



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.172 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. L. Nyambura (Ms.) - PM

delivered on 15th October 2010 in Nairobi Anti-Corruption Case No.20 of 2007)

FRANCIS EMMANUEL OYUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Francis Emmanuel Oyugi was charged with another with the offence of **unlawful acquisition of public property** contrary to **Section 45(1)(a)** as read with **Section 48** of the then **Anti-Corruption and Economic Crimes Act, 2003**. The particulars of the offence were that between 26th August 2003 and 3rd September 2003 at Kenya Wine Agencies Limited premises in Industrial Area Nairobi, the Appellant, being the Managing Director thereof, unlawfully acquired a public benefit, to wit, a loan of Kshs.6 million from Kenya Wine Agencies Limited (hereinafter referred to as the company) for the purchase of a residential house while knowing that he did not qualify for the said loan under the Kenya Wine Agencies Limited House Purchase Assistance Scheme. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to pay a fine of Kshs.1 million or in default to serve a term of three (3) years imprisonment. The Appellant paid the fine. However, he was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds challenging his conviction and sentence. He was aggrieved that he had been convicted based on findings that were not supported by evidence. He faulted the trial court for failing to properly evaluate and analyze the evidence and thereby erroneously reached a verdict that was against the weight of evidence. In particular, the Appellant took issue with the fact that the trial court found as a fact that the loan that was advanced to him was public property and that the said loan was an unlawfully acquired public property. The Appellant was aggrieved that the trial court misapprehended the evidence by finding that he did not qualify to benefit from the House Purchase Assistance Scheme. He faulted the trial magistrate for failing to take into consideration his defence and his submission before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Oluoch for the

Appellant and by Ms. Aluda for the State. Mr. Oluoch submitted that the evidence adduced by prosecution witnesses did not establish that the Appellant had done anything unlawful and therefore his conviction by the trial court was both erroneous and unjustified. He urged the court to allow the appeal. On her part, Ms. Aluda urged the court to uphold the conviction of the Appellant by the trial court on the basis that the prosecution had adduced sufficient damning evidence which established the Appellant's guilt on the charge brought against him to the required standard of proof beyond any reasonable doubt. This court shall revert to the arguments made on appeal after briefly setting out the facts of the case.

Kenya Wine Agencies Limited is a government corporation. The Appellant was appointed as the Managing Director of Kenya Wine Agencies Limited by the then Permanent Secretary, Ministry of Trade and Industry. The appointment was contained in a *Kenya Gazette Notice No.4740 of 18th July 2003*. The Appellant's appointment was for a period of three (3) years. From the evidence adduced by the prosecution witnesses, immediately the Appellant took office, he sought to take advantage of a mortgage scheme offered to the employees of the company. According to PW1 Philip Bartai, the then Human Resources Manager of the company, the Appellant summoned him to his office and requested for the particulars of the House Purchase Assistance Scheme operated by the company. PW1 gave the documents to the Appellant. After going through the document, the Appellant directed PW1 to prepare the loan application forms so that he could benefit from the said scheme.

According to PW1, to qualify to benefit from the said scheme, an employee was required to have worked for the company for a period of not less than five (5) years. A further requirement was that since the loan was intended for the purposes of assisting the employee to purchase a house, such employee was required to provide a copy of the title deed, letter of allotment or agreement of sale of the house he intends to purchase. Proof was required to be provided that the money would be applied to purchase a residential house. The application for the loan was subject to approval by the company. According to PW1, the amount of loan to be advanced to the employee was subject to the salary that the employee earned and subject to the fact that the loan was required to be repaid within a period of five (5) years (60 months). PW1 testified that pursuant to the instructions that he had been given by the Appellant, he prepared the necessary documents and handed it over to the Appellant. The documents were later returned to him having been duly approved by the then Deputy Managing Director John Njenga Ndungu, who was the Appellant's co-accused in the magistrate's court.

PW3 Jacob Njeru Mwangi testified that at the material time he worked as a Financial Accountant in the company. He explained that the House Purchase Assistance Scheme was a scheme that was operated on behalf of the company by NIC Bank. The company had entered into an agreement with NIC Bank whereby the bank would manage the mortgage scheme on behalf of the company. The actual money that was to be advanced to the employee belonged to the company. In the case of the Appellant, upon approval of the loan, the sum of Kshs.6 million which the Appellant had applied for was transferred to NIC Bank. It was kept in a fixed deposit account as a security for the sum advanced to the Appellant. PW3, PW6 Justus Munyoki Mutua, PW8 Emily Kariuki and PW10 David Mwangi Ndegwa who then worked for the company in various capacities within the Finance Department, testified how upon receipt of instructions from the Deputy Managing Director, a cheque No.018420 for Kshs.6 million was drawn in favour of NIC Bank. This sum was to be the guarantee offered to the bank to enable the Appellant benefit from the House Purchase Assistance Scheme.

PW4 Emmanuel Muta Kideto testified that at the material time, he worked as the Advances Officer with the NIC Bank. He explained that the company had entered into an agreement with the bank whereby the bank agreed to operate a loan scheme on behalf of the company. The company would provide funds which would be managed by the bank. The beneficiary of the loan (a member of staff of the company) would repay back the loan with an interest of 6% per annum. The money deposited by the company would be fixed at an interest rate of 4% per annum. PW4 testified that in the Appellant's case, a sum of Kshs.6 million was deposited by the company at the bank. This amount was advanced to the Appellant. The Appellant was required to repay this loan for a period of 60 months by paying a monthly installment of Kshs.142,759.05. PW4 testified that the Appellant repaid this amount until 28th October 2005 when he stopped repaying the same. At the time, the outstanding balance was Kshs.3,440,469.28. Due to the fact that the Appellant failed to repay this amount, the security that had been deposited by the company was

applied to offset the loan.

PW9 Samuel Magati Osero, worked for the Co-operative Bank at the material time. He testified that the Appellant operated an account with the bank, specifically Account No.0110006521600. The Appellant was the sole signatory of the account. A cheque of Kshs.6 million from NIC Bank was deposited in the account on 4th September 2003. Thereafter on 18th September 2003, the Appellant deposited a sum of Kshs.3 million in a fixed deposit account. PW5 Samuel Muthoka Mbuva, the Chairman of the company, testified that the Appellant did not seek the Board of Directors' authority to benefit from the said House Purchase Assistance Scheme loan. In any event, he testified that the Appellant was not qualified to benefit from the said loan since the said loan was available only to permanent members of staff of the company who had worked continuously for a period of not less than five (5) years. He testified that the Deputy Managing Director had no authority to approve such loan, and neither could the Appellant himself approve the said loan which was advanced to himself. PW11 Vincent Opanga was seconded to the company as the Acting Managing Director after the Appellant had been relieved from employment. It was his evidence that the Appellant ignored the rules pertaining to the House Purchase Assistance Scheme when he awarded himself the loan of Kshs.6 million. In particular, he testified that as the Managing Director, the Appellant was required to present the request for such loan to the Board of Directors which had the mandate to approve the loan. He emphasized that the Deputy Managing Director, a subordinate of the Appellant, had no authority to approve the loan.

The case was investigated by PW12 Ignatius Wekesa, then working for Kenya Anti-Corruption Commission. He testified that upon concluding his investigations, he formed the opinion that a case had been made for the Appellant to be charged with the offence for which he was convicted. He stated that the Appellant had breached the rules and conditions concerning the disbursement of the loan in order to unlawfully benefit from public funds. He further noted that the Appellant had not sought the approval of the Board of Directors hence the decision to charge him with the present offence.

When the Appellant was put on his defence, he denied the charge. He testified that he was entitled to the House Purchase Assistance Scheme loan by virtue of his employment as the Managing Director of the company. In any event, he testified that he was not loaned the sum of Kshs.6 million by the company but rather he was advanced the same by NIC Bank. He however acknowledged that the company had offered security in form of the sum of Kshs.6 million which was deposited in a fixed deposit account. He confirmed that the company was a guarantor of the loan. He testified that if there was any body which had authority to demand payment from him it was not the company but rather NIC Bank. He testified that upon termination of his services, the company gave the list of liabilities that he owed to the company as Kshs.800,259/-. He reiterated that the company made no demand for the sum of Kshs.6 million because it was aware that the said sum was owed to NIC Bank and not the company. He testified that he followed the internal established rules of the company regarding the disbursement of the said loan under the House Purchase Assistance Scheme.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the charge of unlawful acquisition of public property contrary to **Section 45(1)(a)** of the **Anti-Corruption and Economic Crimes Act** to the required standard of proof beyond any reasonable doubt.

The Appellant challenged his conviction by the trial court by arguing that the prosecution had failed to establish that he had acted unlawfully or that he had acquired public property. The Appellant submitted that the prosecution was required to establish that he had unlawfully obtained the loan from the company, and secondly that the company was a public body and thirdly that the Appellant acted fraudulently. The Appellant argued that contrary to the finding by the trial court, he had not borrowed the loan of Kshs.6 million but rather had borrowed it from NIC Bank. In that regard, it was his submission that the prosecution had failed to establish that he had borrowed the money from the company. He emphasized that the company guaranteed the loan but did not advance him the same. In response to this submission, the prosecution submitted that the Appellant had abused his position as the Managing Director of the company by giving orders to his subordinates to subvert set internal processes so as to give himself a benefit. It was the prosecution's case that the Appellant was not entitled to benefit from the scheme because, firstly, he had not worked for the company for a period of five (5) years and secondly, he had not obtained the authority of the Board of Directors to benefit from the said facility.

Upon re-evaluation of the evidence adduced in that regard, this court holds that the prosecution established the following:

I). That the company is wholly owned or substantially owned by the Government of Kenya. It is therefore a public entity. That was the reason why it was the government that appointed the Appellant the Managing Director of the company.

II). That the Appellant having worked for the company for a period of three months prior to applying for the House Purchase Assistance Scheme loan, was not qualified to benefit from the scheme. This is because the scheme was reserved for permanent members of staff who had worked for a period of more than five (5) years. The Appellant was appointed on a three (3) year contract.

III). That the House Purchase Assistance Scheme required that a beneficiary provides evidence that he will utilize the loan advanced to him to purchase a residential house. It was a condition precedent that before the loan was disbursed, the beneficiary actually confirms that there exists a residential house either with a title deed, letter of allotment or agreement of sale which will be purchased using the sum disbursed. In the present appeal, it was established that the Appellant did not provide any evidence that he would utilize the money to purchase a residential house. He did not supply a copy of a title deed, letter of allotment or agreement of sale to prove that there was a residential house which he intended to purchase using the said loan. The evidence that was adduced by PW9 established that the Appellant did not apply the said loan to purchase a residential house. Instead, the Appellant utilized the funds for other purposes.

IV). The Appellant took the said loan purporting that he would repay it in a period of five (5) years yet in actual fact, he knew that his contract ran for only three (3) years. It was apparent to this court that the Appellant, from the word go entered into a fraudulent contract with the clear intent to defraud the company.

V). The claim by the Appellant that he borrowed the sum that was advanced to him from NIC Bank is disingenuous. The evidence adduced before the trial court clearly established that the said bank had entered into an agreement with the company for the said bank to manage its House Purchase Assistance Scheme. The money that was to be loaned to the employees belonged to the company. In the case of the Appellant, upon the purported approval of the loan by the company, a sum of Kshs.6 million was deposited by the company with the bank. This sum constituted a guarantee for the sum advanced to the Appellant. In this court's re-evaluation of the evidence, the position of NIC Bank was that of a manager of the scheme and not a provider of the funds for the scheme.

VI). That the Appellant, being the managing director of the company, knew or ought to have known that as the intended beneficiary of the said loan, he should not have participated in deliberations that led to the said loan being disbursed to him. This court agrees with the prosecution that the Appellant should have sought consent from the Board of Directors whom he was

answerable to. As it were, the Appellant used undue influence on his subordinates to enable him get the loan which he was not legally entitled to.

VII). The Appellant in his defence conceded that he owed the balance of Kshs. Kshs.3,440,469.28 of the loan that he was advanced at the time his contract was terminated. PW4 testified that the Appellant made no effort to repay the said balance together with the accrued interest. Since the loan was secured by a sum of Kshs.6 million deposited in a fixed deposit account at the bank, PW4 testified that, that sum was applied to offset the loan. The Appellant's conduct after termination of his service clearly shows that he had no intention whatsoever of repaying the said outstanding sum. The Appellant argues that he did not defraud the company. If that is the case, he should have repaid the balance of the sum that was advanced to him after being terminated from employment. To date, ten (10) years after his termination, the Appellant has not made any effort to repay the sum. It was clear to this court that he intended to defraud the company of the said sum of money using the legal fiction that he did not owe the said sum to the company but rather to the bank.

VIII). The prosecution was able to establish to the required standard of proof that the Appellant used his position as the Managing Director of the company (a public company) to unlawfully transfer the said sum of Kshs.6 million from the company to himself under the guise that he was benefiting from a House Purchase Assistance Scheme operated by the company.

The upshot of the above reasons is that the appeal lodged by the Appellant on conviction lacks merit and is hereby dismissed. The prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant abused his position as a Managing Director of a Public Company to confer upon himself the sum of Kshs.6 million which he was not entitled to.

As regard sentence, under **Section 48** of the **Anti-Corruption and Economic Crimes Act** it states thus:

1. A person convicted of an offence under this Part shall be liable to-

a. a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

b. an additional mandatory fine if, as a result of the conduct that constituted the offence, the person perceived a quantifiable benefit or any other person suffered a quantifiable loss.

2. The mandatory fine referred to in subsection (1)(b) shall be determined as follows-

a. the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

b. If the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.”

In the present appeal, the trial court pursuant to **Section 48(1)(a)** of the **Act** sentenced the Appellant to pay a fine of Kshs.1 million or in default he was to serve three (3) years imprisonment. However, the trial court did not sentence the Appellant as provided under **Section 48(1)(b)** of the **Act**. During the hearing of the appeal, the court gave an opportunity to the Appellant to make good the loss that the company has suffered. He declined to take up the offer. In the premises therefore, in addition to the sentence meted out by the trial court, the Appellant shall pay a fine of Kshs.3,440,469.28 which is equivalent to the benefit that he got from the said criminal conduct or in default he shall serve one (1) year imprisonment. Should the Appellant pay this fine, the same shall be refunded to the company. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF MARCH 2016.

L. KIMARU

JUDGE