



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.33 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. F. Kombo (Mr.) - PM delivered on 27th January 2016 in Nairobi Anti-Corruption Case No.10 of 2012)

KIZITO WEKESA BARASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Kizito Wekesa Barasa was charged with two (2) counts under the **Anti-Corruption and Economic Crimes Act**. The 1st count was brought under **Section 46** as read with **Section 48(1)**. The particulars of the offence were that between 17th April 2009 and 29th June 2009, the Appellant, being a cashier of Western Kenya Community Driven Development and Flood Mitigation Project (the project), a public body, used his said office to improperly confer a benefit of Kshs.420,000/- to himself, which money was unspent imprest surrendered by Shamsa Abdi in respect of workshops organized by the project in various venues in Eldoret and Kapsabet. He was further charged under **Section 45(1)(a)** as read with **Section 48** of the **Act**. The particulars of the offence were that between the same dates and in the same capacity, the Appellant fraudulently acquired public property i.e. Kshs.420,000/- being unspent imprest surrendered by Shamsa Abdi in respect of workshops organized at various venues in Eldoret and Kapsabet. The Appellant was further charged with two (2) counts of **forgery** contrary to **Section 349** of the **Penal Code**. The particulars of the offence were that between the same dates, the Appellant with intent to defraud, made a false document namely a payment schedule to include ten (10) individuals who purportedly attended the workshops organized by the project and who were each purportedly paid Kshs.400,000/-. The other particulars is that he manipulated a payment schedule to introduce item No.9 purporting to be a genuine entry that he had attended the workshop and was therefore paid Kshs.20,000/- by the project. The Appellant pleaded not guilty to the charges. After full trial, he was convicted of three (3) of the counts, that is, the 1st, 2nd and 4th counts. He was acquitted of the 3rd count. He was sentenced to serve three (3) years imprisonment in each of the first two (2) counts and sentenced to serve two (2) years imprisonment in respect of the 4th count. He was further ordered to pay a fine of Kshs.60,000/-. The Appellant paid the fine. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of contradictory and weak

evidence that did not support the charges brought against him. He averred that the charges brought against him were defective and were not supported by evidence to warrant his conviction. He faulted the trial magistrate for failing to appreciate that the evidence that was adduced in the case actually exonerated him from the charges. He averred that no known offence had been disclosed in the evidence adduced by the prosecution witnesses. For added measure, he stated that no loss or damage had been occasioned to the project by the acts of the Appellant. In the premises therefore, the Appellant urged the court to allow his appeal, quash his 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. Bosire for the Appellant and by Ms. Atina for the State. Mr. Bosire submitted that the witnesses upon whom the trial court relied to convict the Appellant did not adduce relevant evidence to support the charge. He explained that PW1 Bill Aggrey Lijoh was the one who initiated the budget which was approved. That budget was for the sum of Kshs.2,796,000/-. An imprest of the sum was issued to PW3 Shamsa Abdi who as a Secretary of the project. He submitted that the entire sum was spent save for the sum of Kshs.40,000/- which was surrendered. He stated that the sums of Kshs.485,000/- and Kshs.420,000/- mentioned in evidence was not supported by evidence. These figures emerged after the audit was done. He submitted that the records of the project were not properly kept. No evidence was brought to prove how much money was surrendered to the Appellant by PW3. He stated that the documents relied on by the Document Examiner to prove the charge against him was in respect of another workshop and not the particular workshop which was alleged that the Appellant inserted his name as a participant. He submitted that the surrender voucher which was a crucial document in the case was deliberately not produced. In the absence of the production of such surrender document, the prosecution failed to establish the sum of money that was actually surrendered to the Appellant by PW3. He reiterated that the Appellant was categorical that he never made any payment to himself nor did he receive the amount allegedly surrendered to him by PW3. In that regard, the Appellant submitted that there was reasonable doubt that the said sum of Kshs.400,000/- was surrendered to him. In the premises therefore, He urged the court to allow the appeal as there was no proof that the public suffered any loss as a result of the performance of the Appellant's duty as a cashier.

Ms. Atina for the State opposed the appeal. She submitted that the prosecution proved its case on the three (3) charges brought against the Appellant to the required standard of proof. She stated that the prosecution adduced ample evidence which proved that the Appellant conferred upon himself a benefit of Kshs.20,000/- after listing himself as a participant in a workshop that he did not attend. Further, the prosecution adduced evidence which established that the Appellant tampered with documents with a view to manipulating the accounts so as to present a lesser figure than the one which was surrendered by PW3. She explained that in the circumstances of the case, the Appellant was supposed to give an explanation where the evidence pointed out that he had undertaken the fraudulent acts. She reiterated that the Appellant did not deny that he had presented himself as a participant in the workshop yet he was not one of those expected to participate. She denied that there were contradictions in the evidence adduced by the prosecution witnesses. The contradiction in the figures did not in any way dent the thrust of the prosecution's case that the Appellant committed the offences that he was charged with.

In response, the Appellant submitted that he attended the workshops as one of the members of the secretariat. He particularly took issue with the fact that the prosecution had relied on the evidence that he had adduced in his defence to convict him. He reiterated that no evidence was produced to support the contention that the public had suffered any loss. He was of the view that the prosecution did not establish its case to the required standard of proof.

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, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the guilt of the Appellant on the charges brought against him to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case and the submission made by the parties to this appeal in support of their respective opposing positions. In respect of the 1st count, PW3 Shamsa Abdi, employed as a Secretary of the project, testified that on 3rd April 2009 she signed an imprest warrant for the sum of Kshs.2,796,000/- which had been budgeted for workshops which were to be held in Eldoret and Kapsabet. She testified that the workshops were duly conducted. The total number of the members of the secretariat was eight (8). These included the project coordinator, PW1 Bill Aggrey Lijoh. PW1 and PW3 were categorical that the Appellant was not a member of the secretariat that travelled to Eldoret and Kapsabet. This was because the Appellant remained in Nairobi. PW3 testified that the members of secretariat were paid in total the sum of Kshs.204,000/- as their per diems. When she was shown Prosecution's Exhibit No.3 which indicated that the Appellant was one of the participants and had been paid Kshs.20,000/- in terms of entry No.9 of the said list of participants, she denied making such an entry. The Appellant was categorical in his evidence that he was a participant as a member of the secretariat at the said workshops. Having re-evaluated the evidence adduced by the prosecution witnesses particularly PW1 and PW3, it was clear to this court that the prosecution indeed established that the Appellant was not a participant in the workshops and neither was he a member of the secretariat. It was clear from the evidence that the Appellant made an entry in the list of participants as the 9th member of the secretariat with a view to conferring upon himself a benefit of the sum of Kshs.20,000/- yet he did not participate in the said workshops. PW3 denied making the entry. PW4 Jacob Oduor, the Document Examiner testified that the said entry No.9 in the list of participants and the payment schedule was made by the Appellant. In the premises therefore, this court holds that the prosecution proved to the required standard of proof beyond any reasonable doubt the 4th count of forgery.

In respect of the 1st and 2nd counts, it was the prosecution's case that the Appellant created a fictitious list of participants in the workshop with a view to conferring upon himself a benefit of Kshs.400,000/-. The prosecution alleged that the Appellant did this by abusing his office as a cashier and by fraudulently acquiring the said sum from a public project. What was the evidence that the prosecution adduced in support of the two (2) counts" The prosecution called PW6 Davis Wafula Juma, PW7 Jennifer Agola, PW8 Sammy Koech Kemboi, PW9 Getrude Ekikina, PW10 Jeremiah Ochieng, PW11 Esther Mapesa Mutuangi, PW12 Wilkister Shisiala Mutoka, PW13 Kennedy Nandasaba Wanyonyi and PW14 Joseph Sangala Omukanga. All these witnesses were civil servants who had been appointed to be members of mobile advisory team in various regions in Western Kenya covered by the project. A payment schedule had been prepared which indicated that the said witnesses were each paid Kshs.40,000/- to participate in the workshops that were the subject of the case. These witnesses testified that they did not participate in the said workshops, and neither were they paid any money to participate in the said workshops. The Document Examiner Jacob Oduor established that the particular payment schedule had been prepared

by the Appellant. This was after he had examined the specimen signature and handwriting of the Appellant and compared it with the one on the payment schedule. The document examiner also obtained specimen signatures from the particular witnesses (i.e. PW6 – PW14) and confirmed that the signatures appearing in the payment schedule were not the known signatures of the particular witnesses.

Having re-evaluated the evidence adduced in that regard, this court reached the irresistible conclusion that it was the Appellant who prepared the payment schedule and inserted the particular witnesses as having participated in the particular workshops with a view to conferring to himself the benefit of the particular sums as having been received by the said witnesses for having allegedly participated in the said workshops. This court finds that the Appellant hatched the scheme to defraud the public when PW3 surrendered the imprest of the sum of Kshs.485,000/- which remained unused upon the completion of the workshops. The Appellant argued on this appeal that there was no evidence to support the contention by PW3 that she had indeed surrendered the said sum of Kshs.485,000/- or any other lesser sum. While it is a fact that the prosecution did not produce a document to support its assertion that indeed the said sum of Kshs.485,000/- had been surrendered, upon re-evaluation of the evidence adduced by the prosecution, it was clear to this court that PW3 was a honest and credible witness when she testified that she had surrendered the said sum of money to the Appellant. PW3 explained that the Appellant did not give her any receipt upon the surrender of the said unspent imprest under the pretext that he was busy at the time. He gave the excuse that he was attending to queries raised by auditors. From the analysis of the evidence adduced by the prosecution witnesses, it was clear to this court that upon receipt of this sum, the Appellant created the payment schedules with a view to manipulating the list of attendees in the said workshops so as to confer to himself the benefit of the said sums allegedly received by the said participants. This court therefore holds that the prosecution did establish to the required standard of proof beyond any reasonable doubt the 1st and the 2nd count of the charge.

This court therefore finds no merit with the Appellant's assertion to the effect that the prosecution did not establish the three (3) charges brought against him to the required standard of proof. To the contrary, the prosecution was able to prove that the Appellant fraudulently manipulated the payment schedules to indicate himself as a participant and also indicate others as having participated in the said workshops with a view to conferring a benefit to himself. The defence put forward by the Appellant, and also the grounds of appeal argued by the Appellant, did not persuade this court that the trial court made an error in convicting the Appellant on the three (3) counts. The Appellant's appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence, this court has considered the entire circumstances of the case and the value of the property lost by the public. It has also considered the mitigation of the Appellant. Having done so, this court is of the view that the sentence of three (3) years imprisonment imposed by the trial court, although legal, was harsh and excessive in the circumstances. In the premises therefore, the sentence of three (3) years imprisonment (3 years imprisonment on each of the 1st and 2nd counts and 2 years imprisonment in respect of the 4th count – to run concurrently) is set aside and substituted by a sentence of this court sentencing the Appellant to serve one (1) year imprisonment with effect from 27th January 2016 when he was convicted by the trial court. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF MAY 2016

L. KIMARU

JUDGE



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