



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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 348 OF 2011**

**BONIFACE PETER NDEGWA .....1<sup>ST</sup> APPELLANT**

**BON MOTORS LIMITED..... 2<sup>ND</sup> APPELLANT**

**JACKSON MUGO NDEGWA.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 60 of 2010 in the Chief Magistrate's Court at Milimani–Mr. K.A Bidali (SPM) on 14<sup>th</sup> December 2011)*

**JUDGMENT**

**Introduction**

1. **BONIFACE PETER NDEGWA**, the Appellant, faced a charge of making a false claim for V.A.T refund contrary to **section 40(1) (a) of the V.A.T Act, Cap 476 laws of Kenya** in Count I, making a false return contrary to **section 40(1) (a) of the VAT Act Cap 476 laws of Kenya** in Count II and obtaining money by false pretense contrary to **section 313 of the Penal Code** in Count III. The particulars of the offences are well set out in the charge sheet. He was convicted and sentenced to pay a fine of Kshs. 400,000 and in default to serve twelve months imprisonment in Count I and Count II respectively. In Count III he was sentenced to pay a fine of Kshs. 100,000/= and in default to serve six months imprisonment.

**Grounds of Appeal**

2. Being dissatisfied with the conviction and sentence, he filed this appeal and advanced ten grounds the sum of which was that; the charges did not disclose an offence against the appellant; the prosecution did not prove its case beyond reasonable doubt; the burden of proof was shifted from the prosecution to the appellant and that the sentences were not only excessive but contrary to the law.
3. Mr. Njoroge, learned counsel for the Appellant argued all the grounds of appeal together. He submitted that the convictions of the appellant were based on a misapprehension of the law on when tax refund based on a withholding VAT certificate may be made by a supplier. He questioned the prosecution's case that the 2<sup>nd</sup> accused company's claim for VAT before delivery

of the vehicles was fraudulent when no evidence was called to aid the court in determining when a tax refund claim may be made.

4. Further, in view of the statutory requirement that a claim for refund be made within one year, Mr. Njoroge contended that the subordinate court did not consider the following questions that were raised both in evidence and submissions by counsel for the appellant;
  - a. Was the delivery of the motor vehicles a condition precedent for claiming VAT?
  - b. Was the claim made during the pendency of the contract which was terminated on 17<sup>th</sup> July 2007 intended to defraud?
  - c. Could Kenya Forestry Research Institute (hereinafter called KEFRI) demand from Kenya Revenue Authority (hereinafter called KRA) a refund of the VAT paid on ten vehicles more than twelve months after it had been paid?
5. It was submitted for the appellant that the subordinate court ignored the evidence of **PW2** and **PW4**, who testified that the claim as made was proper and that they were not concerned with the delivery of the motor vehicles. That in any case no representations had been made to the effect that vehicles had been delivered.
6. Mr. Njoroge asserted that it was proper for the VAT to be claimed as the contract was ongoing at the time the claim was paid and was only cancelled on the 17<sup>th</sup> July 2007 after payment had been made. That the payment was made on or about the 30<sup>th</sup> November 2005 whereas the claim was due to lapse on 30<sup>th</sup> November 2006 in line with section 13 of the VAT Act, hence they could not await delivery of the vehicles before lodging the claim whose limitation period was about to lapse.

### **Respondent's Reply**

7. Ms. Nyauncho, learned State Counsel opposed the appeal, arguing that the Prosecution had proved its case beyond reasonable doubt. She contended that V.A.T is normally claimed by a trader who has supplied taxable goods and services, yet the appellant who was to supply KEFRI with thirteen motor vehicles only supplied three. She cited section 13 of the V.A.T Act, Cap 476 laws of Kenya, which makes sale and delivery a pre-condition for a claim of V.A.T refund. For that reason she argued that the appellants were not entitled to the refund as they had not delivered all the thirteen motor vehicles to KEFRI
8. Ms. Nyauncho pointed out that although **PW2** had examined the documents, he indicated that the issue of delivery would be confirmed at the audit stage and that **PW4** testified that she would not know whether the claim was genuine or not although she believed it was. She agreed with the trial magistrate's conclusion that there was misrepresentation of delivery of the vehicles by the appellant in form VAT 4 column 6, where he indicated that he had supplied thirteen vehicles instead of three.
9. Regarding the limitation of time for refund to one year, Miss Nyauncho referred to section 24 of the V.A.T Act, Cap.476 law of Kenya and asserted that it was very clear that it only applied in respect of tax that was paid in error, which was not the case herein.

### **Analysis of Evidence**

10. **PW3** worked at KEFRI and was in charge of procurement, overseeing all the supplies. She testified that KEFRI had advertised in an open tender for the purchase of thirteen motor vehicles through the Nation newspaper. The tender was won by the appellants and they were expected to deliver the thirteen motor vehicles between December 2004 and March 2006. However, only three vehicles were delivered. One vehicle came in January 2007 and the others came in March 2007. Some of the remaining motor vehicles were to be delivered between March and April 2007, while 5 others would be delivered in July 2007. However these subsequent deliveries did not take

place and KEFRI cancelled the agreement by consent of all the involved parties.

11.KEFRI cancelled the bank guarantee they had obtained in advance from NIC bank. They received a refund in the sum of Kshs. 18,127,814 exclusive of VAT, which they learnt had been claimed by the appellants from KRA leading to this action in court. From the record, it is therefore clear that the only supply that was made was that of three motor vehicles and not thirteen as agreed. Section 13 of the VAT Act, provides that the Taxable value of supply including supply of imported services, shall be the consideration for the supply; or if the supplier and recipient are related, the open market value of the supply.

The Act provides as follows:

“ **Supply**” means a supply of goods or services;

“ **Supply of goods**” means-

- (a) **sale, exchange, or other transfer of the right to dispose of the goods as owner; or**
- (b) **the provision of electrical or thermal energy, gas or water;”**

12.From my assessment of the record, the appellants’ claim was for a tax refund for thirteen motor vehicles that they alleged to have delivered, as evinced by the document VAT 4 a which was produced as exhibit 20. In reality they had only supplied three motor vehicles. Their claim was therefore false. The reason that they gave for their claim was that it was to cater for the company’s operations. That is not one of the known reasons for refund of VAT. The goods were clearly not supplied in terms of the legal provisions above.

13.**PW1**, a senior accountant at KEFRI testified that they wrote to K.R.A seeking a refund of VAT for the remaining vehicles which were not delivered and in response, K.R.A notified them that the 2<sup>nd</sup> appellant had already claimed VAT for all thirteen vehicles. They commenced investigating into the transaction since the 2<sup>nd</sup> appellant had only delivered to them three motor vehicles.

14.**PW6**, the investigating officer recorded statements from **PW1** and **PW3**. He established that the 2<sup>nd</sup> appellant had indeed entered into a contract with KEFRI for the supply of thirteen motor vehicles. The 2<sup>nd</sup> appellant was to make a claim for refund only after supplying the goods. The supply did not take place as agreed. Notwithstanding the above, the 2<sup>nd</sup> appellant claimed a full refund which was paid to them. This payment is being challenged for being obtained fraudulently by both the K.R.A and KEFRI, who have lodged complaints to the effect that VAT was unlawfully claimed before delivery had taken place.

15.Section 49 (10) (c) of the VAT Act provides thus:-

“Any person who -

- a. ....
- b. ....
- c. makes any statement in response to any such requirement, knowing it to be false or incomplete in any material particular, or not having reason to believe that it is true or complete in all material respects; or
- d. procures or attempts to procure, by any means, any other person to act as aforesaid, commits an offence.” From the foregoing events and in view of the provisions of the relevant law an offence

was indeed committed.” (*emphasis mine*) The trial magistrate in her Judgment stated thus;

**“...the accused stated that there were no misrepresentations that delivery was made, but that flies in the face of what he filled in VAT 4 of column No. 6 which states brief description of supply and indeed in that column he filled that 13 vehicles had been supplied....It clearly follows that in filling in the VAT 4a the accused person made a false return which is clearly contrary to the provisions of section 40(1)(a) of the VAT Act.”**

16.The appellant’s were well aware of their inability to supply all the vehicles as required but went ahead to claim the full VAT. This shows that the appellants knew the claim was not due and their intent was therefore fraudulent. It was not disputed that KEFRI had paid the withholding tax to K.R.A for the thirteen motor vehicles, and that the appellants only supplied three vehicles and claimed VAT for thirteen vehicles.

17.**PW2** who worked for K.R.A at the refund section testified that the 2<sup>nd</sup> appellant presented a claim in June 2006 which was subjected to their internal processes. They sought for evidence that the tax was paid and were indeed satisfied that the advance tax had been paid. Regarding the claim for a refund, he confirmed that such claim could only be made by the appellants within a period of one year. KEFRI could not therefore demand a refund on the ten vehicles that were not delivered as posited by Mr. Njoroge.

18.I am in agreement with the findings of the subordinate court that a refund ought to be in respect of goods or services that had been rendered or supplied as required by law and therefore, the 2<sup>nd</sup> appellant was not legally entitled to make a claim of refund when the goods had not been supplied.

19.Section 30 of the VAT Act deals with the issue of Refund of Tax paid in error. It provides that where, in respect of any supply, tax has been paid in error, the Commissioner shall, except as otherwise provided by the regulations, refund such tax: Provided that no refund shall be made under this section unless a claim in respect thereof is lodged within twelve months from the date the tax became due and payable under the section. Tax becomes due and payable at the time of supply. From the record, the appellants presented a claim in June 2006, when they had not supplied anything. It is clear as pike staff therefore, that their claim was fraudulent.

20.Section 33 of the VAT Act deals with the offence of fraud in relation to claims for tax refund and provides that any person who fraudulently makes a claim for a refund of tax shall be liable to pay a penalty of an amount equal to two times the amount of the claim. In count I therefore, upon conviction, the appellants were liable to a fine equal to two times the amount of the claim they received which was Kshs.2,853,615/=. The fine imposed against them cannot therefore be said to be excessive in any way.

21.Having given careful consideration to all the circumstances of this case, I am satisfied that the learned trial Magistrate properly convicted the appellants based on sound evidence. I therefore confirm the conviction and sentence and dismiss the appeal.

**SIGNED DATED and DELIVERED in open court this 22<sup>nd</sup> day of October 2014.**

**L. A. ACHODE**

**JUDGE**