



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 13 OF 2016

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

MARGARET KAMONYA NDANYI.....1ST RESPONDENT

MUTHEKI MUVENGEI MBITI.....2ND RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at

Nairobi, Hon. D. N. Mulekyo, delivered on 28th October 2016

in Nairobi Anti-Corruption Case No. 7 of 2011)

J U D G M E N T

1. The 1st Respondent, at the material time, was an employee of the Ministry of Education as the Head of School Health and Nutrition Unit tasked to implement the National School based Deworming Program. She was prosecuted but acquitted under **Section 215 of the Criminal Procedure Code** for the following offences:

Count 1: False accounting by a public officer contrary to **Section 331(1)** as read with **Section 331(2)** of the **Penal Code**. Particulars were that on 22nd June, 2009, at Jogoo House in Nairobi, within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, an officer charged with management of public revenue to wit Kenya Shillings 8,574,740 received by her on 31st March 2009 vide Imprest Warrant Number 0481858, money intended to finance the school based deworming programme in Coast, Western, Nyanza, Eastern and Central provinces, knowingly furnished a false return of expenditure of the said money.

Alternative to Count 1: Knowingly giving a false statement to one's principal contrary to **Section 41(2)** as read with **Section 48(1)** of the **Anti-Corruption and Economic Crimes Act** No. 3 of 2003. Particulars were that on 22nd June 2009 at Jogoo House in Nairobi, within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, an officer charged with management of public revenue, to the detriment of the Ministry of Education, knowingly furnished false payment schedules, work tickets and receipts to the said Ministry purporting that she had spent Kshs. 8,549,642 to facilitate the school deworming programme in Coast, Western, Nyanza, Eastern and Central provinces in the period 31st March 2009 to June 2009, documents which she knew to be false.

Count 2: Fraudulent acquisition of public property contrary to **Section 45(1)(a)** as read with **Section 48(1)** of the **Anti-Corruption and Economic Crimes Act**. Particulars were that on diverse dates between 23rd March 2009 and 22nd June 2009, at the Ministry of Education Headquarters, Jogoo House, in Nairobi within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, fraudulently acquired a sum of Kshs. 1,735,500 from the Ministry of Education, which money was intended to facilitate the school based de-worming programme in Coast, Western, Nyanza, Eastern and Central provinces in the period 31st March 2009 to 22nd June 2009.

Count 3: Uttering a false document contrary to Section 353 of the Penal Code. Particulars were that on or about 22nd June 2009 at Jogoo House in Nairobi, within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, with intent to defraud, knowingly uttered a false document to wit a Transport Daily Work Ticket Serial No. K240237 in respect of motor vehicle registration number GK A067H to Gregory Onyango Okal, a Senior Assistant Secretary in the Ministry of Education purporting it to be a genuine transport work ticket for the said motor vehicle for the month of April 2009.

Count 4: Uttering a false document contrary to **Section 353 of the Penal Code**. Particulars were that on or about 22nd June 2009 at Jogoo House in Nairobi, within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, with intent to defraud, knowingly uttered a false document to wit a Transport Daily Work Ticket Serial No. K378835 in respect of motor vehicle registration number GK A067H to Gregory Onyango Okal, a Senior Assistant Secretary in the Ministry of Education purporting it to be a genuine transport work ticket for the said motor vehicle for the month of May 2009.

Count 5: Uttering a false document contrary to **Section 353 of the Penal Code**. Particulars were that on or about 22nd June 2009 at Jogoo House in Nairobi, within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, with intent to defraud, knowingly uttered a false document to wit a Transport Daily Work Ticket Serial No. K240250 in respect of motor vehicle registration number GK A067H to Gregory Onyango Okal, a Senior Assistant Secretary in the Ministry of Education purporting it to be a genuine transport work ticket for the said motor vehicle for the month of June 2009.

Count 6: Uttering a false document contrary to **Section 353 of the Penal Code**. Particulars were that on or about 22nd June 2009 at Jogoo House in Nairobi, within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, with intent to defraud, knowingly uttered a false document to wit a Transport Daily Work Ticket Serial No. K378834 in respect of motor vehicle registration number GK A988F to Gregory Onyango Okal, a Senior Assistant Secretary in the Ministry of Education purporting it to be a genuine transport work ticket for the said motor vehicle for the month of April 2009.

Count 7: Uttering a false document contrary to **Section 353 of the Penal Code**. Particulars were that on or about 22nd June 2009 at Jogoo House in Nairobi, within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, with intent to defraud, knowingly uttered a false document to wit a Transport Daily Work Ticket Serial No. K111678 in respect of motor vehicle registration number GK A988F to Gregory Onyango Okal, a Senior Assistant Secretary in the Ministry of Education purporting it to be a genuine transport work ticket for the said motor vehicle for the month of May 2009.

Count 8: Uttering a false document contrary to **Section 353 of the Penal Code**. Particulars were that on or about 22nd June 2009 at Jogoo House in Nairobi, within Nairobi province, being a Senior Education Officer and Head of School Health and Nutrition Unit at the Ministry of Education, with intent to defraud, knowingly uttered a false document to wit a Transport Daily Work Ticket Serial No. K214480 in respect of motor vehicle registration number GK A988F to Gregory Onyango Okal, a Senior Assistant Secretary in the Ministry of Education purporting it to be a genuine transport work ticket for the said motor vehicle for the month of June 2009.

2. The State has now appealed against the acquittal in all eight counts but was able only to locate and serve the 1st Respondent and not the 2nd Respondent. The following grounds were set forth in the petition of appeal dated 11th November 2016;

a. THAT the learned trial magistrate erred in law and in fact in acquitting the Respondents under **Section 215 of the Criminal Procedure Code** while the prosecution had proved its case beyond any reasonable doubt.

b. THAT the learned trial magistrate erred in law and in fact in holding that the prosecution did not prove *mens rea* on the part of the 1st Respondent yet there was overwhelming evidence that the 1st Respondent took an imprest and thereafter surrendered the same using false payment schedules for per diem, falsified Facilitation Payment schedules as well as fake work tickets for fuel in support of her expenditure.

c. THAT the learned trial magistrate erred in law by failing to consider the weight of the evidence against the respondents.

3. The appeal was canvassed through written submissions. The Appellant submitted that the 1st Respondent, who was the recipient of Kshs. 8,574,740/= imprest from the Ministry of Education vide Imprest Warrant No. 0481858, surrendered an imprest payment voucher wherein she exaggerated the amount in payments made; and prepared new schedules other than the ones that the participants had written on and signed.

4. The Appellant submitted that the testimony of PW3, PW4, PW5, PW7, PW8, PW9, PW11, PW14, PW16, PW17, PW19, PW20, PW21, PW22, PW25, PW26 and PW30, confirmed that the schedules produced as exhibits by the Prosecution in Court contained exaggerated payment amounts and were not the ones that the witnesses had signed. In some instances, the schedules indicated that the witnesses were paid in areas where they had not travelled to.

5. The Appellant submitted that the 1st Respondent had a duty to ensure that the money was accounted for properly and she could not therefore disassociate herself from the falsified schedules which she had relied upon for surrender as her name, signature and other writings in her own handwriting appeared on Payment Schedule Exhibits 10, 13, 23, 24, 32, 55, 56, 57, 59, 74 and at the back of exhibits 48(a), 48(b) and 48(c).

6. It was the Appellants submission that the 1st Respondent fraudulently acquired the money disowned by the witnesses and urged the court to find all the prosecution evidence credible and reliable and convict the Respondents.

7. The 1st Respondent submitted that after hearing 32 witnesses and examining the exhibits as produced, the Court acquitted the 1st Respondent as the prosecution had not proved its case beyond reasonable doubt.

8. The 1st Respondent made reference to **Section 107 of the Evidence Act** and submitted that the duty of the Prosecution to furnish the Court with proof beyond reasonable doubt cannot shift to the accused person. The case of **Republic v David Ruo Nyambura & 4 others [02001] eKLR** was cited where Etyang J stated as follows:

“An accused person does not assume any burden to prove his innocence in a criminal case. He is obliged only, if he so wishes, to give an explanation or to raise a defence to the charge, which is probably or possibly true. If he does this, then he discharges his burden of proof and his explanation or defence must be accepted....”

9. The 1st Respondent submitted that no evidence had been adduced to prove that the 1st Respondent was the person who manipulated the figures in the payment schedules because the Document Examiner’s testimony had failed to link the falsified documents to the 1st Respondent.

Analysis and Determination:

10. I have carefully considered the evidence on record, the grounds of appeal, and the submissions by the learned counsels. Being a first appeal, this Court is obligated to evaluate the evidence placed before the trial Court and arrive at its own conclusions in that regard, bearing in mind that this Court did not have the opportunity to see or hear the witnesses as they testified. — See **Okeno v. Republic (1972) E.A. 32.**

11. The prosecution produced 97 documentary exhibits and called 32 witnesses in the trial Court. PW1 and PW2 were the Principal Accountant and the Senior Assistant Director of Education respectively. PW2 confirmed that between April and June 2009 there was a deworming programme under the Schools Nutrition Programme headed by the 1st Respondent whose basis was to eliminate infections in schools through deworming. PW1 testified that the 1st Respondent was the recipient of Kshs. 8,574,140/= imprest and that she later surrendered Kshs. 8,549,140/= via Surrender Voucher F020 in addition to Kshs. 24,498 in cash.

12. PW 32 was the Investigating Officer. It was his testimony that the Commission received a complaint from the Internal Auditor on allegations of embezzlement of funds relating to the Kenya Education Section Support Programme [KESSP] with regard to several payment vouchers for payments made to various employees of the Ministry of Education.

13. He told the Court that subsequent investigations revealed that various payments totaling Kshs. 1,679,500/= reflected as having been made on the schedules surrendered by the 1st Respondent had not actually been done. The Work Tickets surrendered by the 1st Respondent for vehicles used by the programme did not match the original Work Tickets that he had obtained from the Ministry of Health. In particular: P Exh 27 differed in detail from the original P Exh 51; Work ticket P Exh 28 differed from the original P Exh 53; P Exh 29 differed from P Exh 54; and P Exh 25 differed from the original P Exh 49.

14. Several participants who attended the workshop as either facilitators or trainees testified that the amount of money indicated in the payment schedules as having been paid to them was not what they had received and signed for as the figures had been inflated. The witnesses also disowned writings and the signatures appearing against the payment schedules, in some instances indicating that they had not participated in the activities indicated.

15. PW4, PW5 and PW9 testified that they had received payments directly from the 1st Respondent for work in Coast Province. The schedules they were however presented with in Court differed from the ones they had signed and contained inflated amounts.

16. PW 6, PW 12 and PW13 told the Court that they received payments from persons other than the 1st Respondent and disowned the content and signatures appearing on the schedules presented to them in Court. PW6 testified that she was paid by one Susan Waweru.

17. PW8, PW14 and PW17 were all paid by a Mr. Laban Benaya Kirui who is PW16. PW8 told the Court that P Exh 21 did not reflect the true amount he was paid. PW14 indicated that she had signed a different Payment Schedule from P Exh 21 while PW17 disowned the signatures and the payments reflected in P Exh 21, 12 and 59 altogether.

18. PW16 confirmed that he had indeed assisted the 1st Respondent in making payments. He however disowned the content of P Exh 59 and averred that he was in Nyanza for 11 days and not 5 as reflected in the schedule. He also testified that he had been in the Coast province for 11 days and not 6 as reflected in P Exh 34 and he was paid Kshs. 44,000/= and not 18,000/=. His name had been misspelt on P Exh 24 and the signature appearing thereon was not his.

19. PW31 the Document Examiner, confirmed that indeed the signatures appearing in the schedules surrendered by the 1st Respondent did not match the specimen signatures of the participants he had obtained. It was his testimony however that he was not required to match the writing against that of the 1st Respondent and therefore could not tell whether the names were entered by the 1st Respondent or not.

20. In Count 1, the 1st Respondent faced a charge of false accounting contrary to **Section 331** of the **Penal Code** which Section provides as follows:

“(1) Any person who, being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of any money or property received by him or entrusted to his care, or of any balance of money or property in his possession or under his control, is guilty of a felony.

(2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.”

21. In the alternative to Count 1 she was charged under **Section 41 (2)** as read with **Section 48(1)** of the **Anti-Corruption and Economic Crimes Act** for knowingly giving a false statement to one’s principal.

22. Indeed, there exists overwhelming evidence that in an attempt to account for the money received, the 1st Respondent tendered false accounting documents in support of expenditure of the imprest sum. The question that arises however is whether the 1st Respondent knowingly furnished the false documents. It is trite law that the evidence presented by the prosecution must be sufficient to establish beyond reasonable doubt, that the offence took place and that there exists a direct connection between the offence and the accused person.

23. The 1st Respondent in her defence indicated that the deworming initiative was a multi-sector programme involving the Ministry of Health, KEMRI and the Ministry of Education. From her testimony, she was assisted by Dr. Stewart Kabaka who made payments for the Ministry of Health officers; Mr. Rashid Kisingu and M/s. Karen Levi from KEMRI; and various officers within the Ministry of Education.

24. The investigating Officer told the Court that he was aware of the fact that there were persons other than the 1st Respondent who were involved in the making of payments. PW6, 12 and 13 testified that they were not paid directly by the 1st Respondent. PW3 told the Court that Karen from Kemri was the person who paid her, while PW8, PW14 and PW17 indicated that it was PW16 who paid them. PW16 confirmed that he indeed assisted the 1st Respondent in making payments.

25. The court notes that whereas the 1st Respondent was directly linked to the payments made to PW4, PW5 and PW9, the investigating officer neglected to have the Document Examiner link the 1st Respondent's handwriting to the falsified entries in the schedules. Without this crucial link, it is difficult to conclude without a doubt that it is the 1st Respondent who falsified the surrender documents or that she knowingly gave false statements to her principal.

26. The amount of money alleged to have been misappropriated according to the Charge Sheet in Count 2 is Kshs. 1,735,500/= while the investigating officer in his testimony in Court talked about a sum of Kshs. 1,679,500/=. He testified that he did not question the amount of monies that the 1st Respondent had paid herself during the programme.

27. No evidence has been tendered by the Appellant that the 1st Respondent directly benefitted from the misappropriated imprest sum. As mentioned in paragraph 24 above, there were persons other than the 1st Respondent who handled payment of participants. A conviction under Count 2 cannot stand since the evidence does not exclude the possibility of the offence having been committed by other persons.

28. In Counts No. 3, 4, 5, 6, 7 and 8, the 1st Respondent was accused of uttering a false document contrary to **Section 353** of the **Penal Code**. It was the Investigation Officer's testimony that the Work Tickets surrendered by the 1st Respondent for vehicles used by the programme did not match the original Work Tickets that he had obtained from the Ministry of Health.

29. This was corroborated by PW4 who told the trial Court that the Ministry of Health did not have a Child Adolescent Division and that James Njoroge Waweru PN. 79074352 does not exist in the Division of Child Health. Furthermore, there was no Officer by the name of Nickson Ouko of PN 83691001, who authorized the Work Tickets P Exh 27, 28 & 29 in relation to motor vehicle registration No. GK A067H.

30. The evidence on record is that at the material time PW11 worked at the Ministry of Health. He did not know a Nickson Ouko who was the authorizing officer appearing on the work tickets. He asserted that he had not travelled to Kisumu and Central province during the relevant period and that the name appearing in P Exh 27, 28 and 29 was not his, although the Personal Number indicated was his.

31. PW10, who was the Senior Assistant Secretary with the Ministry of Education, testified that he was approached by the 1st Respondent to allocate vehicles to the programme and he did sign for motor vehicles registration No. GK A217H and GK A413G. He testified that the work tickets, given to him by the 1st Respondent in relation to motor vehicles registration Nos. GK A067H and GK A988F were not the documents shown to him in Court. It was his testimony that although the 1st Respondent was not the authorizing officer for the vehicles issued from the Ministry of Health, she was the one who brought the work tickets to the Ministry of Education.

32. The 1st Respondent in her sworn evidence asserted that she was not the author of the work tickets which were contained in the particulars of Counts 3-8. It was her testimony also that the vehicles in question belonged to the Ministry of Health and were used to transport Ministry of Health personnel. She did not travel in the subject vehicles. She told the Court that she had obtained certified work tickets from one Dr. Kabaka because as the imprest holder, she was the person mandated to make a surrender.

33. It is observed that the work ticket register from the Ministry of Health was not produced to dispel all doubts as to the origin of the work tickets said to be false. The evidence produced by the prosecution did not exclude the possibility of the offences having been committed by other persons.

34. For a conviction to lie against an accused person for a crime with which they are charged, their guilt must be proved beyond reasonable doubt by the prosecution to this end. I associate myself with the words of **Brennan J** in the United States Supreme Court decision in **Re Winship, 397 U.S. 358 (1970)** in which he states thus:

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction..... Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned”

35. In the light of the foregoing, I find no merit in the appeal which I hereby dismiss.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF February, 2018.

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L. A. ACHODE

JUDGE