



**Republic v Uchenna Valerie Bassey & another (Criminal Case
1216 of 2016) [2022] KEMC 20 (KLR) (2 August 2022) (Ruling)**

Neutral citation: [2022] KEMC 20 (KLR)

**REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)
CRIMINAL CASE 1216 OF 2016
E KIMILU, SPM
AUGUST 2, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

UCHENNA VALERIE BASSEY 1ST ACCUSED

KIMBERLEY RYAN KENYA LIMITED 2ND ACCUSED

RULING

1. The accused persons have been charged with the offence of failure to account for Pay As You Earn Tax (PAYE) tax totaling to a sum of Kshs.100, 950,965/= for the periods between January 1, 2011 to December 2016 under counts 1-6 contrary to section 97(e) as read with section 104(3) of the [Tax Procedures Act](#) No. 29 of 2015 and section 37 of the [Income Tax Act](#) cap 470 Laws of Kenya and with the offence of failure to account for Value Added Tax (VAT) tax of Kshs. 7,916,084/-or the periods between January 2011 to December 2016 under count No. 7 the accused and the company are alleged to failed to deduct and account for VAT in the sum of Kshs. 7,916,084/= contrary to section 97(e) as read with section 104(3) of the [Tax Procedures Act](#) No. 29 of 2015 and section 5(3) of the [Value Added Tax Act](#) No.35 of 2015 Laws of Kenya.
2. The first accused person has been charged on the basis that she was a director of the second accused during the period of January 2011 and December 2016 and therefore responsible for the acts or omissions of the 2nd accused. Notably case against the 2nd accused was withdrawn by the prosecution and this case only proceeded as against the 1st accused person. The first accused person resigned as the director and is no longer an officer of the Second accused. It was the testimony of PW1 that they had exhausted all avenues of collecting the tax liability from the Second accused person.
3. On Counts No 1-7, the prosecution was able to produce witnesses in this court and various documents which showed that the second accused person had contracts between itself and persons (employees)



who were in Kenya who provided services both in Kenya and outside Kenya (“the outsourced personnel”). Based on the contract terms, the third parties would pay the second accused person and in turn the second accused person would pay the outsourced personnel. The second accused person was also responsible for accounting for taxes to the KRA. The witness testified that the second accused person used to collect statutory deductions but did not remit the same to KRA. However, there was no evidence produced by the prosecution that showed that the second accused person received the payments from third party persons for onward payment to the outsourced employees and KRA. On Count No. 7, the prosecution produced witnesses and outsourcing services contract between the second accused person and Vodacom and another agreement with Westcom services. The prosecution argued that the services are subject to VAT under Section 5 of the VAT Act 2013 since the second accused person was in Kenya.

4. I have reviewed the evidence produced before this court including both documentary evidence and the evidence given by the witnesses. The matters in question are matters of law and specifically, Tax law. On counts 1 to 7 on PAYE, there was no evidence that the second accused person received the statutory deductions from the third parties as per the contracts and therefore the case to be determined is the income earned by the outsourced employees was derived or accrued in Kenya and therefore subject to PAYE under section 5 of the *Income Tax Act*. On count.7, based on the service contracts between the second accused person and the third parties, the case to be established was whether the services were subject to VAT under the *VAT Act* of 2015. Therefore, in order to determine whether the prosecution has established a *prima facie* case and therefore determine whether the accused persons have a case to answer, the court must evaluate the substance of the evidence and the provisions of the relevant tax laws.
5. The laws relating to tax matters have been codified under the *Tax Procedures Act* of 2015. Section 97 of the *Tax Procedures Act* of 2015 provides that:

“Fraud in relation to tax Any person who, in relation to a tax period, knowingly—

- a. omits from his or her return any amount which should have been included; or
- b. claims any relief or refund to which he or she is not entitled; or
- c. makes any incorrect statement which affects his or her liability to tax; or
- d. prepares false books of account or other records relating to that other person or falsifies any such books of account or other records; or
- e. deliberately defaults on any obligation imposed under a tax law, commits an offence.

Section 104(3) provides for the penalty of the offence of Fraud under section 97 above and provides that:

A person convicted of an offence under section 97 shall be liable to a fine not exceeding ten million shillings or double the tax evaded, whichever is higher or to imprisonment for a term not exceeding ten years, or to both.

6. I have reviewed the said laws and observed that the offense under section 97 of the *Tax Procedures Act* is that of Tax Fraud. In order to determine whether there was a case of fraud, the prosecution must establish a *prima facie* case that the accused persons:
 1. Had a duty to Collect and/or to Truthfully Account for and Pay the taxes



2. That the accused persons failed to collect or truthfully Account for the taxes
 3. Willfulness on the part of the accused persons
7. The duty to collect and account for taxes is guided by the *Income Tax Act* and the VAT Act. The failure to collect or truthfully account for taxes is an evidential and factual matter while willful conduct to is contextual to the issue, conduct and purpose. The general definition of willful according to the dictionary is as follows: “Proceeding form a conscious motion of the will; voluntary; knowingly deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary. ... A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished form an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act.”
 8. Based on the evidence on record, it was stated that on counts 1-6, though the outsourced employees had contracts with the second accused person, the company was to receive the remuneration of the personnel from third parties inclusive of statutory deductions and remit the statutory deductions to KRA. There was no evidence adduced to show that the second accused person indeed received the monies for onward payment to KRA and therefore it cannot be established that the accused persons acted willfully and failed to account for the taxes. PW1 testified stated that they do not have access to the bank statements of the second accused person however, this court observes that KRA has the mechanisms and powers to obtain that information under section 59 of the *Tax Procedures Act* of 2015 to establish the true position. On counts No. 7, the prosecution adduced service contracts to show liability under the VAT Act but did not provide any evidence to show that if there was an omission, it was willful on the part of the accused persons.
 9. Further, the documents produced before this court showed that the KRA issued the letter of findings in June 2016 on the PAYE and VAT arrears for the years 2011-2016. Thereafter the second accused person responded to the findings on 26/7/2016. The KRA went ahead to review the response and issued an objection decision on 21/7/2016 which was the subject of appeal at the Tax Appeals Tribunal in the year 2017. The prosecution has relied on the provisions of the *Tax Procedures Act* to charge the accused persons. The accused persons raised the issue of having proceedings both at the Tax Appeals Tribunal whose decision has now been appealed to at the High court and proceedings in this court on the same matters. The amounts in dispute included principal taxes, penalties and interest. Section 80 of the *Tax Procedures Act* 2015 on general provisions relating to administrative penalties and offences provides that:
 1. A person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.
 2. If a person has committed an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence, the Commissioner shall decide whether to make a demand for the penalty or to prosecute the offence.
 3. If a person has paid a penalty under a tax law and, in respect of the same act or omission for which the penalty was paid, the Commissioner commences a prosecution, the penalty shall be repaid to the person as a refund of tax under section 47, and the person shall not pay a penalty, in the case of a prosecution, unless the prosecution is withdrawn.
 10. In my view therefore, section 80 gives guidance on the remedies available to the KRA where tax has not been paid but the options are mutually exclusive. The Appeal process under the *Tax Procedures Act* commences once the KRA issues an objection decision under section 51 of the *Tax Procedures Act*. Given the provisions of section 80 of the *Tax Procedures Act*, this court cannot turn a blind eye to



the proceedings under the Tribunal. In the proceedings before the Appeals Tribunal, it is evident that the KRA imposed penalties and interest and was also a party to the proceedings. In light of section 80 of the [Tax Procedures Act](#), once the KRA made a decision to levy general penalties and interest, it cannot prosecute the same matter. Though the earlier court had ruled to proceed on hearing the matter, I find that prosecuting the same matters that have been subjected to penalties and interest is contrary to the provisions of the Law. The Lex Specialis doctrine states that more specific rules prevail over more general rules and therefore while the Criminal Procedure Code allows for both criminal and civil proceedings on the same matter to run concurrently, the [Tax Procedures Act](#), specifically requires the Commissioner to decide whether to prosecute or charge penalties and not both.

11. I therefore find that:

1. The first accused person has since seized to be an officer of the second accused person and therefore can no longer be held as a representative of the second accused person in line with section 15 of the [Tax Procedures Act](#).
2. The prosecution has not provided enough evidence to bring a case under section 97 of the [Tax Procedures Act](#) and therefore I find that the accused persons have no case to answer.
3. The KRA elected to charge penalties and interest and are therefore estopped from prosecuting the matters at the same time.

12. In conclusion and as above stated I find the prosecution failed meet the threshold of [Criminal Procedure Code](#) of beyond reasonable doubt and I hereby acquit accused under section 210 of the [CPC](#) with no case to answer.

RULING IS READ, SIGNED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF AUGUST, 2022

ESTHER.K KIMILU

SENIOR PRINCIPAL MAGISTRATE

