

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL APPEAL NO. E044 of 2023**

**ANTONINA MUYOKA**  
**SANGURA.....APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**....RESPONDENT**

*(Being an appeal from the judgement, conviction and sentence of **Hon. F.M. Rashid, Principal Magistrate** delivered/imposed on 4<sup>th</sup> September, 2023 in **Winam Criminal Case No. 354 of 2018, Republic v Margaret Nduku Joseph & 3 others**).*

**JUDGEMENT**

**A. THE CHARGES**

1. **Antonina Muyoka Sangura** (hereinafter referred to as “the Appellant) was the 3<sup>rd</sup> Accused person before the lower court in **Winam Criminal Case No. 354 of 2018, Republic v Margaret Nduku Joseph & 3 others**.
  
2. Noting that the charge sheet as presented before the trial court had four accused persons, it remains unclear why the matter proceeded only as against the Appellant, who was the only one among the four who was presented for plea.
  
3. There is no explanation that was made by the prosecution as to why the other three accused persons were not presented for plea. In my view, proceeding with the case against persons who had not been called upon to plead to the charges was

irregular. If the case was that the other three could not be brought to court for whatever reason, the charges against them ought to have been withdrawn so that the case against the Appellant proceeds as the only accused person before the trial court.

4. Be that as it may, as the appeal herein has been preferred only by the Appellant, I will limit my reference in this judgement, as much as possible, to the Appellant only.
5. The Appellant and her co accused were charged before the trial court with the following offences:

Count I:

Failure to submit a tax return by the due date contrary to *Section 94(1)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on or about the 30<sup>th</sup> of June, 2015, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons failed to submit to the Commissioner of Domestic Taxes, income tax returns for the year of income 2014 by the due date.

Count II:

Deliberately defaulting in the obligation to remit income tax by the due date contrary to *Section 97(e)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on or about the 30<sup>th</sup> of June, 2015, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons deliberately defaulted in the obligation to remit to the Commissioner of Domestic Taxes, income tax amounting to Ksh.6,538,886/= for the year of income 2014 by the due date.

Count III:

Failure to submit a tax return by the due date contrary to *Section 94(1)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on or about the 30<sup>th</sup> of June, 2016, being the directors of a limited liability company, a company secretary of a limited

liability company and a limited liability company respectively, without reasonable cause, the accused persons failed to submit to the Commissioner of Domestic Taxes, income tax returns for the year of income 2015 by the due date.

Count IV:

Deliberately defaulting in the obligation to remit income tax by the due date contrary to *Section 97(e)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on or about the 30<sup>th</sup> of June, 2016, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons deliberately defaulted in the obligation to remit to the Commissioner of Domestic Taxes, income tax amounting to Ksh.14,248,843/= for the year of income 2015 by the due date.

Count V:

Failure to submit a tax return by the due date contrary to *Section 94(1)* of the *Tax Procedures Act, 2015* as

read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on or about the 30<sup>th</sup> of June, 2017, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons failed to submit to the Commissioner of Domestic Taxes, income tax returns for the year of income 2016 by the due date.

Count VI:

Deliberately defaulting in the obligation to remit income tax by the due date contrary to *Section 97(e)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on or about the 30<sup>th</sup> of June, 2016, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons deliberately defaulted in the obligation to remit to the Commissioner of Domestic Taxes, income

tax amounting to Ksh.4,890,299/= for the year of income 2016 by the due date.

Count VII:

Failure to submit a tax return by the due date contrary to *Section 94(1)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on diverse dates between 20<sup>th</sup> July, 2014 and 20<sup>th</sup> December, 2014, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons failed to submit to the Commissioner of Domestic Taxes, Value Added Tax (VAT) returns by the due dates.

Count VIII:

Deliberately defaulting in the obligation to remit Value Added Tax by the due date contrary to *Section 97(e)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on diverse dates between 20<sup>th</sup> July, 2014 and 20<sup>th</sup> December,

2014, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons deliberately defaulted in the obligation to remit to the Commissioner of Domestic Taxes, Value Added Tax amounting to Ksh.3,681,151/- by the due dates.

Count IX:

Failure to submit a tax return by the due date contrary to *Section 94(1)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on diverse dates between 20<sup>th</sup> January, 2015 and 20<sup>th</sup> December, 2015, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons failed to submit to the Commissioner of Domestic Taxes, Value Added Tax (VAT) returns by the due dates.

Count X:

Deliberately defaulting in the obligation to remit Value Added Tax by the due date contrary to *Section 97(e)* of

the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on diverse dates between 20<sup>th</sup> January, 2015 and 20<sup>th</sup> December, 2015, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons deliberately defaulted in the obligation to remit to the Commissioner of Domestic Taxes, Value Added Tax amounting to Ksh.8,059,952/- by the due dates.

Count XI:

Failure to submit a tax return by the due date contrary to *Section 94(1)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on diverse dates between 20<sup>th</sup> January, 2016 and 20<sup>th</sup> December, 2016, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons failed to submit

to the Commissioner of Domestic Taxes, Value Added Tax (VAT) returns by the due dates.

Count XII:

Deliberately defaulting in the obligation to remit Value Added Tax by the due date contrary to *Section 97(e)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the *Tax Procedures Act, 2015*.

The particulars of the offence were that on diverse dates between 20<sup>th</sup> January, 2016 and 20<sup>th</sup> December, 2016, being the directors of a limited liability company, a company secretary of a limited liability company and a limited liability company respectively, without reasonable cause, the accused persons deliberately defaulted in the obligation to remit to the Commissioner of Domestic Taxes, Value Added Tax amounting to Ksh.2,782,037/- by the due dates.

6. The Appellant denied all the twelve counts, which then called for a trial.
7. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence tendered before the trial court and make its own conclusions. It must, however, have in mind that the trial court, unlike this court, had the advantage

of hearing and seeing the evidence of the witnesses first hand when they testified, and thereby observing their demeanour.

8. In the Case of ***Okeno v Republic [1972] EA 32***, the then Court of Appeal for Eastern Africa, was succinct that in a first appeal, it is the duty of the first appellate court to re-evaluate and re-assess the evidence adduced before the trial court and to arrive at its own conclusions while bearing in mind that the appellate court did not see or hear the witnesses when they testified.
9. The said duty had also been dealt with earlier by the former Court of Appeal for Eastern Africa in ***Pandya v Republic [1957] EA 336***, where the court posited that:

***“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression***

*made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”*

10. In a case of **Mark Oiruri Mose v Republic [2013] eKLR**, the Court of Appeal observed that:

*“It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and to give allowance for that. The well-known case of Okeno vs Republic [1977] EA 32 which sets out that principle has been referred to in several decisions of this Court and of the High Court. In our view, it does not appear that the learned Judge was alive to those legal requirements or if he was, then he did not apparently put them into practice.”*

## **B. THE PROSECUTION CASE**

11. The prosecution case was founded on the evidence of two witnesses while the defence comprised of the Appellant's sworn testimony.
12. The prosecution's first witness was **Mureithi Ndege**, a Chief Inspector of Police ("PW1"). The witness told the trial court that between the year 2018 and 2021, he worked at the Kenya Revenue Authority (KRA), Kisumu on secondment.
13. The witness told the trial court that he took over the investigations of the matter from one **Mr. Wambua** and one **Inspector Bosco** whose terms at KRA had ended. He stated that upon the arrest of the Appellant, he handed over the investigations to **Inspector Sarah Guchu**.
14. Upon cross examination by the Appellant, the witness told the trial court that the Appellant was a Company Secretary of Ollkey Consultants Limited.
15. The second prosecution was **Simon Yatich**, a tax investigator at KRA. The witness told the trial court that he investigated the matter. He stated that on 30<sup>th</sup> January, 2018, he received information from his manager one **Mr. Ezekiel Obegi** that there was a company - Ollkey Consultants Limited - that had been awarded tenders by Vihiga County Government but failed to pay taxes. The witness confirmed from the KRA system that Ollkey was registered but however

noted that there were no records to indicate that the company had paid income tax and value added tax (VAT) and further that no returns were made to that effect from the period January, 2013 to February, 2018.

16. The witness stated that as per information in his hands that was received from the Registrar of Companies, the directors of Ollkey were **Isaac Ambani Msitsi** and **Margaret Nduku Joseph**.

17. PW2 told the trial court that in the course of investigations, **Mr. Obegi** inquired from Eco Bank Limited - the company's bankers - who the company's signatories at the bank were and was informed that the Appellant was the Company Secretary and one of its signatories at the bank and that as per the bank statements that the investigator's received from Eco Bank Limited, Ollkey received Ksh.17,558,120/= in 2014; Ksh.36,029,035/- in 2015; and Ksh.15,757,630/- in 2016. The total amount that the company received in the three years was Ksh.69,414,785/.

18. Pw2 further told the trial court that in the course of his investigations, he confirmed from Vihiga County Government that the County paid Ollkey a total of Ksh.47,378,775/- as per the statement "from March 2015, May 2015, December 2014, March 2016 and March 2016" (verbatim, PW2's recorded testimony). That further, on 18<sup>th</sup> March, 2015, a further

Ksh.5,640,000/- was paid by Vihiga County Government to Ollkey.

19. PW2 stated that he computed the taxes that were due from Ollkey to KRA and the result was that the former owed the latter Ksh.72,092,847/-. He prepared a report on his findings. The taxes included income tax on rental income as investigations revealed that Ollkey had rental houses. The witness stated that on 27<sup>th</sup> April, 2018, the amount in taxes due from the company to KRA stood at Ksh.84,989,824/- as 2% interest was applicable.

20. The witness produced the following exhibits in support of the prosecution case:

- A letter to the Registrar of Companies dated 8<sup>th</sup> February, 2018 - PExh1.
- A response from the Registrar of Companies dated 15<sup>th</sup> February, 2018 - PExh2.
- A document confirming that the company was registered in itax - PExh3.
- A document confirming that the company did not file tax returns - PExh4a and PExh4b.
- A letter dated 20<sup>th</sup> February, 2018 to Eco Bank Limited requesting for account details - PExh5.
- Account opening forms - PExh6a.
- Account statement - PExh6b.

- Resolutions of the company to open the account – PExh6c.
- Minutes of the company dated 10<sup>th</sup> December, 2014 designating the Appellant as its Company Secretary – PExh6d.
- Letter from Vihiga County Government dated 13<sup>th</sup> February, 2018 – PExh7a.
- Payment schedule from Vihiga County Government – PExh7b.
- Account statement from Vihiga County Government – PExh7c.
- A report on assessment on the total amount owing – PExh8a.
- Workings of the taxes – PExh8b.
- Letter to the Appellant – PExh9.
- Certificate of incorporation of the company – PExh10.

21. Upon cross examination by the Appellant, the witness told the trial court that he was aware that the Appellant was outside the country for her child’s treatment between February and September, 2018.

22. The witness stated that the meters at the rental premises that the company owned were in the name of **Joseph Nduku** and that the investigator presumed that the rental income was deposited into the company’s account at Eco Bank. He stated that it was the directors of Ollkey who were required to pay taxes to KRA and file returns. He confirmed that the Appellant

was not a director of the company, but was a Company Secretary.

23. With regard to the payment made by the Vihiga County Government, the witness told the trial court that the county retained 6% withholding tax and 2% as VAT.

### **C. THE DEFENCE CASE**

24. The Appellant opted to give sworn evidence and told the trial court that she was an Advocate of the High Court of Kenya and previously worked as a Company Secretary for Ollkey Consultants Limited, whose directors were **Isaac Ambani** and **Margaret Nduku Joseph**.

25. The Appellant told the trial court that it was the obligation of the directors of the company to pay taxes and file returns. The Appellant stated that the company did not give her the duties to remit taxes and file returns and that her mandate at Eco Bank was limited to open the bank account and sign on behalf of the company. Her duties did not include the daily operations of the company. The Appellant questioned why the directors of the company and the company were not presented before the trial court to stand trial, although they appeared in the charge sheet as the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Accused persons.

26. The Appellant did not call any witness.

27. The trial court proceeded to consider the record and the evidence that was presented by the prosecution and the Appellant's defence and ultimately convicted on all the twelve counts. The trial court went on to sentence the Appellant as follows:

***"I am directed by Section 104 of the Tax Procedures Act (No. 29 of 2015).***

***As regards to Count No. 1, I will proceed to fine the accused person Ksh.200,000/- in default 2 years as guided by Section 104 (1) of the Tax Procedures Act.***

***As relates to Count No. 2, I am guided by Section 104 (3) which provides for a fine of not exceeding ten million shillings or double the tax evaded, whichever is higher or imprisonment for a term not exceeding ten years or both. The accused person failed to pay tax of Ksh.6,538,886/- the fine herein will be  $Ksh.6,538,886/- \times 2 = Ksh.13,077,772/-$  in default 7 years imprisonment.***

***As regards Count No. 3, she will pay a fine of Ksh.200,000/- in default 2 years.***

***In relation to Count No. 4, she will pay a fine of  $Ksh.14,248,843/- \times 2 = Ksh.28,497,686/-$  in default 7 years imprisonment.***

***As regards to Count No. 5, she will pay a fine of Ksh.200,000/- in default 2 years.***

***In relation to Count No. 6, she will pay a fine of Ksh. (4,890,299/- x 2) Ksh.9,780,598/- in default imprisonment for a period of 7 years.***

***As regards Count No. 7, she will pay a fine of Ksh.200,000/- in default 2 years.***

***In relation to Count No. 8, she will pay a fine of Ksh. (3,681,151 x 2) Ksh.7,362,302/- in default imprisonment for a period of 7 years.***

***In relation to Count No. 9, she will pay a fine of Ksh.200,000/- in default 2 years.***

***As relates to Count No. 10 she will pay a total of Ksh. (8,059,952 x 2) = Ksh.16,119,904/- in default 7 years imprisonment.***

***As pertains to Count No. 11, she will pay a fine of Ksh.200,000/- in default 2 years.***

***Lastly on Count No. 12, she will pay a fine of Ksh. (2,782,037 x 2) = Ksh.5,564,074/- in default imprisonment for a period of 7 years.***

***The accused person will pay a total of Ksh.81,402,336/-. The terms herein shall run concurrently.”***

## **D. GROUNDS OF APPEAL**

28. The grounds upon which the present appeal is premised, as discernible from the Appellant's petition of appeal and the submissions filed are, in precis, as follows:

- a. The learned trial Magistrate erred in law in applying provisions of the law on which the Appellant was charged retrospectively, thereby resulting in a violation of the Appellant's rights to a fair trial.
- b. That the learned trial Magistrate erred in law in reaching the finding that the prosecution provided sufficient evidence to prove each of the twelve counts.
- c. That the trial court erred in law by shifting the burden of proof to the Appellant.
- d. That the learned trial Magistrate erred in law in failing to consider the Appellant's defence.
- e. That the sentences that were imposed against the Appellant were excessive.

## **E. ISSUES FOR DETERMINATION**

29. I have carefully considered the respective testimonies of the two prosecution witnesses and the sworn testimony by the Appellant. I have further considered the grounds of appeal, the

submissions by the two sides and the record of the trial court. I will frame the issues for determination, as discernible from the material before me, as follows:

- a. Whether the Appellant was lawfully charged, prosecuted, convicted and sentenced under the *Tax Procedures Act* for alleged conduct that predated the commencement of the said *Act*.
- b. Whether the prosecution proved beyond reasonable doubt that the Appellant committed the offences that she was charged with.
- c. Whether the sentences that the trial court imposed were excessive.

#### **F. ANALYSIS AND FINDINGS.**

30. The first issue for determination which is whether the Appellant was lawfully charged, prosecuted, convicted and sentenced under the *Tax Procedures Act* for alleged conduct that predated the commencement of the said *Act*.

31. The charge sheet before the trial court alleged that the Appellant committed several criminal offences under the *Tax Procedures Act, 2015*. The said statute was assented to on 15<sup>th</sup> December, 2015 and it commenced on 19<sup>th</sup> January, 2016. This

commencement date was set by Legal Notice No. 2 of 2016, issued by the Cabinet Secretary for the National Treasury.

32. One will notice from the charge sheet (as reproduced above) that the Appellant is said to have committed the respective offences in counts I, II, VII, VIII, IX and X on periods or times before the commencement of the *Act* that created the respective offences. The question that then abounds is whether there can arise a conviction on the six counts, which are in respect of acts and/or omissions that are said to have been committed before 19<sup>th</sup> January, 2016, being the commencement date of the statute.

33. This question goes right to the heart of retrospective application of criminal law, which is generally prohibited under both constitutional and statutory principles.

34. The general principle on non-retrospective application of criminal liability is to be found under *Article 50(2)(n)* of the *Constitution*. Let us read the said provision:

**“50(2)(n). Every accused person has the right not to be convicted for an act or omission that t the time it was committed was not an offence in Kenya.”**

35. The above provision means, in my understanding, that criminal liability cannot be imposed retrospectively — a

person can only be tried for conduct that was an offence at the time it occurred.

36. It is to be recalled that the above provision is among those that generally secure the rights to a fair hearing under *Article 50* of the *Constitution*. Under *Article 25* of the *Constitution*, the rights to a fair hearing under *Article 50* are non-derogable and/or cannot be limited. *Article 25* provides as follows:

**“Article 25. Rights that may not be limited**

**Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited -**

**(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;**

**(b) freedom from slavery or servitude;**

**(c) the right to a fair trial; and**

**(d) the right to an order of habeas corpus.”**

37. It is further to be noted that *Section 113(1)* of the *Tax Procedures Act* provides for transitional arrangements as follows:

**“113(1). Any proceedings or other matter commenced under a repealed provision shall continue to be dealt with as if the repealed provision were still in force.”**

38. This section preserves offences and proceedings that arose under repealed or earlier provisions of the respective tax laws (e.g. the *Income Tax Act*, *VAT Act* or *Excise Duty Act*) and ensures continuity, without retrospectively applying the *Tax Procedures Act* to conduct predating its commencement. Thus, criminal offences under the *Tax Procedures Act* apply prospectively only.

39. Hence, an act or omission that was not an offence under any written law before 19<sup>th</sup> January, 2015 cannot be prosecuted under the *Tax Procedures Act* and a person cannot be held criminally liable under the *Tax Procedures Act* for an act or an omission committed before its commencement.

40. Under the transitional provisions, any offence arising before that date ought to be prosecuted under the tax laws that were in force at the time of the act or omission, in accordance with *Section 23* of the *Criminal Procedure Code* and *Section 113(1)* of the *Tax Procedures Act*. To hold otherwise would amount to an unconstitutional retrospective application of criminal law that would defy *Articles 25* and *50(n)* of the *Constitution*.

41. There is also *Section 23* of the *Criminal Procedure Code* which provides:

**“Where any law repeals any other law, then, unless a contrary intention appears, the repeal shall not affect any investigation, legal proceeding, or remedy in respect of**

**any right, liability, or penalty... and any such investigation, legal proceeding, or remedy may be instituted, continued or enforced as if the repealing law had not been made.”**

42. This procedural safeguard aligns with *Section 113(1)* of the *Tax Procedures Act*, ensuring that offences committed before 19<sup>th</sup> January, 2016 are prosecuted under the repealed tax laws and/or the tax laws that were in force at the time that the offences are alleged to have been committed.
43. In the case of ***Republic v Ongaro & Another [2023] KEHC 2309***, the High Court reaffirmed that criminal statutes must not apply retrospectively unless expressly provided for, and even then, only where beneficial to the accused.
44. The same reasoning was applied in ***Nyangiro v Republic [2024] KEHC 12509***, where the court stated that any attempt to impose liability under a statute for past conduct would be an affront to the constitutional guarantee of legality.
45. Accordingly, the charges as framed in counts I, II, VII, VIII, IX and X were defective, having been founded on a statute and provisions of the law that were not operative at the time of the commission of the alleged acts and/or omissions. No convictions could lawfully arise from the six counts.

46. The second issue for determination is whether the prosecution proved beyond reasonable doubt that the Appellant committed the offences that she was charged with in counts III, IV, V, VI, XI and XII. I will consider the evidence of the two prosecution witnesses, *vis a vis* the six counts.

47. In respect of counts III, V and XI, it was alleged by the prosecution witnesses that the Appellant failed to submit tax returns by the due date contrary to *Section 94(1)* of the *Tax Procedures Act, 2015* as read with *Section 104(1)* of the same *Act*. The two *Sections* provide as follows:

**“Section 94. Failure to submit tax return or other document -**

**(1). A person commits an offence if the person without reasonable cause fails to submit a tax return or other document required under a tax law by the due date.”**

**“Section 104. Sanctions for offences -**

**(1) Subject to subsection (2) or (3), a person convicted of an offence under this Act shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.”**

48. From the wording of *Section 94(1)* of the *Act* and the surrounding legal context one can extract the constituent

ingredients of the offence created by the said provision. In brief the key elements are as follows:

- a. The person must have a duty under a tax law to submit a tax return *or* to submit “other document” required under a tax law.
  - b. The person must have failed to submit the return or other required document.
  - c. The failure must be by the due date for submission.
  - d. The offence requires that the failure be without reasonable cause. That is, if the person has a reasonable cause for not submitting, then the offence may not be made out.
  - e. The due-date for submission is a necessary fact: the person must fail by the due date. If submission is after due date the “failure to submit by due date” element is fulfilled (subject to “reasonable cause” under (d) above).
49. In practical terms, to prove the offence under *Section 94(1)* of the *Act* against the Appellant, the prosecution was under the duty to establish that: the Appellant was required by a tax law to submit a tax return or other document; that the due date for submission passed; that the Appellant did not submit

the required return or document by that due date; and that the Appellant did so without reasonable cause for the failure.

50. All the above elements must conjunctively be established for the offence under *Section 94(1)* of the *Act* to be proved.

51. In order to prove that the Appellant was required by a tax law to submit a tax return under *Section 94(1)* of the *Act*, the prosecution was required to establish, as a factual and legal matter, that a statutory obligation existed.

52. No doubt, Ollkey, being a company, was under the law required to file income tax and VAT returns. The question that then calls for an answer is whether the Appellant, who admittedly was a Company Secretary of Ollkey and who was not a director of the said company, was under legal obligation to file the income tax and VAT returns of the company.

53. In my view, a Company Secretary has legal obligations in relation to the company's compliance. However, whether the Appellant, in her capacity as Company Secretary, was criminally liable under *Section 94(1)* of the *Act* depends on the circumstances and operations of the company and statutory interpretation.

54. Tax obligations are generally imposed on the taxpayer, which in this case was the company itself. The company, as a

legal person, was therefore ultimately responsible for filing returns. However, in practice, companies often delegate the administrative task of filing returns to employees or officers, such as the Company Secretary, Accountants or even Directors.

55. *Section 94(1)* of the *Act* creates an offence for a person who, without reasonable cause, fails to submit a tax return or other required document. Under *Subsection (2)* of *Section 94*, the law specifically allows liability to extend to an officer of a company or other body corporate who is responsible for ensuring that the company complies with the law.

56. That then means that if the Company Secretary is the officer responsible for filing tax returns (e.g., assigned in the company's board resolutions or internal governance documents), she can be held personally liable if she fails to file without reasonable cause. However, if the Company Secretary is merely an administrative assistant without such responsibility, criminal liability does not attach, because the law focuses on persons responsible for compliance.

57. In the circumstances, it was incumbent upon the prosecution to prove that the Appellant, in her capacity as the Company Secretary was the officer responsible for ensuring compliance and that she failed to submit the returns by the due date and that the failure was without reasonable cause.

58. In the present case, the prosecution produced the company's account opening documents that were supplied to **Ezekiel Obegi** by Eco Bank Limited. The same included resolutions of the company that showed that the Appellant was Ollkey's Company Secretary and further showed that she was appointed as a signatory of the account. No evidence was however provided that she was the one responsible with filing the tax returns. Nothing was provided to prove the scope of the Appellant's duties and responsibilities.

59. Filing of tax returns is not automatically part of a Company Secretary's duties. Under *Section 94(2)* of the *Act*, criminal liability attaches to an officer only if it is proved that the officer was responsible for ensuring compliance.

60. In her defence, the Appellant told the trial court that her role did not include responsibility for filing tax returns, and that the failure occurred in an area outside her duties as that was supposed to be done by the directors. In my view, as the prosecution did not specifically call evidence to prove that it was her responsibility to file tax returns, her defence constituted reasonable cause, because she lacked the legal duty to act.

61. Under *Section 94(1)*, the failure to submit a tax return or other required document is only an offence if it is "without

reasonable cause.” Therefore, the prosecution must first prove that the person had a duty or responsibility to submit the return or document. Once that is established, if the accused claims “reasonable cause”, the burden shifts to the accused to raise credible evidence of reasonable cause. However, the prosecution may still challenge that evidence and argue that the claimed cause is not reasonable in law.

62. I have stated above that the Appellant raised the defence that she was not the officer responsible for filing the returns. The prosecution bore the burden to show that the company secretary was indeed the officer responsible for filing.

63. The prosecution did not controvert the evidence in defence by the Appellant, and I accept, in the circumstances, that the Appellant showed reasonable cause and could not in the circumstances, be held personally criminally liable. To that end, I am in agreement with the Appellant that the trial court fell into error in failing to consider her defence and in shifting the burden to her to provide evidence that she did not bear the duty to file the returns.

64. I will now turn to the element of failure to submit under *Section 94(1)* of the *Act*. To prove that element, the prosecution must establish that the taxpayer (or responsible officer) did not submit the return required by law within the prescribed time. The element, from the provision, requires

that the prosecution must show the exact date by which the return or document should have been filed. This is because it must be proved that the failure occurred at the relevant time, i.e., by the statutory due date.

65. The charge sheet in the three counts (Count III, V and XI) merely stated that the Appellant failed to submit the required statutory returns by due dates. In my view, a charge sheet that fails to state the date or statutory due date of the return is generally defective or invalid because the date of filing of the return is a crucial element of the offence under *Section 94(1)* of the *Act*.

66. Without stating the due date for compliance, an accused person cannot know what date they allegedly failed to comply with, which violates the principle of fair trial and proper notice of charges.

67. The charge sheet therefore defied the mandatory requirements of *Section 134* of the *Criminal Procedure Code* which provides that a charge shall contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of offence charged. My view is that the Appellant could not properly prepare a defence where the essential fact of the deadline or due date was missing.

68. Without specifying the due date, the Appellant could not know which exact day she is alleged to have failed to comply with the law. I opine that it would be difficult for the Appellant to meaningfully argue “reasonable cause” without knowing the exact due date that she allegedly failed to meet.

69. With respect to counts IV, VI and XII, it was alleged that the Appellant deliberately defaulted in the obligation to remit income tax by the due dates contrary to *Section 97(e)* of the *Tax Procedures Act* as read with *Section 104(1)* of the same statute.

70. We have seen above that *Section 104(1)* prescribes the penalty or sentence for non-compliance. *Section 97(e)* provides as follows:

**97. Fraud in relation to tax -**

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

**(e) deliberately defaults on any obligation imposed under a tax law, commits an offence.**

71. The earlier findings that I made in respect to counts III, V and XI that the prosecution did not prove the duty on the part of the Appellant and that the due dates are not stated in the particulars of the offences under counts IV, VI and XII are applicable to the latter set of counts, with the result that the charge sheet is defective.

72. Being of the findings above, I reach the result that the appeal on conviction is meritorious. I proceed to allow it and hereby quash the convictions on each of the twelve counts.

73. As the appeal on convictions on each of the twelve counts is successful, I need not address the appeal on the sentences imposed. Accordingly, the sentences imposed on each of the 12 counts are hereby set aside.

74. The Appellant shall be set at liberty forthwith unless she is otherwise lawfully detained.

75. The Appellant's surety is discharged. The security/securities deposited shall be released to the surety/sureties.

DELIVERED, DATED and SIGNED in open court this 11<sup>th</sup> day of November, 2025.

**JOE M. OMIDO**  
**JUDGE**

APPELLANT: Present.

FOR THE APPELLANT: **Mr. Okoth Odero** for **Mr. Katwa Kigen.**

FOR THE RESPONDENT: **Ms. Muema.**

COURT ASSISTANTS: **Mr. Ngoge.**