



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 4 OF 2015

ZAVERIO NDUGUTA NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Anti Corruption case No. 1/15 at Embu Chief Magistrate's Court by Hon. P. Biwott - SPM on 11th July, 2014)

JUDGEMENT

1. The appellant appeals against his conviction and sentence of Kshs 100,000/- in default to serve 6 months imprisonment in respect of the offence of fraud by a person employed in the public service contrary to section 127 (1) as read with sections 331 (2) both of the Penal Code (Cap 63) Laws of Kenya, imposed upon him by the court of the Senior Principal Magistrate at Embu on 11th July 2014. The judgement was delivered by the Senior Principal Magistrate, on behalf of the Chief Magistrate.

2. The evidence upon which the appellant was convicted consisted of Ann Naomi Wangari Kimotho (PW 1). PW 1 was the Principal of Kigali Teachers Training College, which institution was charged with the responsibility of training P1 teachers. Her evidence was that in May 2009, she was requested by the Ministry of Education to accommodate a training session for 350 participants, with each participant being required to pay Kshs 500/- per day which in total was a sum of Kshs 1,575,000/-. She therefore raised an invoice in that sum. It was also her evidence that on 24th May 2009, the first group of participants arrived and were accommodated in her institution and the Ministry of Education made a down payment of Kshs 787,500/-. After training, she raised a final invoice for the balance of Kshs 702,000/- which she sent to the Ministry on 4th June 2009. In total she trained 331 participants.

3. In addition to her evidence, there was evidence from Charles Malovi Kataka (PW 2), who was from the Ministry Headquarters in Nairobi. His evidence was that he arrived at Embu on 24th May 2009 with the appellant who was in charge of instructive improvement funds for primary schools. PW 2 was one of the facilitators. He presented his paper and was only paid Kshs 4,000/- for his facilitation. He denied being paid per diem amounting to Kshs 72,000/- from the Ministry of Education. He identified the appellant as the person in charge of the exercise from the Headquarters of the Ministry of Education in Nairobi.

4. The next witness called was Mwangi Cyrus (PW 3). He was one of the facilitators and was paid only Kshs 30,000/- for facilitating the exercise. He denied receiving Kshs 72,000/- for his facilitation. The evidence of Anna Waithira Njagi (PW 4) is that she did not facilitate the training session as claimed in prosecution exhibit PEX 4. She denied attending any training as a facilitator and also denied receiving

Kshs 54,000/- for her alleged facilitation at that institution.

5. Furthermore, there is evidence of George Oyalo Ayah (PW 5). He was a chief accountant with the Ministry of Education, to whom the appellant surrendered and accounted for the imprest monies taken for the training session.

6. There is also the evidence of the document examiner John Muinde (PW 6), who examined the known signatures of the appellant and the disputed (questioned) documents of the appellant and the facilitators (PW 2 and PW 3). He also proceeded to examine the known signatures of Cyrus Christopher Mwangi, Ann Waithira, Jekonia Leserian and Xaveria Njeru. PW 6 also examined the questioned documents of the facilitators (PW 2 and PW 3). Pw 4 was not a facilitator. He concluded that these prosecution witnesses did not make the questioned (disputed) documents.

7. The appellant gave sworn evidence and admitted to have undertaken a training course at Kigali Teachers Training College. He admitted that he conducted the exercise with a facilitator and a driver. He also admitted that he submitted the imprest surrender documents to PW 5. He further confirmed having the documents in his custody until he handed them over to the investigating officer. His further evidence was that PW 5 did not complain against the manner in which he had accounted and surrendered for the imprest. He finally testified that he fully accounted for the imprest that had been entrusted to him for the training sessions conducted at Kigali Teachers Training College.

8. The appellant has raised six grounds of appeal. In ground 1, he has faulted the trial court for convicting him on insufficient evidence. I find that the evidence of the prosecution witnesses PW 2, 3 and 4 was that they were not paid the sums of money, which the appellant claimed was paid to them. The evidence of the document examiner supports their evidence. I therefore find that there was ample evidence upon which the appellant was convicted. In the circumstances, this ground of appeal is without merit and is hereby dismissed.

9. In ground 2, the appellant has faulted the trial court for disregarding the evidence of the chief accountant (PW 5) to whom the appellant had fully accounted for the imprest that he had taken from the Ministry Headquarters. Again I find that the evidence of the prosecution witnesses showed that the surrender of the imprest by the appellant was on the face of it accurate. There is no way that the chief accountant could have known whether the facilitators were paid as shown in the questioned documents or not. The reason being that the chief accountant did not himself attend the training sessions. It therefore follows that this ground of appeal is without merit and is hereby dismissed.

10. In ground 3, the appellant has faulted the trial court for failing to appreciate that the document examiner (PW 6) relied on documents that had not been formally forwarded to him for examination, which omission led to the conclusion that the disputed documents were made by the appellant. I find that there is ample evidence to show that the disputed documents were made by the appellant notwithstanding that some documents were not formally forwarded to him. This ground of appeal is without merit and is hereby dismissed.

11. In ground 4, the appellant has faulted the trial magistrate for relying exclusively on the evidence of the document examiner in order to convict the appellant. I find that the appellant was convicted on the evidence of the prosecution witnesses, PW 2, 3, and 4. It is therefore not correct to state that the appellant was convicted solely on the evidence of the document examiner. This ground of appeal is without merit and is hereby dismissed.

12. In ground 5, the appellant has faulted the trial court for disregarding the fact that there was no formal complaint made to the Kenya Anti-corruption Commission, in particular that PW 5 did not lodge any complaint. Once a complaint is made to an investigating agency, whether formally or anonymously, it is immaterial to argue that there should be a formal complaint in order to sustain a conviction. What matters is the evidence collected by the investigator and if it is believed by the court the conviction resulting therefrom cannot be quashed merely because there was no formal complaint.

13. I have re-assessed the entire evidence as I am required to do, as a first appeal court according to ***Peters v Sunday Post Ltd (1958) EA 424***. I have also considered the submissions of both counsel. As a result I find that the appellant's conviction is supported by ample evidence.

14. In ground 6, the appellant has faulted the trial court for imposing a sentence that was manifestly excessive in view of the fact that the appellant was a first offender. The statutory sentence provided for this offence is one of a fine not exceeding one million (Kshs 1,000,000/-) or to imprisonment for a term not exceeding 10 years or to both. The trial court in this regard took into account that the appellant was a first offender and proceeded to sentence him to a fine of Kshs 100,000/- in default to serve 6 months imprisonment. The trial court erred in this regard by imposing a default sentence of 6 months imprisonment. It should have imposed a default sentence of 12 months of imprisonment as prescribed by ***section 28(2) of the Penal Code (Cap 63) Laws of Kenya***. I hereby set aside the default sentence of 6 months imprisonment and I hereby substitute a default sentence of 12 months imprisonment in its place. I find that the trial court was very lenient in imposing the sentence of a fine of Kshs 100, 000 but not to the extent of warranting interference by this court.

15. In the light of the foregoing, I hereby confirm both the conviction and sentence of the appellant. The appeal is hereby dismissed in its entirety.

JUDGEMENT DELIVERED, DATED and SIGNED in open court at **EMBU** this 25th day of **OCTOBER 2016**.

In the presence of Mr.ithiga for the appellant and Ms Mbae for the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

25/10/2016