



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoga & another v Republic (Criminal Appeal 61 of 2018)  
[2023] KEHC 163 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 163 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL 61 OF 2018  
FA OCHIENG, J  
JANUARY 23, 2023**

**BETWEEN**

**JANET ABONYO NJOGA ..... 1<sup>ST</sup> APPELLANT**

**BENTA ANYANGO OIGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellants, Janet Abonyo Njoga and Benta Anyango Oigo were convicted for the offences of;
  - i. Conspiracy to commit a felony contrary to section 393 of the *Penal Code*; and
  - ii. Stealing by servant contrary to section 281 of the Penal Code.
2. Janet, who was the 5<sup>th</sup> accused during the trial, was then sentenced to fine of Kshs 100,000/- or in default 2 years' imprisonment for the offence of conspiracy to commit a felony.
3. And in respect to the offence of stealing by servant, Janet was sentenced to a fine of Kshs 50,000/- or in default 1 year imprisonment.
4. Benta who was the 6<sup>th</sup> accused during the trial, was sentenced to a fine of Kshs 300,000/= for the offence of conspiracy to commit a felony.
5. With regard to the offence of stealing by servant, Benta was sentenced to a fine of Kshs 100,000/- or in the default 2 years imprisonment.
6. Being dissatisfied with both the convictions and the sentences, the appellants filed an appeal at the High Court. In the said appeal they raised a total of 15 grounds of appeal, which can be summarized into 5 issues, as follows:



- i. Elements of the offence of conspiracy were not proved.
  - ii. The trial court erred by relying on the evidence of PW3, who was an accomplice.
  - iii. The prosecution did not call key witnesses, thus leaving gaps in the case.
  - iv. The appellants were not accorded a fair trial.
  - v. The trial court ignored crucial evidence which could have led to the acquittal of the appellants.
7. Being the first appellate court, I am obliged to re-evaluate all the evidence on record. The appellants are entitled to expect the court to conduct an exhaustive scrutiny of the evidence, and to derive its own conclusions therefrom.
  8. In order to have a better appreciation of the task of re-evaluation of the evidence, I will be doing so within the context of the submissions advanced herein.
  9. For instance, I will be asking myself whether or not the evidence adduced was sufficient to prove the elements of the offence of conspiracy to commit a felony.
  10. I would also give consideration to the question whether or not the mix-up by the trial court, of the evidence tendered by PW3 and PW4 had the consequence of leading the court to arrive at an erroneous decision.
  11. PW3 was an accomplice to the appellants. The appellants submitted that PW3 was an unreliable witness, as his evidence was full of inconsistencies.
  12. When a person entices another person who did not have an account, to obtain money from the account of another person; and if the person facilitates the obtaining of such money, he would certainly have committed an offence.
  13. In this instance, PW3 was enticed by Benta to deposit a cheque for her, into his account at the Kite Sacco. He was then given Kshs 25,000/-, after he had withdrawn Kshs 155,000/- from an account which was not his.
  14. It was his evidence that he gave the rest of the said money to Benta and Janet.
  15. By dint of the provisions of section 393 of the *Penal Code*;
 

Any person who conspires with another to commit any felony, or to do any act in any part of the world, which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.'
  16. Although the appellants submitted that there was no evidence of any agreement between themselves or between them and other persons, with a view to giving effect to the furtherance of a criminal purpose, I find that there were agreements between them and other persons, to steal from Kite.
  17. Whereas, there was no evidence in the nature of communication data between the appellants and staff, or between them and the witnesses who they interacted with, that was not fatal.



18. There is absolutely no legal requirement that communication between co-conspirators be captured through communication data. Indeed, I hold the view that if the law were to lay down such a requirement as a basis for conviction, there is little likelihood that conspirators would be convicted.
19. Conspiracy is defined as;

'a secret plan by a group to do something unlawful or harmful.'
20. PW3 testified that Benta introduced him to the 'deal', whereby a cheque would be deposited into his account, and upon its withdrawal, PW3 would be given a share of the proceeds.
21. Such oral communication cannot be expected to be captured through 'communication data'. The secrecy thereof could only be achieved by keeping the communication verbal. And that is exactly what PW3 told the trial court about.
22. The appellants have pointed out that there was no evidence that they or either of them communicated with the system administrator to open an account for a non-member, for whom a fictitious credit balance would be created.
23. In my understanding of the evidence, the cheques payable to members were simply handled as if the payments thereof were due to PW3.
24. Once the 'account' of PW3 reflected the credit, he would be legitimately be entitled to withdraw funds from his said account.
25. PW3 testified that his own account did not have funds. Therefore, when the appellants enabled him to withdraw funds that did not belong to him, that was wrong.
26. This court must ask itself where the evidence is to be found, to prove what the prosecution asserted.
27. I note that in the written submissions which the appellants filed at the trial court, it was expressly conceded by the 2<sup>nd</sup> appellant that she worked, inter alia, as a teller and a chief teller. She further conceded that;

'Each teller could use interchangeably any counter or teller stamps.'
28. In the circumstances, I find that the appellants' current submissions about the inconsistency in the evidence tendered by PW3 was actually an accurate account of what transpired.
29. Benta could and did use any counters interchangeably. She also used the teller stamps interchangeably. The only constant feature, as positively identified by PW3, was Benta.
30. As PW3 testified that he worked with the appellants in withdrawing money from accounts of other persons, he was an accomplice to the fact.
31. It is well settled that the evidence of an accomplice ought to be corroborated.
32. In the case of *Karanja & Another vs Republic [1990] eKLR* the Court of Appeal expressed the well-considered view that the uncorroborated evidence of an accomplice witness ought to be generally held to be untrustworthy for 3 reasons, as follows;
33. The accomplice is likely to swear falsely in order to shift the guilt from himself. As a participator in the crime he is an immoral person who is likely to disregard sanctity of an oath. He gives his evidence either under a promise of a pardon or in expectation of implied promise of pardon, and is therefore liable to favour the prosecution. See *Asumani Lagoni s/o Muza vs Rex 10 EACA 92*.



34. An accomplice is, of course a competent witness, but corroboration should be found for his evidence before a conviction can be based upon it.
35. The corroboration which should be looked for is, as laid down in the case of *R vs Baskeville [1916] 2 KB 658*, some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.
36. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime; confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.'
37. In this case, the learned trial magistrate made an express finding that;
- The witness was very candid in her testimony, that she was served by the 6<sup>th</sup> accused on all her visits to Kite, when she was directed by Benta.'
38. In effect, the trial court found PW3 to be a credible witness.
39. The court had the benefit of observing the demeanour of the witnesses when they were testifying. It made the following finding;
- It is my finding that, based on the evidence on record, PW3 was merely used as a conduit to receive the money which was later given back to the accused persons, thus the accused cannot be said not to have stolen the same.'
40. As the trial court said, PW3 and PW4 were primary school teachers who needed loans from Kite. They were thus vulnerable persons, and were exploited by the employees of Kite.
41. Meanwhile, as regards the defence of alibi, which was raised by the 1<sup>st</sup> appellant, the trial court noted that the same was raised for the first time, when the 1<sup>st</sup> appellant was testifying in her defence. As the learned trial magistrate noted, the appellant did not raise the defence of an alibi when she was cross-examining the prosecution witnesses. Therefore, the defence of an alibi was simply an afterthought.
42. As regards the complaint that the proceedings before the trial court lasted for 10 years, I do agree with the appellants that the trial took unduly long.
43. However, the appellants have not given any specific example of the manner in which the trial court had been conducted in an unfair manner. I hold the considered view that the delay, of itself, cannot vitiate the proceedings.
44. In the final result, I find no merit in the appeal; it is therefore dismissed.

**DATED, SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF JANUARY, 2023.**

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**FRED A OCHIENG**  
**JUDGE**

