



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.24 OF 2012**

*(An Appeal arising out of the conviction and sentence of Hon K. Bidali - PM delivered on 15<sup>th</sup> December 2011 in Nairobi CM. CR. Case No. 1040 of 2009)*

**MICHAEL MUASA KILONZO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Michael Muasa Kilonzo, was charged with several offences under the **Penal Code** and the **Value Added Tax (VAT) Act**. He was charged with two counts under **Section 40(I)(a)** of the **Value Added Tax Act**. The particulars of the offence were that on 26<sup>th</sup> March 2009 and 29<sup>th</sup> December 2008, the Appellant, jointly with others not before court, made a false claim for the refund of VAT from Kenya Revenue being the Authority sums of Kshs.4,156,682/= and Kshs.4,737,690/= allegedly due Garfield Investment Ltd in contravention of the said **Act**. The Appellant was further charged with two counts of **obtaining by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offences were that the Appellant obtained the said sums of Kshs.4,156,682/= and Kshs.4,737,690/= from Kenya Revenue Authority by pretending that the VAT refund was genuine and a valid claim for payment. The Appellant was further charged with **attempting to obtain by false pretences** contrary to **Section 313** as read with **Section 389** of the **Penal Code**. The particulars of the offence were that on 6<sup>th</sup> May 2009 and 16<sup>th</sup> January 2009, the Appellant attempted to obtain the sum of Kshs.3,937,555/= and Kshs.4,092,905/= from Kenya Revenue Authority by purporting the said sums were genuine and valid claim for VAT refund.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on all the counts. He was fined a total sum of Kshs.1.2 million or in default he was to serve a total term in prison of 44 months. The Appellant was aggrieved by his conviction and sentences. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentences. He faulted the trial court for convicting him of the offences yet no evidence was adduced by the prosecution to link him to the alleged claim for VAT refund from Kenya Revenue Authority (KRA). The Appellant was aggrieved that the trial court did not properly evaluate the totality of the evidence adduced which in his view exonerated him from the crime. The Appellant was of the view that no sufficient nexus was established between him and the two companies, Garfields Investment Company Ltd and Garfields Investment Ltd. to connect him with the alleged offences. The Appellant was aggrieved that

the trial court had not considered his defence before arriving at the erroneous decision to convict him. He finally faulted the trial court for failing to take into account his health situation before sentencing him to serve an inappropriate custodial sentence. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, the Appellant filed written submission in support of his appeal. Mr. Aketch for the Appellant amplified the written submission by making oral submission before court during the hearing of the appeal. He urged the court to allow the appeal because, in his view, the prosecution failed to establish both the *actus reus* and the *mens rea*, and further shifted the burden of proof. Learned Counsel was emphatic that no nexus had been established between the alleged offences and the Appellant. On sentence, he urged the court to put into account the Appellant's physical condition (he is a paraplegic) before giving any verdict that may result in the Appellant being incarcerated. He submitted that the conviction was unsafe and should, in the circumstances, be set aside.

Ms. Aluda for the State relied on the written submission filed on behalf of the State. She opposed the appeal. She submitted that the prosecution established to the required standard of proof that indeed the Appellant, as a director of a limited liability company registered as Garfields Investment Company Ltd. made claims for VAT refund which it was not entitled to. The prosecution established that the Appellant obtained the sums in question by false pretences by making it appear as if the company was qualified of the said VAT refund. Learned Counsel submitted that the documentary evidence established to the required standard of proof that the Appellant, in collusion with others, committed the offences in question. She urged the court to dismiss the appeal and uphold the conviction and sentence of the Appellant.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court and reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to always have in mind that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard (see **Okeno – vs- Republic [1972]EA 32**). The issue for determination by this court is whether the prosecution established to the required standard of proof the offences that the Appellant was charged with.

This court has carefully re-evaluated the evidence adduced before the trial court in light of the rival submission made by counsel for the Appellant and counsel of the State. This court finds as a fact that the following was established to the required standard of proof beyond any reasonable doubt:

1. The Appellant was a former employee of Kenya Revenue Authority. He therefore knew the internal workings of the institution when dealing with VAT refunds. PW3 Joseph Kaburo confirmed this fact. The Appellant did not dispute the fact that he previously worked at Kenya Revenue Authority.
2. The Applicant with PW5 Nicholas Nduva Mbuvi registered a limited liability company by the name Garfield Investment Company Ltd. This company was incorporated to undertake clearing and forwarding business. There was no evidence however which was adduced to suggest that the company undertook such clearing and forwarding business. PW5 resigned as a director of the company leaving the Appellant as the sole director in charge of the management of the Company. The claim by the Appellant to the effect that the prosecution failed to establish nexus between himself and the company is therefore not supported by evidence.
3. The prosecution established that there existed another company with similar names to that incorporated by the Appellant. The company is registered as Garfield Investment Ltd. It was clear from the evidence adduced by prosecution witnesses that this company was also in clearing and forwarding business which undertook substantial business on behalf of various clients.
4. It was further established that documents belonging to Garfield Investment Ltd. was submitted to Kenya Revenue Authority for VAT refund by the company associated with the Appellant. This court's re-evaluation of the evidence points to no other conclusion other than the fact that the

Appellant incorporated the particular company with similar name to an already existing busy company so as to facilitate the fraudulent claim for VAT refund.

5. The prosecution was able to establish, by documentary evidence, that the company associated with the Appellant lodged documents with the Kenya Revenue Authority for VAT refund. Four requests for tax refunds were made. Two of the requests were paid i.e. the sums of Kshs.4,156,682/= and Kshs.4,737,690/=. Two other requests were not paid after it was discovered that the transactions were fraudulent.

6. The fraud would not have been succeeded were it not for the fact that the Appellant, using his knowledge as a former employee of Kenya Revenue Authority, colluded with others to manipulate the system to obtain the refunds in question.

The thrust of the Appellant's appeal is that the prosecution failed to adduce evidence to link him with the company. In answer to this claim, the prosecution did call PW5 Nicholas Nduva Mbuvi, the Appellant's co-director at the time the company was incorporated and PW6 Faith Chirchir, a registrar at the Companies Registry who confirmed the particulars of the directorship of Garfields Investment Company Ltd. Documentary evidence was produced to support this evidence. The Appellant denial of association with this company therefore does not have merit.

The Appellant further argued that the prosecution was wrong in law when it made the decision to charge him as a director of the company yet the company was an independent entity. The Appellant was saying that he could not be charged for acts committed by a legal entity in the name of a company. This court was not persuaded by this submission. Limited liability companies, although legal personalities, are inanimate: they can only act through directors who incorporated them. Criminal liability attaches to the directors acting through the veil of incorporation of the company. In the present appeal, it was clear that the Appellant incorporated the particular company with the aim of defrauding the Government of tax through fraudulent VAT refund claims. No evidence was placed on record to suggest that the company incorporated by the Appellant in reality undertook clearing and forwarding business. It was evident that the company was incorporated for the purpose of defrauding the Kenya Revenue Authority by manipulating its system. This court holds that the prosecution did establish to the required standard of proof that the Appellant did participate in the fraud and was properly convicted for the six offences that he was charged with. His appeal against conviction lacks merit.

On sentence, there is no dispute that the Appellant is a paraplegic. According to the medical report prepared by Dr. David Oluoch-Olunya, a Consultant Neurosurgeon, the Appellant sustained a gunshot wound to the root of the neck that resulted in the Appellant being paralyzed on his lower limbs. The doctor noted that the Appellant:

***“is currently on a motorized wheelchair but is dependant because he has no movement sensation in his lower limbs. He requires a personal assistant/care assistant 24 hours as he needs bowel care insertion of dulcolax repositions every 3 days, he cannot do any of his activities of daily living, he requires care for use of uricondom for passing urine. He needs 30 uricondom every month and 15 urine bags, he requires ripple mattress for pressure care; physical therapy once a week and sculptural therapy twice a week. He needs two people to transfer him to and from his chair. He needs manual evacuation of his bowel once a week and he has truncal stability and therefore needs to be supported.”***

This physical condition militates against the Appellant being sentenced to serve a custodial sentence. However, this court notes that the Appellant committed these offences when he was in this state. Clearly, at the back of his mind, the Appellant must have formed the view and calculated that he would not be incarcerated because his disability would prove to be a burden to the penal system. Much as this court finds this state of mind abhorrent, it is evident that this court must take into account the Appellant's disability in sentencing him. In the premises therefore, this court confirms the fines that were imposed by the trial court but sets aside the default custodial sentence and substitute it with a sentence of three (3) years imprisonment which shall be suspended in so far as the Appellant shall not commit a criminal

offence in the next five (5) years. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF MAY 2017.**

**L. KIMARU**

**JUDGE**