Omar v Republic (Criminal Appeal E094 of 2023)
[2024] KECA 1670 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1670 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E094 OF 2023

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

NOVEMBER 22, 2024

BETWEEN

DAUD ABDULLAH OMAR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court Anti-Corruption & Economic Crimes Division in Nairobi (E.N. Maina, J.) dated 6th July, 2023 in ACEC Appeal No. E007 of 2021)

JUDGMENT

1. By this appeal the appellant, Daud Abdullah Omar, seeks to reverse the decision of the High Court's Anti-Corruption and Economic Crimes Division at Nairobi (Maina, J.) made on 6th July 2023, dismissing the appellant's appeal thereto. That first appeal itself challenged the decision of the Chief Magistrate's Court made on 15th March 2021 which found the appellant guilty of wilful failure to comply with the laws relating to management of public property contrary to section 45(2)(b) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*. He was convicted and sentenced to pay a fine of Kshs.800,000 and in default to serve four year's imprisonment.

2. He was acquitted of one other count that had been preferred against him solely. He was equally acquitted of another count, one of conspiracy to commit an offence of corruption, as were his 3 co-accused. Those co-accused were acquitted of all other charges they separately or jointly faced.

3. The particulars of the offence on which the appellant was convicted and sentenced were that;

> "Between 5th October, 2018 and 9th October 2018, within Wajir County in the Republic of Kenya, being the County Executive Committee Member for Finance and Economic Planning at the Wajir County Government being an officer whose functions concern the management of pubic funds, [he] wilfully failed to comply with applicable law

and procedures relating to management of public funds to wit Regulation 85(2) of Public Finance Management (County Governments) Regulations, 2015 by designating one authorised signatory in respect of County Government of Wajir imprest Account instead of the mandatory two signatories required."

4. The evidence led on the charge, which was believed by both the trial magistrate and the learned judge, was that at the material time the appellant was the County Executive Committee Member (CEC) in charge of Finance and Economic Planning. By a letter dated 6th October 2018, the appellant wrote to the County's Bankers, Kenya Commercial Bank, Wajir Branch, advising that one Jeff Mworia, would, effective that date, be the sole signatory of the county's Imprest Account. The said Mworia subsequently withdrew from the said account some Kshs.26.1 million through various cheques drawn on the said account. We need not go into details of those cheques and the withdrawals they effected as they were the subject of various charges that the appellant, Mworia himself, and their co-accorded, one Ahmed Sahal Omar, were tried for, and eventually acquitted of.

5. The point of contention at trial, in the first appeal and before us is whether, in writing the said letter designating Mworia as the sole signatory of the subject account, the appellant was guilty of wilful failure to comply with laws relating to management of public property. The laws he was alleged to have and was in fact convicted of flouting were first, section 45(2) of the ACECA which is in these terms;

> "(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any art of the public revenue or public property is guilty of an office if the person-
>
> a. ...
>
> b. wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering or contracts, management of funds or incurring of expenditures."

6. Second, and more particularly, he was found to have contravened Regulation 85(2) of the Public Finance Management (County Governments) Regulations, 2015 which provides that:

> "There shall be two authorized signatures to sign a cheque drawn or electronic payment or find transfer on a country government bank account."

7. In holding the case against the appellant proved the trial magistrate made a finding that the appellant had the mandate to appoint signatories to the County Accounts. He made this finding on the history of the Wajir County Government imprest account which showed that "the tradition was for the CEC to appoint signatories to it with Chief Officer Finance being the mandatory signatory." Prior to 5th October 2018, the Chief Officer Finance was Ahmed Guhad Omar and he was a signatory alongside Jeff Mworia who was the Head of Treasury. On 6th October 2018, however, the Omar was replaced in that docket, as signatory, by Mohammed Salat. The appellant's letter critically communicating these changes to the Bank read as follows in relevant part:

> "Kindly note that we are currently in a transition period in the department and the Chief Officer Ahmed Guhad Omar is no longer a signatory to the said account. The Head of Treasury Mr. Jeff Mworia is hereby authorised to be the sole signatory to the account until further communication."

8. The appellant, when placed on his defense readily admitted having written the said letter. The trial magistrate, in adverting to the appellant's testimony under oath summarized it as follows;

> "The 1st accused admitted having written the letter. The document examiner confirmed that the signature on the letter belonged to the 1st accused. The 1st accused testified that there was a crisis as the casual workers wanted to demonstrate for non-payment of wages. It is his evidence that the political tension was high in Wajir as there was a pending election petition challenging the Governor's victory. He stated that the majority of the staff were inherited from the previous Government and thus there was a lot of hostility towards the current Governor. He further testified that the new Chief Officer Mohammed Salat was away attending to his sick mother and to avert a crisis in the County, he wrote the letter exhibit 35 to the County Secretary requesting for approval from the CEC to authorise Jeff Mworia to the sole signatory to the imprest account since he was already an existing signatory."

9. That court went onto hold that section 119(1) of the Act did not place the responsibility of appointing bank signatories upon the CEC Finance, which the appellant was at the material time. It rejected his justification for making the designation on the fact that he was trying to prevent a crisis in the county reasoning thus;

> "The 1st accused was in charge of the finances in the County. He was charged with the function of managing the County finances. If there was a crisis as he would wish this Court to believe, he would have taken steps to ensure that the incoming Chief Officer Finance signed the amendments forms to enable him transact imprest account. As the time PW2 was appointed he should have gone to the bank immediately he was called by the bank officials to sign the amendment forms to enable him to transact the imprest account. As the CEC finance. He was well versed with the regulations. The cabinet had no role to play in matters of Finance. For him to have done that letter I find that he wilfully failed to adhere to the law which is couched in mandatory terms. He did not demonstrate that he made any efforts to reach out to Salat to regularize. I find that the law is couched in mandatory terms. He could not deviate from the same. As the CEC Finance he failed to ensure that public property is protected and acted contrary to the law."

10. The learned judge also rejected the appellant's justification for his writing of the letter, in terms that we shall advert to a little later in this judgment, on her way to dismissing his appeal. That decision is challenged by the appellant who, by a memorandum of appeal dated 6th September 2023, raises the following three grounds of challenge;

> "1. The learned judge erred in law and contradicted herself in finding the appellant guilty of wilful non- compliance of the law for designating one authorised signatory in respect of County Government of Wajir Imprest Account instead of the two mandatory signatories as required she had held that the appellant does not have any legal duty or power under the law to designate signatories to the said imprest account.
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> 2. The learned judge erred in law in finding that the prosecution had proved their case beyond reasonable doubt despite the glaring inconsistencies in the prosecution witnesses' testimonies which did not prove the charge against the appellant to the required standard.
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> 3. The learned judge erred in law by failing to acknowledge that the Prosecutions did not prove that the appellant had the mens rea to commit the offence in count iii of the charges –wilful

failure to comply with the law relating to management of public property contrary to section 45(2) (b) as read with section 48 of the *Anti-corruption and economic Crimes Act*, 2003."

11. In support of the appeal, the appellant, through the law firm of Nyachoti & Co. advocates, filed written submissions dated 6th March 2024. In support of the first ground, it was contended that both courts below failed to appreciate and give full effect to the provisions of *the Constitution* and the *Public Finance Management Act* and give them precedence in the event of a conflict with the 2015 County Government Regulations made under the Act. In particular, it was submitted that under section 2 of the Act, the CEC Finance is generally responsible for the financial affairs of the County and the County Treasury. As such, the appellant "had the mandate and overall authority in all financial affairs of Wajir County [including] management of its funds and Bank accounts." Moreover, under section 92, the CEC Finance had the right, in complying with the responsibility of a state organ or public entity "to avail identity and resolve the financial problem," to take the action in order to resolve the financial problems of unpaid casual labourers and operational costs that faced Wajir County.

12. The appellant faults the learned judge for "reducing the authority of the CEC Finance in the discharge of his duties under the PFMA Act" and for disregarding and not interrogating;

> The material fact and evidence that the appellant had designated the Chief Officer Finance (PW2) as the second signatory to the Imprest Account but he was unable to resume his duties as he was attending to an ailing relative, at the same time the County was facing a crisis of delayed salary payments of casual labourers that were picketing."

13. Moreover, it was urged;

> The learned judge failed to appreciate the unrebutted fact that the absence of the Chief Officer Finance from office and second signatory to the Imprest Account created a crisis in the operations of the County; the learned judge seemingly ignored the obvious cure in Law by *the Constitution* and the Parent Act PFMA 2012, under section 92 that authorized the appellant to avert an operational and financial problem."

14. On the ground that the learned judge erred in finding that the prosecution had proved its case beyond reasonable doubt when it had not, the appellant contended that;

> "The burden of proof lay on the prosecution to prove that the appellant was wilful or careless to authorise the Jeff Mworia Kithinji as the sole signatory of the Wajir County Imprest Account, it is our humble submission that the evidence from the Prosecution witnesses did not support this charge against the appellant." (Emphasis theirs)

15. It was submitted that the learned judge ignored the testimony of PW2 that in the absence of the Chief Financial Officer who is the accounting officer that designates signatures, it was an order for CEC Finance to give instructions as to who would become a signatory. The learned judge thus failed to appreciate that there was a cure in law in the event of the absence of the Chief Officer Finance and Accounting Officer from office. Moreover, there was no requirement under the Act itself for the appellant to designate two signatures for the Imprest Account. It was urged for the appellant that the learned judge erred in disregarding the evidence of PW17, Fatuma Guyo Dima, who was the Manager Service Quality Compliance at Kenya Commercial Bank Wajir Branch. Referring to exhibit No. 56, her testimony was that the Imprest Account, opened on 6th May, 2013, though having two signatures, did not have any signing mandate which, according to the appellant, exonerated the appellant from any wrongdoing as there was no clear indication that the account had a signing mandate of two persons. Citing NAFTALI MWENDWA MUTUA Vs. REPUBLIC [2015] eKLR and KASYLA KINGO Vs.

REPUBLIC Nairobi Criminal Appeal No. 98 of 2014, the appellant charged that the learned judge failed to test the evidence and to reconcile any discrepancies to determine whether they went to the root of the prosecution case.

16. Finally, the appellant contended that the prosecution was under a duty to prove beyond reasonable doubt that the appellant had the requisite mens rea in the form of a manifest intention to not comply with the law relating to the management of public property, but it failed to do so. The Indian case of BALAKRISHNA PILLAI Vs. STATE OF KERALA Criminal Appeal No. 371 of 2001 referred to in GEOFFREY ANDERE Vs. ATTORNEY GENERAL & 2 OTHERS [2016] eKLR was cited in buttressing the duty to prove mens rea.

17. Highlighting those submissions during the plenary hearing of the appeal, the appellant's learned counsel Ms. Atikunda reiterated that the offence was not proved beyond reasonable since the appellant acted in obedience of his duty to avert a crisis and could not thus be held to be criminally culpable. She reiterated that as the Chief Officer Finance was not in the office during the crisis, the appellant exercised his powers properly to designate Mworia as sole signatory after consulting.

18. Opposing the appeal, Mr. O. J. Omondi, learned counsel for the Republic insisted that the appellant acted in breach of Regulation 83. He characterized the appellant's offence thus;

> What he did is that without calling upon the Accounting Officer to designate any other person to be a signatory, he himself proceeded to designate a signatory."

19. He went on to submit, rather interestingly, that the appellant "removed the signatures and appointed one" and that the appellant "did not say that there was no other person that he could have designated as a second signatory." He added that there was no crisis and "nothing stopped him [the appellant] forum designating two signatories." Regarding whether or not it was in fact the appellant's duty to designate two signatories, Mr. Omondi charged that the appellant's powers did not include designation of signatories then added;

> If he decided to usurp the powers of the accounting officer he ought to have followed the law as prescribed for service acting as accounting officer."

20. Answering questions, we posed to him regarding this rather intriguing case, Mr. Omondi made the following telling statements;"This was a strict liability offence and every other circumstance (including the existence of a crisis in the county) is a mitigating factor""He [the appellant] needed someone who could apply for an overdraft because there was a crisis of payment of casual workers who were in in arms.""He [the appellant] was under a duty to resolve a crisis [but] in attempting to resolve the crisis he should not have broken the law.""There was no loss of funds.""The signatories were not in office. They were not present at work for one reason or another.""He [the appellant] was the final authority or ought to have appointed an officer."

21. We have given due consideration to the memorandum of appeal, the entire record and the rival submissions made before us cognizant that our jurisdiction on a second appeal is restricted to matters of law only. See section 361(1) of the Criminal Procedure Code;

> A party to an appeal from a subordinate court may, subject to subsection (8), appeal against decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-
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> a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence except where a sentence has been enhanced by the High Court, unless subordinate court had no power under section 7 to pass that sentence.

22. In this appeal, the central question for our determination is whether from the record, and given the defence mounted by the appellant, the offence of which he was convicted was proved beyond reasonable doubt.

23. It is common ground that the appellant did write the letter dated 6th October 2018 which factually communicated that the Department was in a period of transition and that the Chief Officer Ahmed Guhed Omar was no longer a signatory to the Imprest Account and authorized Jeff Mworia, who was Head of Treasury and an existing signatory, to be the sole signatory to the account until further communication. What the appellant did offer was an explanation for authorizing a single signatory in the person of Mworia. His sworn testimony in-chief on the matter was this;

> "On 4/10/18 I called Salat he knew chief officer. He told me that he was in Nairobi. I asked him if he was aware he was the new chief officer finance. He told me that the county secretary and the governor communicated to him and informed him that he should report immediately. I asked Salat if he was aware that casuals were demonstrating and that here was a problem. He told me that he would report on 5/10/18. I was not expecting him on 5/10/18. I called him and he told me that he could not make it as he was doing something for the county. He was previously the chief officer. He told me that he was with his sick mother. We then consulted as a county government on how to handle the situation. I consulted the governor, his deputy and my colleague the director legal department. The director legal advices the country government issues. He is the head of legal. After consultation it was decided that Jeff Mworia who was the existing signatory to operate the account until further notice. I did not write the letter in my personal capacity but as the CEC finance and on behalf of the country government of Wajir."

24. Under the cross examination by Ms. Mwila, the Prosecutor, the appellant added the following;

> I am not the one who appointed Jeff. He was known in the bank. It was a country government's decision that Jeff was made a sole signatory. We consulted. It was in the public interest. The urgency was the problem that were facing. There was nothing personal. In the execution of my duties the county government Act says we must consult. I was guided by PFM Act as well. I have not breached any of them."

25. The defence mounted by the appellant, as we understand it, is that there was no intention to breach the law and that the designation of Mworia as sole signatory was in an attempt to deal with a present crisis at the county where casual employees who had gone for months without pay were restless, restive and demonstrating. All this is the context of a fluid political situation where loyalties were divided between the previous and new Governor with a petition pending in court challenging the latter's victory. The appellant was essentially stating that the exigencies and urgency of the situation necessitated that he takes the action that he did, and that he did so after consulting persons he identified in cross examination as the Governor, the Deputy Governor, the Director Legal and the County Executive Committee Member for Water, one Abdi Haffith. The second accused Ahmed Sahal Omar, under cross-examination by Ms. Mwila, confirmed that the top brass of the county did consult and agree that Mworia be the single signatory because there was a crisis in the county and he (the witness) had no reason to doubt them.

26. In dealing with the appellant's defence, the learned judge took the view that "what he did was not just irregular but it was illegal as it was usurpation of the power of the Chief Finance Officer who had designated as the Accounting Officer of the County Government Financial Affairs." She then dealt with the crux of the matter as follows, in a single paragraph:

> "That the employees of the County were hostile as they belonged to the clan of the former Governor is also not a defence. The illegality the appellant committed and which he did knowingly; as he has readily admitted, led to the withdrawal of public funds in the sum of Kshs.21,000,000 through cheques signed by one signatory which was against the clear provision of Regulation 85(2) of the Public Finance Management (County Governments) Regulations 2015. So that not only did the appellant flout the clear provisions of 85(1) but he also did those of Regulations 85(2). That the Governor was a party to the illegality cannot make it right or render it lawful. Indeed, what followed after the appellant made Jeff Mworia a sole signatory is a clear manifestation that he did not do it in good faith. Why, even if there was an outcry by the workers, even were we to assume that he had power to designate the signatories, didn't he appoint another person to be signatory with Jeff Mworia? There were many other officers in that department who could have been designated as signatories together with Jeff Mworia as the return of the Chief Officer Finance was awaited."

27. With great respect to the learned judge, she seems to have allowed the fact that some money was withdrawn through cheques signed by the one signatory, Mworia, to unduly colour her judgment and cloud her assessment of the appellant's defence. This is particularly troubling when considered against the fact Mworia was himself acquitted of the charges of abuse of office and fraudulent acquisition of public property. These charges were on the basis that Mworia had allegedly conferred upon himself the benefit of and fraudulently acquired Kshs.26,100,000 withdrawn for the Standing Imprest Account. The learned judge seems to have proceeded on the erroneous basis that Mworia did take that money for himself when the evidence on record is that the sum was used to pay pending salaries. There was no evidence of fraudulent acquisition and Mworia was exonerated and acquitted.

28. Equally troubling is the learned judge's reasoning, contradictory of her earlier finding that he had no such powers, that the appellant should have appointed another person to be signatory with Mworia. From our reading of the record, there was no evidence led, nor suggestion made to the appellant by the prosecution, that "there were many other officers in that department who could have been designated signatories together with Jeff Mworia." In essence, the learned judge resorted to theorizing, on what the situation in the department was, without the benefit of evidence lead and tested. Moreover, given that the appointments of signatories under the relevant law fell under the mandate of the Chief Officer Finance and not the CEC Finance,the learned judge proceeded on an erroneous footing.

29. Given the full circumstances of the case, it seems to us that on a proper reading of the charge, and giving the words of section 45 (2)(b) of ACECA full and proper meaning, the appellant's action cannot be said to have amounted to a wilful or careless failure to comply with the law. Black's Law Dictionary, Tenth Edn. defines the term "wilful@ thus;

> The word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent."

30. We do not think, that from the record, the prosecution met the threshold of proving beyond reasonable doubt this critical aspect of the charge. Nowhere in the record can one discern an intentional and deliberate desire to flout the law in the appellant's action.

31. Rather, what emerges from the appellant's defence, and we are not satisfied that the prosecution attempted to or was at any rate successful in countering it, is that the appellant, faced with a serious crisis of non-payment of casual employees in the county who were demonstrating in the face of a volatile and tense political situation, acted to avert a crisis. We do not think that it was reasonable to expect that he would, in the temporary absence of a recently – appointed Chief Finance Officer, make an appointment of a new Chief Finance Officer who would then designate a second signatory. We doubt that he had the power to do so, anyway, and we doubt further whether he and the "top brass" he consulted had the luxury of awaiting the return of the Chief Finance Officer given the clear and present danger posed by the crisis. Nor do we think that, beyond enquiring whether the appellant's actions were reasonable in the circumstances, (which the two courts did not, though it was their duty to) it was proper for the learned judge to offer alternative theories or to second guess the officers present on the ground in the face of the crisis.

32. The version the appellant presented amounted to in law, though not expressly so characterized and articulated, was the defence of necessity. Such general defence has long been recognized at common law. See R vs. MARTIN [1989] LRC (CRIM) 1377 a decision of the Court of Appeal, Criminal Division of the United Kingdom. The Canadian Supreme Court discussed this defence at length in PERKA & OTHERS Vs. R [1985] LRC (Crim) but we need not attempt such immersion into the subject seeing as it was not pursued in those precise terms before us. It is enough to say that there was enough of the defence posed by the appellant in the cross examination of witnesses, and his own testimony, to have required the prosecution to seek to rebut it; but it did not. Moreover, we think that, properly understood, section 92 of the *Public Finance Management Act* that imposed on the appellant as CEC Finance a duty to resolve a financial crisis amounts to a statutory codification of that defence in the circumstances of this case.

33. Thinking as we do that the action of designating Jeff Mworia, an existing signatory, as a sole signatory given the absence of the Chief Financial Officer, with a live crisis ranging, was the result of compulsion of circumstances and was reasonable in the circumstances. We do not think that his conviction for the offence of wilful failure to comply with the law relating to management of public funds was safe. We think that had the two courts below attempted an enquiring into whether the appellant's action was in the circumstances reasonable, they would as likely as not have concluded in the affirmative. Being of that view ourselves, we must conclude that the appellant was entitled to and should have been accorded the benefit of doubt.

34. In the result, we quash the appellant's conviction, set aside the sentence and direct that if held on account of this case, the appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR