



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Khachongo (Criminal Appeal 132 of 2019)
[2023] KEHC 20559 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL 132 OF 2019**

**REA OUGO, J
JULY 13, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

DAVID BARASA KHACHONGO RESPONDENT

*(An appeal from the judgment of C.A. S. Mutai SPM in election
offence no 4 of 2017, Republic vs David Barasa Kachongo)*

JUDGMENT

1. David Barasa Khachongo (the respondent) was charged with breaching of official duty without a reasonable cause contrary to section 6(j) of the *Elections Offences Act*. The particulars of the offence are; On the 9th day of August 2017 at Bumula Girls Secondary School a constituency tallying centre of Bumula constituency in Bumula sub-count within Bungoma County being a member of staff , a presiding officer of independent electoral and boundaries commissions (IEBC) without reasonable cause failed to submit original election results declaration forms 34A, 35A, 36A, 37A, 38A and 39A of Napora polling station to the Bumula constituency returning officer in breach of his duty.
2. The trial court him acquitted of the said charge. The appellant was dissatisfied with the acquittal and filed this appeal. the petition of appeal lists the following grounds of appeal:
 - i. The learned magistrate erred in law and in fact by failing to convict the respondent in the face of overwhelming evidence from the prosecution.
 - ii. The learned magistrate erred in law and in fact by relying on the hearsay evidence of the defendant thereby arriving at an erroneous finding.
 - iii. The learned magistrate erred in law and in fact by finding that the forms carrying the election results were transported separately from the presiding



officer which finding was based on evidence of a stranger and in the face of overwhelming evidence from the returning officer that this was not the case.

- iv. That the learned magistrate erred in law and in fact by misapprehending the law.

The appellant seeks that the court sets aside the acquittal of the respondent and to convict the respondent.

3. As first appellant court it is my duty to re-evaluate the evidence adduced before the lower court, bearing in mind that I did not see or hear the witnesses and to draw my own conclusion .
4. A summary of the evidence before the lower was that the respondent was employed as a presiding officer by the IEBC. On the 9.8.2017 he was stationed at Napara Primary School as a presiding officer. His duties included ensuring the safe custody of all entrusted documents specific to this case were forms 35A, 36A, 37A, 38A and 39A (forms pext 3 (a) to (f)), during the 2017 General Elections. On the 7.8.2017 he was issued with the said forms for various elective positions. He was to handover of all election materials, in this case the original forms and equipment to the Returning Officer (RO) after the General Elections. The respondent failed to take the forms to the returning officer as was required. He admitted that he failed to hand in the said forms. In his defence he stated that he failed to submit the forms because he had misplaced them. He claimed that they got misplaced since they concluded the tallying process in a hurry. That the drivers who were supposed to transport him, the other election officials and the election materials arrived before they had finished the vote counting and this them into confusion. He claimed that the was fatigued. That the results from his polling station were not contested by any of the parties..
5. The appeal was canvassed by way of written submissions. I have considered the said submissions.

Determination

6. After considering the evidence adduced at the trial and the rival submissions the only issue for determination is whether the respondent breached his official duties without a reasonable cause .
7. Section 6 (j) provides that “a member of the Commission , staff or other person having any duty to perform pursuant to any written law relating to any election who, without reasonable cause does or omits to do anything in breach of his official duty commits an offence and is liable on conviction to a fine not exceeding three years or both”
8. What the appellant was required to prove was that the acts of the respondent were without reasonable cause. There is no dispute that the respondent was a presiding officer and that he received the official forms. He was required at the close of the elections on the material day to hand over the original forms to his returning officer. He did not. He readily admitted this in his defense. Does failing to submit the form indicate that the respondent did so without a reasonable cause. Was he in breach of his official duties as alleged, did his actions amount to a criminal offence.
9. The prosecution witnesses testified that the respondent was given the said forms as the presiding officer and that once it was found out that he did not have them the respondent went out to look for them in the boxes he thought they could have been placed. The documents were not found. He did perform his duties as required of him. In his defense he explained what happened.
10. The words without reasonable cause mean in simple words means that a claim is made without there being any real reason, basis in facts or purpose. In my view the defence offered by the respondent against the evidence adduced by the appellant witnesses showed that his actions on the material day were not



negligent nor careless to be termed without reasonable cause. Failing to inform the RO of the incident immediately or to inform the RO that he was fatigued was not in my view something that one can term an uncalled-for excuse. I find that the appellant through their witnesses failed to demonstrate that the respondent failed to submit the forms without reasonable cause and thus was guilty of a criminal offence.

11. In my view the appellant failed to prove their case beyond reasonable doubt. The appellant has failed to establish that they had overwhelming evidence to prove that the respondent was guilty of the offence he was charged with. The appeal is dismissed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT BUNGOMA THIS 13TH} DAY OF JULY 2023.

R.E.OUGO

JUDGE

In the presence of:

Mr. Ayekha For the Appellant

Respondent in person

Counsel For the Respondent

Wilkister/ Okwaro C/A

