Chacha v Republic (Anti-Corruption and Economic Crimes Appeal 2 of 2021) [2022] KEHC 14482 (KLR) (Anti-Corruption and Economic Crimes) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14482 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL 2 OF 2021

EN MAINA, J

OCTOBER 27, 2022

BETWEEN

CHRISTINE WEGESA CHACHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against conviction and sentence by Hon. L.N Mugambi CM in Milimani Anti-Corruption Case No. 11 of 2010 Republic v Concelia Aoko Ondieki and Christine Wegesa Chacha)

JUDGMENT

Introduction

1. The appellant Christine Wegesa Chacha and another who is not before this court was charged with 5 counts of forgery and 1 count of false accounting by a public officer, charges made under the provisions of the *Penal Code* cap 63 of the Laws of Kenya, in Nairobi Anti-Corruption case number 11 of 2010.

2. The appellant was arraigned before the trial court on February 12, 2010 and answered to the following charges: -

Count I: False accounting by a public officer contrary to section 331(2) of the *Penal Code*.

Particulars of the offence: - Christine Wegesa Chacha and another, on or about June 29, 2010 at Jogoo House in Nairobi, within Nairobi Province, being a Senior Education Officer and an Acting Director of Secondary and Tertiary Education respectively at the Ministry of Education, officers charged with the management of public revenue, to wit Kshs 1,478,581; money intended to facilitate infrastructure needs assessment workshops for secondary schools

in coast region, jointly knowingly furnished a false return of money received for the said workshop during the period June 13, 2009 to June 29, 2009.

Count II: The appellant was not charged on this count

Count III: Forgery contrary to section 349 as read with section 345 of the *Penal Code*, chapter 63 of the Laws of Kenya.

Particulars of the offence: Christine Wegesa Chacha on or about June 15, 2009 at an unknown place, being a person employed by a public body to wit Ministry of Education as a Senior Education Officer, with intent to defraud made a false fuel cash sale receipt serial number 56606 purporting it to be a genuine cash sale receipt issued by Warsame's Traders for 124 litres of fuel worth Kshs 9,176 allegedly drawn into a Government of Kenya motor vehicle registration number GK A905G on June 15, 2009.

Count IV: Forgery contrary to section 349 as read with section 345 of the *Penal Code*, Chapter 63 of the Laws of Kenya.

Particulars of the offence: Christine Wegesa Chacha on or about June 21, 2009 at an unknown place, being a person employed by a public body to wit the Ministry of Education as a Senior Education Officer, with intent to defraud made a false fuel cash sale receipt serial number 56617 purporting it to be a genuine cash sale receipt issued by Warsame's Traders for 96 litres of fuel worth Kshs 7,104 allegedly drawn into a Government of Kenya motor vehicle registration number GK A905G on June 21, 2009.

Count V: Forgery contrary to section 349 as read with section 345 of the *Penal Code*, Chapter 63 of the Laws of Kenya.

Particulars of the offence: Christine Wegesa Chacha on or about June 23, 2009 at an unknown place, being a person employed by a public body to wit the Ministry of Education as a Senior Education Officer, with intent to defraud made a false fuel cash sale receipt serial number 56626 purporting it to be a genuine cash sale receipt issued by Warsame's Traders for 124 liters of fuel worth Kshs 9,176 allegedly drawn into a Government of Kenya motor vehicle registration number GK A905G on June 23, 2009.

Count VI: Forgery contrary to section 349 as read with section 345 of the *Penal Code*, chapter 63 of the Laws of Kenya.

Particulars of the offence: Christine Wegesa Chacha on or about June 17, 2009 at an unknown place, being a person employed by a public body to wit Ministry of Education as a Senior Education Officer, with intent to defraud made a false fuel cash sale receipt serial number 13184 purporting it to be a genuine cash sale receipt issued by Trans Energy Kenya Ltd for 124 liters of fuel worth Kshs 9,176 allegedly drawn into a Government of Kenya motor vehicle registration number GK A905G on June 17, 2009.

Count VII: Forgery contrary to section 349 as read with section 345 of the *Penal Code*, Chapter 63 of the Laws of Kenya.

Particulars of the offence: Christine Wegesa Chacha on or about June 22, 2009 at an unknown place, being a person employed by a public body to wit the Ministry of Education as a Senior Education Officer, with intent to defraud made a false fuel cash sale receipt serial number 119081 purporting it to be a genuine cash sale receipt issued by Malindi Service Station for 125 liters of fuel worth Kshs 9500 allegedly drawn into a Government of Kenya motor vehicle registration number GK A905G on June 22, 2009."

3. After hearing and evaluating the evidence by both sides the trial court *vide* its judgement delivered on February 11, 2021 convicted the appellant on count 1 and acquitted her of counts 3,4,5,6 and 7 under section 215 of the *Criminal Procedure Code*. The appellant was sentenced to pay a fine of Kshs 1,000,000 in default to serve one (1) year imprisonment.

4. Being aggrieved by the conviction and sentence, the appellant preferred this appeal. The petition of appeal dated February 25, 2021 raises the following 10 grounds of appeal: -

> " 1) The trial magistrate erred in law and fact in convicting the appellant when there was no sufficient evidence against the appellant to support such conviction.
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> 2) The trial magistrate erred in law and fact in finding and holding that the appellant was charged with the management of the revenue or funds in question when there was no evidence that the appellant either received or was charged with the management of the revenue in question.
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> 3) The trial magistrate erred in law and fact in convicting the appellant for the offence of false accounting, yet the evidence tendered before the court clearly demonstrated that the imprest in question was applied for and was issued in the name of one Martin Orwa and there was no evidence that the appellant knew that the sum of Kshs 400,000/= which the appellant had admitted to have received from Concelia Aoko Ondiek, her boss, to undertake an assignment given to the appellant by the aid Concelia Aoko Ondiek was part of the imprest in question.
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> 4) The trial magistrate erred in law and fact in convicting the appellant for the offence of false accounting for money which the appellant was not under any obligation in law to account for.
>
> 5) The trial magistrate erred in law and fact in convicting the appellant for the offence of false accounting when the evidence on record clearly showed that the imprest surrender and the documents submitted in support thereof were prepared and submitted by persons other than the appellant.
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> 6) The trial magistrate erred in law and fact in convicting the appellant upon the ground that the appellant had admitted receiving some Kshs 400,000/= from the 1st accused, Concelia Aoko Ondiek, without any further evidence that the appellant knew that the said sum of Kshs 400,000/= given to her was part of the sum of Kshs 1,478,581/= which was alleged to have been falsely accounted for.
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> 7) The trial magistrate erred in law and fact in finding and holding that the appellant knowingly furnished false returns in respect of the sum of Kshs 1,478,581/= on the basis of the evidence given by PW4, Richard Yugi, whose evidence should have been rejected or treated with caution because he was himself a suspect and/or an accomplish (sic).
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> 8) The trial magistrate erred in law and fact in shifting the burden of proof to the appellant.

9) The trial magistrate erred in law and fact in imposing upon the appellant a harsh and oppressive sentence when she ordered the appellant to pay a fine of Kshs 1,000,000/= or serve one (1) year imprisonment in default.

10) The trial magistrate erred in law and fact in failing to consider the appellant for a discharge under section 35 of the *Penal Code*, even after finding that the appellant had strong and favorable mitigating factors and was a first offender."

5. The factual background of the case as presented by the prosecution was that in the financial year 2008/2009, the Ministry of Education embarked on various activities to support the introduction of free secondary education by the government. Part of the programmes that were to be carried out by the Ministry of Education included infrastructure needs assessment workshops throughout the country.

6. This appeal relates therefore to funds disbursed for the infrastructure needs assessment workshops for the Coast Region and more specifically Kshs 1,478,581 public funds approved as expenditure for the workshop which was allegedly misappropriated by the appellant and her co-accused, who then falsified records meant to account for the funds. A total of 7 counts were preferred but only counts 1,3,4,5,6 and 7 related to the appellant herein.

7. Having been acquitted of all counts except count 1, this appeal is addresses only count 1 of the charge, as the prosecution did not prefer a cross-appeal against the acquittal of the appellant on the other charges.

8. I reckon that this court has heard determined, and rendered its judgment in a related appeal filed by the co-accused in ACEC Cr Appeal No E001 of 2021 Concelia Aoko Ondiek v Republic.

The Appellant's Submissions

9. Learned counsel for the appellant condensed the ten grounds of appeal into two broad thematic areas: grounds 1 to 8 and grounds 9 and 10 of the appeal.

10. The appellant submits that the prosecution failed to prove all the elements of the charge of false accounting by public officer to the required standard. She submits that she did not receive the sum in question, being Kshs 1,478,581. That the amount was issued in the name of one Martin Orwa PW1 but the Imprest was received by the 1st accused. She submits that PExh 80 which was the only document tendered as proof of her receipt of the money was disowned by both PW 41 and the 1st accused who testified that it was fake. That accordingly, there was no evidence that she was entrusted with the management of the said funds, an important element of the charge. That the funds were entrusted upon the 1st accused and not the appellant.

11. Secondly, she submits that she did not render the imprest in question and she therefore did not furnish a false return of the money as stated in the particulars of the charge. She cited the authorities in *Enos Meshack Magwa v Republic* [2012] eKLR and *Director of Public Prosecutions v Margaret Kamonya Ndanyi and another* [2018] eKLR and submitted that the learned magistrate erred in convicting her of count 1 when she admitted to have received Kshs 400,000 only.

12. Thirdly, the appellant submits that the learned magistrate erred in shifting the burden of proof to the appellant under section 111 of the *Evidence Act*. That although the appellant admitted receiving Kshs 400,000 from the 1st accused, she did not know that the money was part of the larger sum of Kshs 1,478,581. That she was therefore only expected to account for Kshs 400,000 which she accounted for with the 1st accused. She argued that the documents she had accounted with were not before court and referred to PW2's testimony. That the court erred in relying on the evidence of PW 4, who was involved in preparing the false documents subject of the charge and therefore not a reliable witness.

That the receipts for the purchase of mineral water, there was no evidence that the appellant handed them to PW2.

13. Lastly, the appellant submits that the sentence of a fine of Kshs 1,000,000 in default one-year imprisonment was too harsh. That the offense was a misdemeanor and there was evidence that the amount was used for the intended purpose hence there was no loss of funds. She urged the court to allow the appeal.

The Respondent's Submissions

14. In opposing the appeal, the respondent submits that the prosecution did prove the charge beyond reasonable doubt.

15. The respondent submits that the prosecution did establish that the appellant was a Senior Education Officer at the Ministry of Education. She was therefore a public officer. The sum of the money in count 1 was approved by the Permanent Secretary (PW7) from the ministry of education to facilitate the workshop on the infrastructure needs assessment that was carried out at the coast region. The fund's request was made through an internal memo produced as PExh 1 from the department of secondary and tertiary education. The author of the memo was PW1 who was at that time the Deputy Director in the Ministry of Education.

16. They submit that the appellant did attend the workshop in the company of PW4 a Senior Clerical Office, who testified that he was only given a 10-day per diem when she was called by the director to her office and informed about the workshop. His role at the workshop was to distribute questionnaires that were to be filled by various participants but it is the appellant herein who was making payments to the participants.

17. The appellant's defense was that she did not know that the money that the acting director had given her was part of the imprest that had been applied for and the same was in the name of PW1. The evidence looked at in its totality points to the guilt of the appellant together with the person whom she was convicted with.

18. In responding to the issue of whether or not the appellant received the money in question, they submit that the court made a proper finding on the issue as the appellant in her unsworn evidence admitted that Concelia Ondieki, her co-accused, gave her Kshs400, 000/. This is after she called her to her office and briefed her on an intended needs assessment project that was to be conducted in the Coast region. This was part of the money her co-accused had processed as imprest in the names of PW1-Martin Orwa (reference made to exhibit number three) who denied during the trial that he neither was involved in the processing of the money in question nor did he receive the money.

19. On whether or not the appellant surrendered imprest, they submit that prosecution during the trial led evidence through PExh 4 which was the surrender payment schedule and which the court found to have been falsified because various witnesses who had attended the conference disputed the amounts that were in that particular schedule, while some of the prosecution witnesses whose names appeared in the schedule did not attend the workshop. They contend that the trial court did not, therefore, shift the burden of proof to the appellant.Lastly, on the sentence, they submit that the same was not excessive as it was within the limits of section 331(2) of the *Penal Code* which prescribes a fine of not exceeding one million shillings or to imprisonment for a term not exceeding ten years or both. They cited the case of *Dorothy Ndia and another v Republic* [2017] eKLR and the principles quoted therein on the duty of the first appellate court and the elements that constitute the offense the appellant was charged with in count 1. They urged that the appeal be dismissed for lack of merit.

Analysis And Determination.

20. This being a first appeal, the court has a duty to reconsider and evaluate the evidence adduced at the trial to arrive at its own independent conclusion while bearing in mind that I did not hear or see the witnesses who gave evidence. This principle was affirmed in the case of *Muchoki Irima & 2 others v Republic* (1977] eKLR, where the court cited the case of *Okeno v Republic* 1972 which imposed an obligation on the first appellate court as follows;

> " The first appellate court must itself weigh conflicting evidence and draw its conclusions. (*Shantilal M. Ruwala v R* (1957] E.A 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 court's 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] E.A 424."

Issues For Determination

21. Having considered the grounds of appeal, the record of appeal, and the rival submissions of learned counsel three issues arise for determination: -

    1. Whether there was sufficient evidence to sustain a conviction; and

    2. Whether the sentencing of the appellant was severe.

Whether There Was Sufficient Evidence To Sustain A Conviction;

22. In count No 1, the appellant and her co-accused were jointly charged with the offense of false accounting by a public officer contrary to section 331 (1) as read with section 331 (2) of the *Penal Code*. The particulars were that they knowingly furnished a false return of money received by them for the workshop. Section 331 of the *Penal Code* states;

> " 331
>
> (1) Any person who, being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of any money or property received by him or entrusted to his care, or of any balance of money or property in his possession or under his control, is guilty of a felony.
>
> 2) A person convicted of an offense under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both."

23. The key elements of the charge of false accounting by a public officer are, therefore: -

    1. Whether the accused is a public officer;

    2. Whether the funds in issue were public revenue or property;

    3. Whether the money was entrusted to the accused or was received by the accused and whether the accused had a duty over the management of the said funds or any part thereof; and

4. Whether the appellant knowingly made a false return in connection with the said money.

24. It is not disputed that at the time material to this case the appellant was a public officer, a Senior Education Officer at the Ministry of Education. It is also not disputed that the funds are the subject of the charge, to wit, Kshs 1,478,581 were public funds, the same having been budgeted, approved and disbursed to facilitate a needs assessment workshop in the Coast region.

25. The funds had been approved by Prof Edward Karega (PW7), the then Permanent Secretary in the Ministry of Education pursuant to a request made in the internal memo produced as PExb 1. There was also evidence from PW1 that he wrote a memo (Exb 5) to the appellant's co-accused, Concelia Ondieki, authorizing her to collect the imprest warrant No 0xxxx2 (Exb 3) for Kshs 1,478,581 public funds and that she duly signed for and received.

26. The appellant, by her own admission confirmed that she received Kshs 400,000 from her co-accused, which funds were to be utilized in the infrastructure needs assessment in the Coast region, a workshop she confirmed to have physically attended. These in my view confirm that the first two elements of the charge were proven by the prosecution beyond reasonable doubt.

27. On the last two elements, PW4 Richard Yugi implicated the appellant for directing him to prepare payment schedules and leaving blanks on the parts for amounts and signature. The payment schedule PExh 7 was found to have contained fabricated payments with inflated amounts and names of people who did not attend the workshop.

28. Further, the document examiner established that the handwriting on the receipts PExh 35,36 and 37 was similar to that of the appellant. Additional evidence by the investigator was that the receipts for mineral water had the same serial number as those of stationery despite being for different amounts and issued on different dates. The petrol attendants of the petrol stations alleged to have issued the receipts also denied having issued them.

29. The prosecution adduced evidence that the appellant falsified the amounts in the payment schedule (P Exh 7) by including people who did not attend the workshop. The said people PW1, PW6, PW19, PW31, and PW 34 all gave evidence that they did not attend the workshop. They also testified that they were not paid the (Kshs 40,000/- for PW1 and the 6,000/- for the others) indicated as paid against their names in that schedule. Payment for lunches (PExh 6a) and transport reimbursement (PExh 75) were similarly falsified and the signatures of the payees all of who did not attend forged, as testified by the document examiner (PW40).

30. The appellant's defense was that the documents she had submitted to her co-accused to account for the money spent were not in court and that her obligation was to account to her co-accused and not anyone else. This defense in my view does not dislodge the established fact that the appellant together with her co-accused made false return for the funds.

31. The appellant having admitted to have received Kshs 400,000 public funds had the responsibility to account for the expenditure of the funds to the Ministry and not her co-accused. The defense that she submitted different documents not before court was a matter within her special knowledge under section 111 of the *Evidence Act* which was not substantiated in evidence. It is my view, therefore, that all the elements of the charge in count 1 were proven.

32. I agree with the learned magistrate's finding that count 1 was proved beyond reasonable doubt and I would accordingly uphold the conviction of the appellant in that respect.

Whether The Sentence Imposed By The Trial Court Was Excessive

33. The appellant was sentenced to a fine of Kshs 1 million in default to serve one-year imprisonment in count 1.

34. The penalty for the charge is prescribed respectively as follows:

> " Section 331 (2) of the *Penal Code*:
>
> > A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both."

35. It is trite that in sentencing the court determines the sentence based on the options provided by the specific statute creating the offence. However, while sentences are defined by law, the measure of what is an appropriate sentence in a given case is left to the discretion of the trial court and provided the discretion is exercised judiciously and in accordance with the law this court should not interfere. See *Fatuma Hassan Salo v Republic* criminal appeal No 429 of 2006 [2006] eKLR in which the court emphasized that the discretion "must however, be exercised judicially. The trial court must be guided by evidence and sound legal principle".

36. The Sentencing and Policy Guidelines state as follows in respect of custodial and non-custodial sentence:

> " 7.
>
> > 19. In deciding whether to impose a custodial or a non-custodial sentence, the following factors should be taken into account:
> >
> > 1. Gravity of the offence: In the absence of aggravating circumstances or any other circumstance that render a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanours.
> >
> > 2. Criminal history of the offender: Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence. Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance. Previous convictions should not be taken into consideration, unless they are either admitted or proved"

37. Additional considerations in sentencing include *inter alia*, the character of the offender, protection of the community and the offender's plea in mitigation. The trial court considered the mitigation by the appellant and the prosecution's submissions before arriving at the sentence.

38. Bearing in mind that sentencing is at the trial court's discretion, I am not persuaded that the trial court did not properly exercise this discretion as the appellant was granted a non-custodial sentence of a fine of Kshs 1,000,000 in default of which she would serve imprisonment for one year. The length of the sentence is within the prescribed statutory limits and is an appropriate punishment for the offense for which the appellant was convicted.

39. The upshot is that the appeal is dismissed in its entirety and the conviction and sentence of the trial court upheld.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF OCTOBER, 2022.

E N MAINA

JUDGE