



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.E011 OF 2021**

**BENTA AKINYI OTIENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

[1] The appellant **Benta Akinyi Otiemo**, appeared before the Resident Magistrate at Busia facing a charge of failing to pay statutory contributions and penalties within the time and manner prescribed, contrary to **s.16 (1)** read with **Ss 18 (1), 42 (1) and 45** of the **NHIF Act No.9 of 1998**, in that on diverse dates between October 2017 and January 2018 at Deity Academy along Kisumu – Busia Road within Busia town – Busia County of the Republic of Kenya, being the proprietor of Deity Academy, without reasonable cause failed and/or refused to remit ksh.1,072,800/= as required by Law for the period between November 2013 and February 2018 all dates inclusive.

[2] After a full trial, the appellant was convicted and sentenced to a two (2) year probation period with an order to compensate the NHIF Board a sum of ksh.1,072,800/= payable in twenty four (24) equal monthly instalments of kshs.44,700/=with effect from the 31<sup>st</sup> May 2021 and thereafter on the last day of each succeeding month until payment in full.

The order was treated as part of the probation sentence for which breach thereof would constitute a breach of the probation order.

[3] Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds set out in the petition of appeal filed herein on the 23<sup>rd</sup> April 2021, in which the appellant complains that her conviction by the trial court was erroneous in both law and facts inasmuch as it was based on a charge which was defective and evidence which was inadmissible, contradictory and insufficient in establishing and proving the material ingredients of the charge.

[4] Learned counsel, **Mr. Wycliffe Okutta**, represented the appellant at the hearing of the appeal while the learned Prosecution Counsel, **Mr. Gibson Mayaba**, represented the state/respondent.

Both parties filed their written submissions and made brief oral highlights. These were given due consideration by this court in the light of the grounds of appeal and as was held in the case of **Okeno Vs Republic [1972] EA 32**, the duty of this Court was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

[5] In that regard, the prosecution case was briefly that on the 9<sup>th</sup> July 2017, a senior Registration and Compliance Officer with the National Health Insurance Fund (NHIF), **Doris Akweya Lilungu (PW 1)**, issued a notice to Deity Academy for production of records for the period of August 2013 to February 2017 following a demand for payrolls, proof of payment to employees and any other receipts.

[6] The notice was not complied with but a similar notice made earlier on the 28<sup>th</sup> June 2017 by **Henry Musimba Mugalla (PW 2)**, the Busia NHIF Manager, was seemingly complied with when the original master rolls of Deity Academy were availed to the NHIF and forwarded to a registration officer for tabulation. The officer, **Oruko Leonard (PW 3)**, described himself as a compliance officer and indicated that his duty was to ensure that employers deducted NHIF contributions from employees for onward transmission to the NHIF. The records from Deity Academy were handed to him on 27<sup>th</sup> September 2017 for necessary perusal and raising of a demand notice for late contribution and penalty.

[7] After necessary perusal of the master payrolls for the years 2013, 2014, 2015, 2016 and 2017, and calculation of the amount due from Deity Academy for late contribution and penalty, a sum of ksh.1,072,800/= was arrived at in the following manner i.e. ksh.219,840/= for the period 2013 to 2014, to 290,910/= for the period 2014 to 2015, ksh.280,650/= for the period 2015 to 2016 and ksh.287,400/= for the period 2016 to 2017. A demand notice for the payment of the amount within fourteen (14) days was made on 16<sup>th</sup> October 2017.

[8] Even after several reminders, no response was forthcoming from the Deity Academy through the appellant who was said to be a director of the institution.

Ultimately, the appellant was charged with the present offence which she denied and contended in her defence that she was only a spiritual leader at Deity Academy whose directors are in Europe and its managing director is one Peter Kings Ogolla. She therefore did not understand why she was charged yet she is neither a director nor proprietor of the institution.

[9] The trial court considered the evidence in its totality and concluded that the prosecution had proved the charge against the appellant beyond any reasonable doubt. In so doing, the court made significant findings to the effect that the appellant was a director of Deity Academy and that any error apparent on the face of the charge with regard to the applicable provision of the relevant law did not occasion a failure of justice, hence a non-fatal defect in the charge.

[10] A revisit of the evidence by this court reveals that there was no dispute with regard to the issuance of necessary notice of production of records by the NHIF to the educational institution known as Deity Academy. There was also no dispute that the notice was complied with when the institution availed its payrolls to the NHIF for necessary perusal and calculation of NHIF contributions collected from the institution's employees for transmission to the fund.

[11] It was after the calculation that a demand notice for the amount of ksh.1,072,800/= consisting of contributions and penalties was raised by the NHIF against the institution as the employer of the contributors who were its employees. The failure to comply with the demand notice resulted in the commission of an offence under the **NHIF Act No.9 of 1998** and in particular **s.16 (6)** of the Act which provides that:-

**“Any person who:-**

**(a) fails without lawful excuse to pay within the time and in the manner prescribed by this Act in relation to him any standard contribution which he is liable as an employer to pay under this Act or,**

**(b) knowingly makes any deductions from the later or other remuneration of any person employed by him, purporting to be a deduction in respect of any standard contribution other than a deduction which he is authorized to make by this Act, commits an offence and is liable on conviction to a fine not exceeding fifty thousand shillings.”**

[12] As per the charge sheet presented herein, the appellant was described as the offender meaning that she had a proprietary linkage with Deity Academy either as its actual single proprietor or as a director of the limited liability company registered under that name and as the owner of the institution. She was charged under **s.16 (1)** of the **NHIF Act** which provides that:-

**“A person liable to pay a standard contribution under section 15 shall pay such contribution through monthly deductions from his salary or other remuneration and the employer of such person shall be liable to deduct and to pay the contribution to the Board on behalf of and to the exclusion of that person.”**

[13] This provision does not create an offence but an obligation to pay a standard contribution stipulated under s.15 of the Act. The failure to discharge the obligation invariably results in an employer committing the offence created under **s.16 (6)** of the Act. It was therefore erroneous for the appellant to be charged under **s.16 (1)** which does not create an offence instead of **s.16 (6)** of the Act. The prosecution was therefore obligated to amend the charge to accord with **s.16 (6)** of the Act but failed to do so thereby ending with the appellant being convicted for a non-existent offence or for an offence she did not know or understand. Indeed, in her defence, she clearly implied that she did not understand the nature of the charge when she stated that she did not understand why she was charged.

[14] Clearly, the appellant's conviction by the trial court was improper and unlawful in so far as it was based or anchored on a defective charge for which the prosecution had an opportunity to amend and failed to do so, thereby rendering the charge fatally defective and incurable under **s.382** of the **Criminal Procedure Code**. The defect did occasion a failure of justice considering that in the early stages of the proceedings the appellant raised an objection to the charge as framed but this was disregarded not only by the prosecution but also the trial court.

[15] If it is taken that the charge was proper before the court, then the prosecution had the obligation to prove that Deity Academy and the appellant were one and the same thing. This obligation could only be discharged by production of relevant documents from the Registrar of companies showing or establishing that the appellant was a director of a company known as Deity Academy or any other documents confirming the appellant's alleged proprietorship of the institution either as a sole proprietor or in partnership with other individuals.

[16] The allegation by the prosecution that the appellant was the proprietor or a director of the institution was not supported by any evidence. The allegation therefore remained unproved. The party with the burden of proving the allegation was the prosecution and not the appellant. It never shifted to the appellant in terms of **s.111 (1)** of the **Evidence Act** as the circumstances of the case could not permit such shift.

[17] The fact that the appellant dealt with the officers of the NHIF in this matter and that she was responsible for the day to day running of the institution did not make her a director of Deity Academy nor the proprietor of the institution. In any event, she denied as much thereby implying that she dealt with the NHIF as a mere employee of the institution. As it were, the prosecution went for the wrong person and that is why the appellant ended up being charged and wrongly convicted.

[18] Although the trial court appreciated the fact that the prosecution failed to avail records from the Registrar of Companies to prove that the appellant was a director of Deity Academy, it erroneously convicted her as such Director on the basis of her name and signature appearing on the school's stamp and response letters to letters from the NHIF addressed to the director of the school. The appearance of the appellant's name on the school stamp or letters sent to the NHIF did not and could not prove her alleged proprietorship or directorship of the material institution. In other words, the stamp or letters had no probative value for purposes of convicting the appellant.

For all the foregoing reasons, grounds 1,2,4, and 5 of the appeal are hereby sustained.

[19] The remaining ground, 3 and 6 touch on duplicity of charges but are unsustainable for reasons that the appellant faced a single charge, hitherto erroneous and defective, under s.16 of the NHIF Act. This was to be read with s.18 (1), 42 (1) and 45 of the Act, which are merely punishment provisions and do not create any particular offence in themselves. In the circumstances, the charge inasmuch as it related to specific period, for which the contributions were not made or remitted to NHIF was not defective for want of duplicity.

[20] Nonetheless, as noted herein above the appellant's conviction by the trial court was unlawful, improper and unsafe and is hereby quashed with the result that the sentence imposed against the appellant is hereby set aside in its entirety. It is to that extent that this appeal is allowed.

Ordered accordingly.

**J.R. KARANJAH**

**J U D G E**

**[DELIVERED & SIGNED THIS 10<sup>TH</sup> DAY OF FEBRUARY 2022]**