were ambiguous for the reason that the amount allegedly embezzled could not be broken down by the prosecution and that there was no audit report to confirm that the Appellants fraudulently obtained the funds. Counsel stated that during cross examination **Michael Mwangi Wachira (PW25)** indicated that there had been no misappropriation of funds by the Appellants and that they had received a clean bill of health by the National Audit. Counsel contended that contrary to section 214 of the Criminal Procedure Code there was a variance between the particulars of the charge and the evidence adduced and that the accuracy of the amount QUOTED in Count 1 goes to the core of the particulars of the charge. Counsel stated that none of the prosecution witnesses proved that an amount of Kshs. 69,957,000 was misappropriated and that the testimonies of the witnesses was contradictory and uncertain and on this basis the prosecution's

case should fail. To support this submission Counsel cited the case of *Republic v Nahashon Ngugi Gatarwa and 3 others (2007) eKLR*.

10. Counsel for the 1<sup>st</sup> Appellant further submitted that the trial Magistrate erred in law and fact by shifting both the burden and incidence of proof to the Appellants in violation of **Section 107 of the Evidence Act**; That the accused person is presumed innocent until proven guilty and that therefore there was an irregularity in the trial that was so fundamental as to amount to a failure of justice. Counsel argued that where the irregularity is so fundamental to the effect that there was no trial at all, the conviction should be set aside. Counsel cited the case of **Republic v Reuben Kiptanui Kiptoo [2006] eKLR** and a decision of the High Court of South Africa in Natal Province Division in the case of **Shabeer Naicker v the State Case No. AR 204/07**.

11. Lastly, Counsel submitted that the trial Magistrate failed to take into account that the evidence adduced by the prosecution did not meet the standard of proof; That there was lack of congruence between the evidence of the witnesses and their written statements; that the omission of the prosecution to call some of the witnesses to testify yielded lack of corroboration and the evidence adduced was therefore but imaginary assertions. Counsel asserted that an accused person should only be convicted on the strength of the prosecution's case and not on the weakness of his defense and cited the case of **Philip Muiruri Ndaruga v Republic [2016] eKLR** to support that assertion.

#### **Submissions by the 2<sup>nd</sup> Appellant**

12. Learned Counsel for, the 2<sup>nd</sup> Appellant framed 5 issues for determination.

- **whether the charges preferred against the appellant were defective in form or substance.**
- **whether the said defects were curable in accordance with Section 382 of the Criminal Procedure Code.**
- **whether the doubts, gaps, inconsistencies discrepancies and contradictions in the prosecution's case were of a material nature and deserving to be resolved in favour of the appellant.**
- **whether the evidence tendered before the trial court warranted the invocation of Section 111 of the Evidence Act.**
- **whether the prosecution discharged the burden of proof.**

13. Counsel submitted that in respect to Count 1, the prosecution was enjoined to prove that the appellants had "jointly conspired" to "commit an offence of economic crime namely the fraudulent acquisition of public property in the sum of Kshs. 69,957,000". That Counts 1, 3, its alternative charge, counts 4 and 5 were inextricably linked in that proof of Count 1 would lead to proof of the remaining counts. Counsel submitted that the prosecution did not prove conspiracy between the appellants in the manner set out in Count 1. Counsel adopted the definition of "conspiracy" in the **Blacks Law Dictionary Online Legal Dictionary 2nd Ed.** which states:

**"a combination of confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself lawful".**

14. Counsel stated that the prosecution's case was principally hinged on the allegation that the appellants were operating the Nursing Council of Kenya Workforce Account number 0941619762 held at Barclays Bank without the knowledge of the members of the Board of the Nursing Council of Kenya but to the contrary, the testimonies of PW3 (Fredrick Osundwa Nyarotso), PW7 (Titus Munene Tomati) and PW 10 (Rosemary Awendi Mutua) revealed that the Nursing Council of Kenya (NCK) Workforce account was authorized by the Board and was not a secret account. Counsel stated that PW7 and PW10 testified that they were aware that the account was under the Nursing Council of Kenya which coordinated it and that it was exclusively for project monies; that PW14 (Elijah Njeru Mbithi) testified that he was present in the Board meeting of 18<sup>th</sup>/19<sup>th</sup> December 2002 which sanctioned the opening of the Nursing Workforce Account except that he did not recall the closing of the account during his tenure at the Board; Further, that the testimonies of PW5, PW11, PW13 and DW 13 confirmed that the closure of the Nursing Workforce account and the change of signatories were done lawfully and that accordingly, for the charge of conspiracy to stand, the prosecution ought to have charged the past Board members of the Nursing Council of Kenya, the Secretariat and PW9 (Morris Kech Osano) who was the Human Resource Manager at the Nursing Council of Kenya at the material time and who sanctioned the closure of the account. The testimony of PW9, Counsel submitted that the matter of the account was in fact investigated and the 2<sup>nd</sup> Appellant was absolved from any wrongdoing and was asked to resume work from compulsory leave. Counsel contended that the appellants were sacrificial lambs that there were more players to the alleged conspiracy and that the conviction of the appellants on Count 1 was not safe.

15. Counsel further submitted that there were defects in the charge sheet which went to the substance of the charges and which were not curable and that there were gaps, inconsistencies and contradictions in the prosecution's case which could not be cured by **Section 382 of the Criminal Procedure Code**. Counsel argued that there was no evidence of misappropriation in the testimony of PW23 hence creating a gap in the prosecution's case: That **Section 14(3) of the State Corporations Act** required that the accounts of the Nursing Council of Kenya to be audited annually and that DW1's testimony confirmed that the Nursing Council of Kenya received clean audit reports from the Auditor General; That the prosecution failed to call a witness from the office of the Auditor General to affirm or discount the Appellants' claims and that the omission gave rise to an inference that such witness' testimony would have been adverse to the prosecution's case. To support his submissions Counsel cited the decisions in the case **Samuel Wambua Muthoka v Republic [2017] eKLR**, the case of **Pius Arap Maina v Republic [2013] eKLR** and the case of **Donald Majiwa Achilwa & 2 others v Republic [2009] eKLR**.

16. Counsel further submitted that the lack of a complete formal and comprehensive handover at the Nursing Council of Kenya by DW2 was the principal cause of confusion at the Board of the Nursing Council of Kenya leading to the needless trial of the Appellants. Counsel stated that there was a trend of hounding CEO's out of office at the some of the victims being PW18 Justina Nduge Mutinda) and PW6 (Edna Chemutai Tallam). Counsel submitted that these hurried departures were contrived by the Ministry of Health and were geared towards blindsiding the board as to the existence of the Nursing Workforce account.

17. In regard to the issue of the Anti –Corruption & Economic Crimes Court written Notice to Produce records issued under **Section 28 of ACECA**, Counsel for the 2<sup>nd</sup> Appellant submitted that the learned trial Magistrate misdirected himself by wrongly invoking **Section 111 of the Evidence Act**; That the circumstances surrounding the production of DEx 10,11,12, and 13 were extraordinary; that the court was by design calling upon the defence to carry out investigations on behalf of the prosecution which was a role preserved for the investigating officer and that the trial court abdicated its duty as a neutral arbiter and erroneously bestowed upon itself the role of an investigator and prosecutor.

18. On whether the prosecution had discharged its burden of proof, Learned Counsel for the Appellant submitted that the prosecution did not prove its case beyond reasonable doubt. Counsel submitted that finding of the trial court that the evidence of nearly all the witnesses called from the Nursing Council of Kenya that they were not aware of any loss or misappropriation was not material and that the finding of the court that lack of audit query does not absolve the duty to account were both at cross purposes with **Section 48 (1) of the Evidence Act** Counsel stated that those findings were premised on an erroneous assumption. Counsel contended that the lack of evidence from the Office of the Auditor General meant that the trial court was deprived of expert evidence regarding the audit and the audit process, particularly from an entity that gave the Nursing Council of Kenya a clean bill of health. Counsel asserted therefore that the conviction was not safe and by asking this court to quash the conviction, set aside the sentence and set the 2<sup>nd</sup> Appellant at liberty.

### **Submissions of the Respondent**

19. In opposition to both appeals Learned Counsel for the Respondent submitted that there is no instance where the trial court shifted the burden of proof to the Appellants; That the evidence led by the prosecution shows that the appellants operated an account unknown to other board members and conspired to withdraw Kshs. 69,957,000 from that account; which sum of money was then conferred to the 2<sup>nd</sup> Appellant with the knowledge of the 1<sup>st</sup> Appellant and that it is not disputed that both appellants were employees of the Nursing Council of Kenya. Counsel contended that the Appellants abused their positions as the Registrar and Head of Finance respectively by arbitrarily operating an account for their own benefit and to the exclusion of the Board. Counsel also submitted that the entire evidence tendered by the prosecution was consistent and did not have any gaps to warrant the intervention of this court; That the board members were only aware of two accounts but not A/C No. 0941619762 in the name of the Nursing Council of Kenya Workforce Account and that the board members then were PW7, PW12, and PW20. Counsel stated that the evidence showed that several cheques were drawn to the benefit of the 2<sup>nd</sup> Appellant and were signed by both the Appellants. Further that the appellants' conduct of writing to the manager at Barclays Bank in the letter dated 22<sup>nd</sup> September, 2014 in respect of the closure of the account is questionable as none of the Board members were aware. Counsel submitted that PW23, a Certified Public Accountant and Forensic Investigator summed up the prosecution's case by demonstrating to the trial court how the 1<sup>st</sup> Appellant authorized the withdrawals and how some of the funds went to the 2<sup>nd</sup> Appellant. Counsel placed reliance on the case of **Philip Nzaka Watu v Republic [2016] eKLR** and concluded by arguing that the prosecution discharged its burden of proof to the required standard, that the trial court properly analyzed the evidence adduced by both parties and the conviction and sentences imposed upon the appellants were safe and within the law and the appeals ought to be dismissed.

### **Analysis and Determination**

20. As the first appellate court, this court is obligated to consider both the facts and the law and to independently draw its own findings based on the evidence. This principle was long established by the Court of Appeal in **Okeno v R [1972] EA 32** where the court stated:-

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424”.**

21. With the above principles in mind and having carefully considered the grounds of Appeal, the record of the trial court, the rival submissions, the cases cited therein and the law now turn to consider whether the prosecution discharged the burden of proof in respect to the charges against the Appellants to the required standard and whether the convictions and subsequent sentences were safe.

22. The prosecution called a total of 23 witnesses and produced 51 pieces of documentary exhibits while the Appellants gave sworn testimonies and produced a total of 20 exhibits. The 2<sup>nd</sup> Appellant also called one witness DW3 (Thomas Mongare Omariba), an accountant at the Nursing Council Kenya who reported to him during his tenure at the Council.

23. That the 1<sup>st</sup> Appellant was the Acting Registrar of the Nursing Council of Kenya from 1<sup>st</sup> August 2003 to 18<sup>th</sup> July 2014 when she was transferred from the Council and (Jostina Ndunge Mutinda) (PW 18) was appointed in her place in acting capacity is not in dispute. it is also not in dispute that Jostina Ndunge Mutinda was from 5<sup>th</sup> January 2015 succeeded by (Edna Chemutai Talam) (PW 6). Evidence adduced by the prosecution established that at the time material, the Nursing Council of Kenya operated bank **Accounts No. 0948023954 held at Barclays Bank of Kenya and Account Number 0113698613400 held at Co-operative Bank of Kenya**. The third bank account No. 0941619762 named **Nursing Workforce and Training Analysis for Kenya** which was held at Barclays Bank Queensway House branch was the subject in issue and was at the heart of the charges against the Appellants. From the evidence on record the opening of this account was sanctioned by the Board in a meeting held on 18<sup>th</sup> and 19<sup>th</sup> December 2002. The account was designated for the Emory Project. At the time the Board appointed 5 signatories to that account namely Ms Janet Mwamuye (Registrar Nursing Council of Kenya), Mrs Janice Riungu- (Nursing Council of Kenya Vice- Chairperson), Ms Elizabeth Oywer- (1st Appellant as the Assistant Co-ordinator), Ms Grace Kongoro- (In Country Co-ordinator) and Rosemary Mutua- (PW10) a representative of the Nurses Association of Kenya) evidence was tendered between 1<sup>st</sup> January 2013 and 17<sup>th</sup> September 2014 a sum of Ksh 69,957,000/- was withdrawn from the Nursing Workforce Account via 179 Nursing Council of Kenya internal cheques signed by the 1st and 2<sup>nd</sup> Appellants, which amount is the subject of Count 1 of

the charges. There is evidence that the account was closed by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants on 22<sup>nd</sup> September 2014. Michael Ngubo- (PW11) an investigator based at Barclays Bank produced certified copies of account opening mandates and certified copies of bank statements, change of signatories' mandate, certified copies of 179 cashed cheques and 16 certified copies of deposited cheques as PExh 22 in relation to the account. He also produced four certified copies of deposit slips- and a letter of instruction to close **Account No. 0941619762**. He confirmed that all the cheques in Pros Exh 22 were addressed to the Nursing Council of Kenya. he stated that all were crossed cheques and that the account was operated as required and that it was closed procedurally. it was also his evidence that the money remaining in the account was transferred to another Nursing Council of Kenya account. He stated that for all the payments and deposits, there was proper authority by two of the designated signatories. In cross- examination, he confirmed that the change of mandate was procedurally done.

24. The Investigating officer (PW23) testified that she investigated all the three accounts held by Nursing Council of Kenya and that she interviewed witnesses and examined the documents and her findings can be summarized as follows; the Nursing Workforce Account was in existence and was active during the period 1<sup>st</sup> January 2013 and 31<sup>st</sup> July, 2014. That neither the Board of the Nursing Council of Kenya in place at the time nor the Standing Committee on Human Resource and Finance were aware of the account as the operation of the account was kept secret. She stated that no documents were produced or found to support the use of funds withdrawn from that account and that the account was operated by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants as the only signatories. She stated that a total of 179 cheques totaling to Ksh 69.9 million were cashed on that account and also that the closure of the account was kept secret and was un procedural for lack of involvement of the Board. Further that some of the money from the account went into the personal account of the 2<sup>nd</sup> Appellant who was the custodian of documents relating to the moneys drawn from the account. In cross examination, PW23 testified that the Nursing Workforce account was properly opened; that she was unable to obtain bank documents on the account since 2003; that Kshs. 69 million was withdrawn from the account in the relevant period; that she learnt from PW 13 that the project the subject of that account had by that time come to an end and that she was not able to break down the amount reflected in Count 1 because she did not get the records that would have enabled her to do so. She stated that her reason for charging the 1<sup>st</sup> Appellant was because there were cheques cashed from the Account and the 1<sup>st</sup> Appellant was a signatory and the Accounting Officer for the account by virtue of her position and that therefore benefits must have accrued to her because she was in the know of all that was happening.

### **The Defence case**

25. When the appellants were put on their Defense, the 1<sup>st</sup> Appellant (DW 2) testified that she is a Registered Nurse by profession. She testified that she joined the Nursing Council of Kenya in 2003 as acting Registrar and became full Registrar in 2004. She stated that as Registrar, her duties were the day-to-day management of the office overall administration of the office and AIE Holder for all Nursing Council of Kenya accounts. She testified that she was made a signatory to the Nursing Workforce Account in 2002 even before she became the Registrar of the Nursing Council of Kenya and that there were four other signatories to that account. She also testified that as Registrar she was answerable to the Board of the Nursing Council of Kenya. It was her evidence that the account the subject of the charges was subjected to regular audit by the by the Controller and Auditor General and there were no queries. She denied that there was any conspiracy between her and the 2<sup>nd</sup> Appellant and stated that when she closed the Nursing Workforce Account she was still a Board member and the closure was done at the request of Morris Kech Osano (PW9) the Human Resource Manager at the Council .Further that she was hounded out of office because she refused to withdraw a case that the Nursing Council of Kenya had filed against the Pharmacy and Poisons Board relating to a dispute that resulted from an amendment to the Nursing Act that gave the Nursing Council of Kenya the mandate to regulate 'nursing commodities' such as gloves, syringes and sutures and which caused a rift between her and the leadership of the Pharmacy and Poisons Board. She contended that all the accounts of the Nursing Council of Kenya were reflected in the letter of representation to the Auditors and that the monies in the transactions in issue were subjected to audit and there were no queries. She conceded having signed the 179 cheques referred to by the Investigating Officer but contended that she did so upon the advise of Morris Kech Osano (PW9). She stated that the cheques were taken to her office by the 2<sup>nd</sup> Appellant upon the advise of Morris Kech Osano (PW9). She contended that signing of the cheques was initiated not by herself but by the Council.

26. With respect to Count 2 she stated that all the money drawn from the account was used for purposes of the Council and none was found in her accounts and that her accounts were checked by investigators. Further that the Nursing Council of Kenya had different accounts for different purposes which would revert to normal use after the activity, and which is what happened to the Nursing Workforce Account after the Emory project ended. She maintained that once the specific purpose for an account ended, that account reverted to normal administrative use. She stated that by 2014 when she left the council the project had not ended. That it ended in 2014 and only supported the Nursing Council of Kenya in kind from then on, which is why the account reverted to normal administrative use. She conceded that the Nursing Workforce Account was closed on 22<sup>nd</sup> September 2014 through a letter written by herself and the 2<sup>nd</sup> Appellant under the instructions of Morris Kech Osano (PW9).

27. On his part, the 2<sup>nd</sup> Appellant (DW 1) testified that he was the Head of Finance at the Nursing Council of Kenya at the material time. He explained that due to the nature of its work, the Nursing Council of Kenya ran an Imprest System of Accounting in which an officer would be given an imprest which would be surrendered at the end of an activity. He stated that withdrawal of money from bank accounts was done by agents, and the management decided who made deposits and where the revenue would be deposited. He stated that the Nursing Council of Kenya did not have a finance policy although one was under development when he left. He also stated that during his tenure the Nursing Council of Kenya received clean audit reports from the Office of the Auditor General, grew its revenue base and became a benchmarking institution. He testified that when he joined the Nursing Council Kenya, the workforce Account Number 0941619762 was already operational. He contended that it was procedurally opened and closed and the account was audited for all the years he was there and no queries were raised.

The 2<sup>nd</sup> Appellant also told the court that when he joined the council in 2004 he was made an agent for the Nursing Workforce Account alongside one John Irungu. He explained that the work of an agent was to do over-the-counter withdrawals. He also stated that at the time the workforce account had five signatories and that he was appointed a signatory when Grace Kongoro who was a signatory died in 2005. He stated that the account was properly run and its activities were known to the Board. He referred to the letter of representation for purposes of audit (DMF1.2) which according to him reflected all the bank accounts of the Nursing Council of Kenya. He stated that money in that account came from donors, fees charged to training institutions, student indexing, and training materials fees. He testified that all the payment vouchers were signed by the AIE Holder and contended that Cash books and bank reconciliation were kept by the officer in charge of the relevant function, one Tom Omariba (DW 3) and they were easily accessible. The 2<sup>nd</sup> Appellant also testified that the Nursing

Workforce Account had 6 signatories and 5 had to sign. He stated that his woes begun in 2013 when the 1<sup>st</sup> appellant was removed from the Nursing Council of Kenya after she refused to withdraw a case against the Pharmacy and Poisons Board. He stated that after she was removed from the Council he was asked by the Vice Chairperson of the Board to remove her from all the Nursing Council of Kenya accounts to which she was signatory but that because two signatories Janice Riungu and Grace Kongoro were deceased, it was difficult to get signatories to sign and the only way to ensure the 1<sup>st</sup> Appellant did not sign was to close the account. He stated that he discussed this with the Human Resources Manager (PW9) who undertook to request the 1<sup>st</sup> Accused to continue as a signatory. He contended that at the end of every month the person in charge of the cash book would ensure that there was bank reconciliation so as to ensure that all the activities in the cash book relating to that account were the same as appeared in the bank statements. He also contended that the account was properly and ethically run and that all books of account were available and any accountant would have given the account a clean bill of health. He maintained that the closure of the account was procedural and that it was done by the mandated signatories. He denied that the operations of the workforce account was a secret.

28. Thomas Mong'are Omariba (DW 3), an accountant testified that he joined the Nursing Council of Kenya in 2007 and worked as such until when his contract ended. He testified that his duties were to prepare and maintain the books of account and included bank reconciliation. He stated that he reported to the 2nd Applicant who was the Head of Department. He produced a cash book for the financial year 2014-2015 relating to bank Account No.0941619762 and stated that he had been maintaining the cash book for the ten years he was at the Nursing Council of Kenya and that it was in his custody at all times. He stated that he would present that cash book to auditors at the end of the year. He also produced bank reconciliation for the account for July 2014 and a bundle of payment vouchers which he stated he used were prepared by himself in the course of his work. He testified that he encountered the Nursing Workforce Account in the course of his work and it was one of the accounts he was maintaining. He stated that the account was always available to the auditors and to any other person.

29. It is trite that in criminal cases, the burden of proof rests on the prosecution throughout the trial and that the standard of proof is beyond reasonable doubt. **Section 107 of the Evidence Act** enjoins the prosecution to discharge the legal burden, and except where there is an admission by the accused person or a fact is especially within the knowledge of the accused person or unless any other Statutory exception exists such as insanity, there is no duty on the accused person to prove or to disprove the allegations by the prosecution. In the case of H.L. (E)\* **Woolmington V DPP [1935] A.C 462 Pp 481 Viscount Sankey LC** the court expressed this principle as follows:

**“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”**

30. This position in law was restated in the case of **Ajwang vs. Republic [1983] KLR 337** where the Court of Appeal held:

**“The burden of proving the ingredients of the offence is entirely on the prosecution and the accused cannot be called upon to prove his innocence.”**

31. One of the exceptions to the above principle is provided for in **Section 111 of the Evidence Act** which states:

**111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**

32. The Appellants herein contend that the Learned trial Magistrate erred in shifting the burden of proof to the defence by erroneously applying **Section 111 of the Evidence Act**; that in convicting the Appellants the trial magistrate held that they had not discharged their burden in respect of accounting for the transactions in the Workforce account and that they had not, in order to buttress their claim, presented in court any audit reports showing that the Nursing Workforce account was audited and no queries were raised.. They referred to an excerpt of the trial courts judgment at page 81 and 82 of the Judgment which reads:

**“My humble view is that the lack of audit query does not however absolve the duty to account. I also hold the view that the statements by prosecution witnesses to the effect that there was no loss or misappropriation of funds can only be properly understood within the confines of the knowledge they had at the time, about the financial position of NCK. It has since emerged in this case that there was active concealment of information relating to the Nursing Workforce Account orchestrated by the 1st and 2nd Accused.**

**The Accused have also not presented in Court any Audit Reports showing that the Nursing Workforce Account was specifically audited to buttress their claim.**

**Moreover, going by what has emerged in evidence in this trial, I infer that it is more likely than not that the 1st and 2nd Accused continued the trend of concealing the Nursing Workforce Account to external auditors.**

**“The 1st Accused, within her official responsibility as the NCK accounting officer, and the 2nd Accused, within the evidentiary burden placed upon him to account for the withdrawals personally made by him from the Nursing Workforce Account, have barely scratched the surface in discharging their respective obligations.”**

At page 84 the judgment reads:-:

**“In this regard, although it is not shown directly in the evidence that the 1st Accused received any money from the withdrawals, the evidence shows that the 1st and 2<sup>nd</sup> Accused were in joint enterprise in relation to the 179 cheque withdrawals, which they have barely accounted for before this Court.**

**In relation to this finding, it is immaterial that the amount of money fraudulently acquired is not specifically proved, or that it is not proved to be the specified sum of Kshs. 69,957,000/- in the particulars to Count 1. As such I reject any submission in that regard.**

**Finally, in relation to Count 1 I am satisfied that the evidence that establishes the facts I have referred hereinabove is substantially direct and where circumstantial, meets the principle in *Sawe v Republic* [2003] KLR 364 cited herein by Mr. Opiyo for the 1st Accused”**

33. Having carefully considered the evidence before the trial court, it is my finding that the above holdings of the trial court were erroneous. The case against the Appellant hinged on the allegations that they kept the Nursing Workforce account secret and that they secretly withdrew a sum of Kshs 69 million therefrom in favour of the 2<sup>nd</sup> Appellant before stealth fully closing the account. However, there was conflicting evidence regarding the issue of secrecy by members of the Board with some stating that they were aware of the account and others stating that they were not. PW5 who was the Acting Head of Finance during the period of investigation and DW3 an accountant at the time were categorical that they were aware of the Workforce account. DW 3 who was the Accountant at the Council testified that he had maintained that account’s cash book for 10 years, that he drew payment vouchers and that he did bank reconciliations at the Nursing Council of Kenya concerning the account. He also stated that the account was regularly operated regularly. PW11 Michael Ngubo, an investigator at Barclays Bank also testified that the account had a mandate of two signatories and that until it was closed on 22<sup>nd</sup> September 2014, it was regularly operated by the two signatories the other 2 signatories having either died or dropped out. There was therefore nothing sinister about the account being operated by the Appellants alone. PW11 also testified that during the closure of the account, cheques were drawn in favour of the Nursing Council Kenya and delivered to them. It is my finding that the foregoing evidence of the prosecution witnesses PW5 and PW11 and that of DW3 creates doubt in the prosecution’s assertion that the account was a secret between the Appellants. As for the withdrawals the 1<sup>st</sup> Appellant’s evidence that she signed the 179 cheques the subject of the charges on the instructions of the then Finance officer (PW9) and that she did not benefit from any money flowing from the same was not controverted. Moreover, it was the evidence of PW11 that whatever money was in that account when it was closed was transferred to another of the Nursing Council of Kenya account. In my view the trial magistrate having arrived at the conclusion that the 1<sup>st</sup> Appellant never benefited from the money he erred in holding that it was immaterial. In my view that evidence was crucial as it meant that there was no evidence upon which conspiracy between her and the 2<sup>nd</sup> Appellant could be established. It is my finding that the prosecution was required to prove beyond reasonable doubt that the 1<sup>st</sup> Appellant abused her office by embezzling the sum of Kshs.69 million thereby fraudulently acquiring public property but it failed to do so on his part. The 2<sup>nd</sup> Appellant explained to the court that the Council had an Imprest Accounting System which allowed agents such as him to receive money from the Council’s Accounts, use the funds for the Council’s purpose and then account for them. It was his case that this was the position in the case of the Workforce Account. Again this was not controverted and it was indeed the trial court’s finding that the court did not believe that all the money (meaning the Kshs. 69 million) was lost. It is also instructive that the 2<sup>nd</sup> appellant was acquitted on the charge of conferring the sum of Kshs. 5,015,000 upon himself meaning that there was no definite finding that the stole that sum of money. The conflict in the prosecution evidence cast doubt on the case and the benefit of that doubt should have been given the Appellant’s but not to the prosecution as the trial court appears to have done. DW3 was emphatic that through the period he worked at the Nursing Council of Kenya he was aware of the Workforce Account and that the account had been audited and given a clean bill of health. By so stating he corroborated the evidence of the Appellants and the trial court should have taken that into consideration. The trial magistrate not only shifted the burden of proof to the Appellants but he ignored their defence. Accordingly, I find the Appeals by the Appellants merited. The same are allowed. The convictions are quashed and the sentences are set aside. Should the Appellants still be in custody they shall be set at liberty forthwith unless otherwise lawfully held and if any fine was paid the same ought to be refunded.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF MARCH, 2022**

**E. N. MAINA**

**JUDGE**

**IN THE PRESENCE OF:**

Mr.Ogejo for Elizabeth Oywer/Appellant

Mr. Omingo for Duncan Muisyo/Appellant

Ms. Ndombi for the Respondent

Potishoi – Court Assistant