



**REPUBLIC OF KENYA**

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 475 of 2005**

**(From original conviction (s) and Sentence(s) in Criminal Case No. 1762 of 2004 of the  
Senior Principal Magistrate's Court at Kiambu (Wachira (Mrs.) - SPM)**

**JOHN THIANI MBURU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

JOHN THIANI MBURU was convicted for one count of FAILING TO PAY CONTRIBUTIONS contrary to Section 36(a) of the National Social Security Fund Act Cap 258. He was sentenced to a fine of Kshs.4,000/- in default 3 months imprisonment and in addition ordered to pay Kshs.220,980/- to NSSF within 14 days from date of sentence. The Appellant was aggrieved by the conviction and sentence and therefore lodged this appeal.

The facts of the prosecution case was that the Appellant was the proprietor of **S.M. THIANI** slaughterhouse conducting business in Kikuyu Division, Kiambu District. It was the prosecution case that between November 1994 and March 2004, the Appellant failed to pay NSSF contributions for his permanent employees as required, to the tune of Kshs.220, 980/-. Only one employee was called to testify, PW1 one **Njeri**. It was her evidence that she was on casual employment between 1984 up to 1994 when her terms were changed to permanent and she was registered with the NSSF for contribution purposes. She told the court that sometimes in 2004, she discovered that NSSF deduction made on her salary by the Appellant were not being remitted. This she learnt from the NSSF enforcement officers. Two of these officers testified as PW2 and PW3. PW2 told court that the Appellant's business was registered as a contributor in July 1994 but that as of February 2004 when she visited the Appellant's premises, no deductions and contributions were being made by the business. That since the Appellant failed to produce employment records to her, PW2 prepared a schedule, exhibit 6, in which she calculated the un-remitted sums of money as contribution to NSSF as Kshs.220,980/- PW3 said that he assisted PW2 to prepare the schedule exhibit 6 on the basis that the Appellant had 6 employees in 2004. In 1994 PW3 said, the Appellant contributed for 9 employees for only 2 months then stopped. PW3 said that the employees NSSF register numbers were not recorded in the master roll which they used to prepare the schedule.

The Appellant in his sworn evidence said that his father died in 1994 and that the family agreed that the takes up the responsibility of administering the estate. He said that as agreed with the family members that they take up monthly employees, he approached six casuals including PW1 and registered them with the NSSF. That he made contributions to NSSF between 1<sup>st</sup> July 1004 to November 1994 when the six

employees requested him to discontinue the payments as they did not desire to be permanent employees as they made more money as casuals. The Appellant produced D exhibit 1, one of the NSSF returns for November 1994 showing a contribution of Kshs. 675/- for six employees. He decided that he ever made contributions for 9 employees in 1994 as reflected in the prosecution's schedule exhibit 6. The Appellant said he discontinued deductions from employees and stated that he owed NSSF no money. The Appellant called one witness, DW2 one **Gideon Mburu** who corroborated the Appellant's evidence. DW2 said that he was one of the six casual employees approached by the Appellant in 1994. he said that all six of them were registered with NSSF and he produced his card as D. exhibit 2. he said after working for a short period, all the employees including himself requested the Appellant to revert them back to casual employees since their salary was too low as permanent employees.

The filed 'memorandum' of appeal raises seven grounds of appeal. I will deal with them as they arose in the submissions of the Appellant Advocate, **Mr. Chege. Mr. Makura**, Learned State Counsel represented the State and opposed the appeal.

**Mr. Chege** submitted that the learned trial magistrate failed to make a specific finding of how much money was owed by the Appellant to NSSF as contributions on PW1's behalf. Learned trial magistrate submitted further that neither PW2 nor PW5 gave consistent evidence of the number of permanent and registered employees the Appellant had during the period in question. **Mr. Chege** submitted only PW1 was called whose evidence was insufficient to establish the number of employees registered with NSSF. **Mr. Chege** urged that given those circumstances, the schedule produced as exhibit 6 lacked a basis and ought not to have been considered by the learned trial magistrate. **Mr. Chege** further urged the Court to find that since exhibit 6 was neither signed nor stamped, I find it was not authenticated and therefore ought to be disregarded.

**Mr. Chege** also submitted that the Appellant's defence remained unchallenged to the effect that he registered six workers with NSSF in 1994 but that few months later, the same employees requested him to cease deducting NSSF contributions from their salaries and that he obliged. **Mr. Chege** submitted that DW1, who was one of his employees confirmed that bit of the Appellant's defence in his evidence. **Mr. Chege** submitted that as required under **Section 36** of the **NSSF Act**, the Appellant had given a lawful excuse and that the learned trial magistrate's failure to consider it and make a finding on it either way was fatal to the conviction entered in the case.

**Mr. Makura** opposed the appeal and submitted that there was sufficient evidence which proved the case against the Appellant beyond any reasonable doubt. Learned State Counsel submitted that PW1's evidence was that the Appellant failed to submit payment to NSSF. Learned State Counsel urged Court to find that the evidence of PW2 and PW3 and the schedule they prepared, exhibit 6 corroborated PW1's evidence.

On my own evaluation and analysis of the case, PW1's evidence was made on his own behalf. He produced a card to show that the Appellant registered him as a contributor with NSSF in 1994. It was exhibit 1. PW1's further evidence that on checking with NSSF in 2004, January whether any payments had been made to the fund by the Appellant, he was served with exhibit 2. Exhibit 1 is the NSSF members card in the name of **Gideon Njire Mungai** i.e. PW1. The exhibit 2 was NSSF member statement which indicated the contributions between 1996 to 2004. It is in PW1's name. It may not have been necessary in my view to bring all the employees in the Appellant's employment to prove they existed. However the prosecution needed to adduce sufficient evidence to establish that point. As will be noted later in this judgment the prosecution failed to establish that fact in its case. There was unclear evidence whether the Appellant had deducted NSSF from his employees and failed to remit the contribution to NSSF or whether he had failed totally to do both. PW2's complaint was that the Appellant neither deducted nor contributed. PW3 in his evidence said he used the master roll to calculate what the Appellant deducted from employees but failed to remit to NSSF. The master roll used to create the schedule, exhibit 6, was not exhibited in court. Further there was no clear evidence how many registered employees the Appellant had. From the evidence of PW1 and DW2, there were six schedule to show between 22 and 23 employees where the other 16 or 17 names came from remained a nuptery by the time the trial was concluded in the lower court. The learned trial magistrate's finding that the Appellant

had 26 employees registered with NSSF lacked any essential backing and was therefore a serious misapprehension of the facts of the case.

It was the duty of the prosecution case to prove its case beyond any reasonable doubt. The prosecution case as to the number of registered employees the Appellant had between 1994 and 2004 was not proved to the required standard. **Section 36(a)** of NSSF Act provides: -

**“S.36 Any person who –**

**(a) fails without lawful excuse to pay to the Fund within the period prescribed by this Act any contribution which he is liable as a contributing employer to pay under this Act; or**

**Shall be guilty of an offence and liable to a fine not exceeding fifteen thousand shillings.”**

I find that the prosecution case did not establish the amount of money the Appellant should have been contributing to the NSS Fund. The evidence adduced was not only inconsistent but hollow without documentary proof which could easily have been availed. For example in order to prove that contributions to NSSF were deducted the Master Roll was sufficient to do so. The same roll should have been able to demystify the number of employees the Appellant had in his employment at any one time and those for whom he should have made contributions. Without such document, the oral evidence of PW1 which in itself was scanty and inconclusive and assumptious and schedule prepared by PW2 and PW3 were insufficient to prove the case.

**Mr. Makura** submitted that the schedule exhibit 6 was authored by PW2 and PW3, NSSF officials and therefore authentic and admissible in evidence. That was not quite the issue. The issue was that the two witnesses used a primary document from the Appellant’s premises which was availed to them to prepared the schedule exhibit 6. It was imperative to produce the primary document in court for three reasons;

One, the Appellant had contested the information given in the schedule as exaggerated and incorrect.

Two, the evidence of PW1 and DW2 including the Appellant’s evidence in defence all contradicted the information given in the schedule in regard to the number of employees and the contentions due to be made for each.

Three, the application form exhibit 3 contradicted the schedule in that it shows number of employees as 6 while schedule indicated 22 and 23.

In face of these two issues, the primary document was necessary to remove doubts as to the actual content of it and to render credence to the schedule as to its accuracy. Without it, the weight that could be attributed to exhibit 6, the schedule, was quite low indeed and insufficient without corroboration. Corroboration could have been easily secured by NSSF who upon registering an employee as a contributor are expected to open registration details for each individual employee. In exhibit 4 of the prosecution the notification indicates that the fund and employer are expected to have individual members registration forms and cards. That was sufficient corroboration which was lacking in this case because the prosecution failed to adduce all the documents held by them in evidence.

The other important issue to decide is whether the Appellant’s defence amounted to a lawful excuse as envisaged under **Section 36(a)** of the **NSSF Act**. A secondary issue when should an excuse be raised?

At page J3 of judgment, the learned trial magistrate observed:-

**“Accused admits in defence that he started making contributions and made contributions for his employees for 3 months i.e. July – September 1994 and stopped. His excuse is that the workers told him they did not desire to be on permanent terms.**

**The accused did not furnish this court with any documents that he advised the workers or the NSSF**

**that he ceased to make contributions for the workers in reference. I find accused had no lawful excuse to fail to submit contributions to NSSF. I find him guilty as charged and convict him accordingly.”**

I am satisfied that the learned trial magistrate considered the Appellant’s excuse as to why he ceased to make payments to NSSF. However, there was a shifting of burden of proof where the learned trial magistrate made an observation suggesting that the Appellant should have adduced documentary proof that he advised both NSSF and the workers of that ceasure. There is no legal burden placed on the Appellant to adduce proof prior of notification of ceasure to deduct NSSF contributions either to NSSF or the employee or both. In any event the Appellant’s position was not that he notified the employees that he would not make NSSF deductions from them but rather that the employees requested him to translate their terms of employment from permanent to casual and therefore cease to deduct the NSSF contributions.

In the Appellant’s explanation a lawful excuse under Section 36(a) of the Act? I think that part of the answer to that question is provided under **Section 10(1)** of the Act where ‘standard contributions by contributing employers’ is provided for. It provides: -

**“S. 10(1) Subject to this Part, a contributing employer shall, after the appointed day, for every contribution period during which he employs a person who is or is required by this Act to be registered as a member of the Fund, pay to the Fund the standard contribution specified in the Third Schedule in respect of that person:**

**Provided that no contribution shall be paid under this section in respect of any wages earned by a person at any time when he is-**

**(i) an exempt person; or**

**(ii) a casual worker, unless there is in force an order made under Section 5 specifying casual workers generally, or casual workers of a class or description to which he belongs, as persons who are to be registered as members of the Fund.”**

It is clear from this section that an employer is not expected to pay any contributions under the Act employees who are either exempt or those who are casual workers. The Appellant’s explanation that he ceased to deduct NSSF from his employees and therefore ceased to pay contributions to the fund because he had only casual workers is a very lawful excuse. The prosecution had the burden to show that the Appellant’s employees were permanent or were not exempt persons as provided under the Act and therefore that the Appellant should have made payments of NSSF contributions to the fund. This was not done. Even PW1 himself did not establish that fact in his evidence in regard to himself. The Appellant’s defence was therefore good and ought to have been accepted by the Court. The conviction entered was therefore unsafe and should not be allowed to stand.

For the reasons given in this judgment I do allow the appeal, quash the conviction and set aside the sentence together with all the consequential orders made. If any payment was made by the Appellant in compliance to the sentence or order made there under, the same should be refunded to the Appellant.

Dated at Nairobi this 20<sup>th</sup> day of April 2007.

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant present

Mr. Chege for the Appellant

Mr. Makura for the State

Eric: CC

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**DULU**

**JUDGE**