



REPUBLIC OF KENYA



KENYA LAW
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**Kivunira v Republic (Criminal Appeal E088 of 2022)
[2023] KEHC 23659 (KLR) (Crim) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E088 OF 2022

LN MUTENDE, J

SEPTEMBER 27, 2023

BETWEEN

WYCLIFFE LIDONGA KIVUNIRA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal arising from the Conviction and Sentence in Chief
Magistrate's Court Milimani Criminal Case No.934 of 2017,
delivered by Hon. Gilbert Shikwe -P M, on 25th day of May, 2022)*

JUDGMENT

1. Wycliffe Lidonga Kivunira, the Appellant, was charged with the offence of Conspiracy to Defraud Contrary to Section 317 of the Penal Code. The particulars of the offence were that between 31st August, 2015 and 13th November, 2015 at National Bank of Kenya Limited Headquarters in Nairobi County, jointly with others not before court conspired together to defraud National Bank of Kenya the sum of Ksh 7,835,875/= by fraudulently taking over a proof of concept for core banking system validly awarded to Misys and rewarding it to Digitronics Solutions ltd.
2. The appellant was further charged with Abuse of Office contrary to Section 101(1) as read with Section 102 of the Penal Code. Particulars being that between 3rd August,2015 and 13th August,2015 at National Bank of Kenya Headquarters being employed in Public Service to wit Acting Chief Finance Officer at National Bank limited arbitrarily used his office to effect payment of Ksh 7,835,875/= to Digitronics solutions limited for proof of concept for core banking systems solutions upgrade contract without following the payment procedures as contained in the banks procurement policy an act that was in abuse of the authority of his office.



3. In the alternative to the second count, he faced a charge of Breach of Trust against the Public contrary to section 127 of the Penal Code. Particulars being that between 3rd August,2015 and 13th August ,2015 at National Bank of Kenya Headquarters, being employed in Public Service to wit Acting Chief Finance Officer at National Bank limited, and, in breach of the trust bestowed on his office, effected payment of the sum Ksh 7,835,875/= to Digitronics solutions limited for proof of concept for Core Banking systems solutions upgrade contract without following the payment procedures as contained in the banks procurement policy, an act that was not in the best interests of the said National Bank of Kenya Limited.
4. Having been taken through full trial, he was convicted on Count 1 and sentenced to a fine of Ksh 200,000/= and, in default to serve 24 months imprisonment. On Count 2 and its alternative, the trial court reached a finding that the appellant was not a public servant within the definition of Section 4 of the Penal Code and thus acquitted him, a finding that this court affirms.
5. Briefly, facts of the case were that the appellant was an Acting Chief Finance Officer at the National Bank of Kenya. The Bank procured services of Mysis Financial Solutions Company for purposes of upgrading their system which was sourced and later approved. At the time of payment, the appellant with others insisted on paying Digitronics Solutions Ltd for offering proof of concept instead of the company that was selling the system, Mysis, which was an illegality. That there was no proof of work done for which the payment was approved in the sum of Ksh.7.8Million by the appellant and others who escaped arrest and are fugitives of the law. Investigations conducted culminated into the arrest and subsequent charging of the appellant.
6. Upon being put on his defence, the appellant testified that the National Bank of Kenya issued a proposal for producing banking system and Mysis expressed interest. That the bank was to be responsible for provision of hardware and operating system data and results independent of Mysis. A contract was signed with Mysis. He denied having signed any of the contracts and pointed out that the contracts were signed by Thomas Gachie, Director of operations and chairman of management tender committee and incharge procurement and Mohammed Abdalla, Director, ICT. That the exclusion clause allowed a third party to assist the bank. That a document titled ‘one banking system upgrade road map for resourcing’ that was recommended by Thomas Gachie, Director operations and approved by the Managing director.
7. That Digitronics were offering services identified as gaps by the vendor, Mysis. That the acceptance certificate was executed by the Director, ICT. That he did not sign the invoice because it was beyond his limit of Ksh 5Million. He denied having signed the agreement between NBK and Digitronics, a contract worth 7,462,739/- He denied knowing how Digitronics were selected but following confirmation by the MD and user department the finance staff raised the swift.
8. That subsequently an audit was conducted by Deloitte & Touch which culminated into six top managers being sent on compulsory leave. Later he was dismissed and charged.
9. The trial court considered evidence adduced and opined that the charge of conspiracy need not involve two accused persons. Refence was made to the case of Nicholas Akala Mumbo -Vs- R public (2019) eklr where the court convicted only one accused.
10. The court found that the exhibit which the appellant alleged to be a certificate of acceptance and included work done by Digitronics Solutions Ltd only referred to work done by Mysis Financial software and was headed Mysis financial software acceptance Certificate and was not supported anywhere on the document procurement.



11. That Digitronics Solutions Ltd did not provide any services which made the payment of ksh 7.8Million doubtful. The project manager was not privy to how the company was included in the project. That the invoice payment was endorsed by the user department, the appellant and the managing director.
12. The court concluded that a financial crime was committed by the three senior officers and that there was circumstantial evidence pointing to the appellant's guilt and there was clear evidence of more than two persons involved and an explanation was tendered why others were not before court.
13. Aggrieved by the conviction and sentence, the appellant proffered the appeal on grounds as amended, that can be condensed thus: The trial magistrate erred in convicting on a charge which was not proved to the required standard and on particulars of a different count which he had been acquitted; in relying on the wrong facts of case law and misinterpreting the terminologies used in the banking industry; by misrepresenting witness testimonies and ignoring anomalies pointed out during cross examination and reexamination of prosecution witnesses; in denying the appellant his right to fair trial as per Section 200 of the *Criminal Procedure Code*; in convicting despite contradictions of the witness statements and the evidence that could not sustain a conviction; the court gave no consideration to the appellant's evidence and gave undue disproportionate weight to the prosecution evidence which was contrary to law; the complainant was unknown; the trial court was unfair and unjust as no pretrial was conducted and there was an ambush hearing on some witnesses whom the appellant did not have statements; in misinterpreting the proceedings written by the predecessors; in referring to the Special procedures audit report which had disclaimers and could not be used in evidence, and, in preferring a custodial sentence when options of a non-custodial sentence were available for consideration.
14. The appeal was canvassed through written submissions. It was urged by the appellant that in order to prove the offence of conspiracy, the prosecution must prove existence of an agreement between an accused and some other person and the intention to defraud, a burden not discharged.
15. That the appellant was not charged with the other persons involved in the crime and further did not state reasons for the failure to charge them and the prosecution failed to prove that the appellant re-awarded the tender.
16. That the court focused and convicted based on the payments made to Digitronics Solutions, which formed the particulars of Count 2 that was erroneous.
17. That the court misinterpreted the evidence of PW1 on the account that the payment of Ksh 7 Million related to services that were not rendered and ignored the evidence during cross examination that the amount was above the appellant's limit and it was issued by the Managing Director. That the witnesses confirmed that he did not participate in any procurement or breach of any procedure and that all documentation was proper.
18. That the report of the auditor which found Thomas Gachie culpable did not touch the appellant negatively, hence there was no tangible evidence connecting him to the offence.
19. The appellant further submits that the court erred in its interpretation of the case of *Nicholas Akala Mumbo v Republic* [2019] eKLR where the court upheld the conviction of a charge of conspiracy but in that case, there were more than one accused person.
20. Further, the appellant submits that the trial court never explained the import of Section 200 of the Criminal Procedure Code, when it took over the case from the previous magistrate.
21. The Respondent/State opposed the appeal on grounds that it has no merit, is misconceived and unsubstantiated. It urges that the National Bank of Kenya procured the service of Mysis Financial Solutions



- Company for upgrading their system, but, during payment the appellant insisted on paying M/s Digitronics for offering proof of concept, which was an anomaly since proof of concept was normally offered by the company selling the system.
22. That M/s Digitronics was illegally contracted and there was no proof of work done, the payment was suspect and exceeded the budget approved by the Board.
 23. Further that the appellant approved the invoice to M/s Digitronics, and, payment, was made when there was no certificate of acceptance by the recipient. That the ICT Director and the directors of M/s Digitronics Company were found culpable, however the ICT Director fled to Australia, the whereabouts of Digitronics Solutions Directors were not known and the investigators were not able to trace the officers of the company.
 24. The prosecution reiterates that the appellant acted with non-existing directors and conspired to defraud the bank. In this regard reliance was placed on the case of *Stephen Odiaga Kikombero & Another -vs Republic (2019) eklr* where the High court addressed ingredients of conspiracy and the requirement of agreement between two or more persons and a common criminal purpose.
 25. The prosecution further contends that the court cannot fail to render justice to the complainant on ground that other conspirators have not been arrested.
 26. That the investigating officer's explanation was sufficient and there was sufficient evidence to convict the appellant.
 27. The court's jurisdiction on first appeal emanates from the provisions of Section 347 of the Criminal Procedure Code (CPC) which enacts that appeals from the subordinate court are to be determined by the High Court and may be on a matter of fact as well as matter of law.
 28. The role of the court is to reevaluate, analyse and assess the evidence on record and come up with its conclusion on whether the trial court arrived at the correct judgment. The court however notes that it did not see or hear the witnesses and also that decisions made out of discretion can only be set aside where the court acted, misinterpreted the law or where the court acted outside the evidence or where the court left a relevant factor. (See *Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570*).
 29. The appellant's grounds of appeal raise issues of fair trial which though not addressed in the submissions require the court's determination. Regarding the contention that Section 200 of the [CPC](#) was not complied with by the trial magistrate. From the record, the case was heard by three (3) magistrates. Honourable Shikwe, PM was the 3rd magistrate who took over from Honourable D. Ndungi, SRM. Page 95 of the record of the lower court show that the requisite directions were taken and it was agreed that the matter would proceed from where it had stopped. It is also worth noting that the appellant was represented by counsel.
 30. As to the assertion that the court conducted a trial by ambush and without witness statements being supplied, the appellant did not object to any evidence being tendered on this ground. The record shows that the accused was supplied with witness statements in advance, all witnesses were cross examined on that basis and the prosecution case was understood at all stages.
 31. As to whether the ingredients of the offence of conspiracy were proved; Section 317 of the [Penal Code](#) provides for the offence of conspiracy to defraud in the following terms:

Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether



a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.(Emphasis mine)

32. There is no dispute that the impugned transaction led to a financial crime committed against the Bank. Although it is averred on the grounds of appeal that there was no statement from the complainant, it is trite that the Director of Public Prosecutions is the chief complainant on behalf of the Republic.
33. The second complainant and the victim of the offence was the Bank. Although the managing director did not testify, witnesses from the bank attended court and testified, the accused also admitted to facts relating to the transaction where the bank was defrauded. This ground fails.
34. It was proved beyond reasonable doubt that the crime of conspiracy to defraud was committed as well by other persons identified as the Managing Director, Director of the ICT department and the directors of Digitronics Solutions Ltd company. Documents were approved and executed by the identified perpetrators and ultimately money was disbursed to the company.
35. The main contention in this appeal is whether the appellant was part of the conspiracy and whether he had fraudulent intention to defraud the victim.
36. The argument of the Respondent is that the appellant authorized payments for a service which was not done. The evidence informing the trial court's decision to convict was that the invoice was approved by the User department and the Finance department, an invoice that was signed by the Managing Director and the appellant. The Finance department was required to ensure that the goods had been supplied and procedures followed before it could execute the document. This rebutted the appellant's argument that the Finance department did not have responsibility before approval.
37. The charges chiefly related to Ksh 7.8Million paid to Digitronics Solutions Ltd, the payment was traced to the invoice signed by the Finance department, and, further, there is undisputed evidence that the appellant was the Acting Chief Officer of the department with oversight role. Therefore, the trial court did not misconstrue PW2's evidence as alleged in this appeal.
38. It is also worth noting that the final conviction was informed by the court's inquisition on who authored the signature. Section 76 of the Evidence Act provides for comparison of signatures, seals, etc. It enacts as follows:

In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies with necessary modifications to finger impressions

39. This is a statutory power bestowed on a trial court where signatures are disputed, the court did not fashion any evidence to determine a conviction.
40. This was a case where the appellant did not dispute that a certificate of acceptance was the final document which preceded payment. The appellant claimed that the certificate in this case was the one issued in favour of Mysis Financial Software. PW7 pointed out the anomaly



41. and stated that proof of concept was normally offered by the person selling the system to the bank, in this case it was Mysis Financial Software. This evidence rebutted the defence evidence that Digitronics was a 3rd party contracted in the contract between Mysis and the bank and was the one to perform proof of concepts.
42. PW7 Lawrence Karue Mwai, was a competent witness and his evidence was credible considering his position as the core-banking system up-grade manager of the project while the appellant was a finance officer. PW8, Thomas Karithi Gachie, the Chief Operation Officer-Resolutions Insurance, was not privy to how Digitronics Solutions Ltd was included in the project, and there having been no evidence of work done by Digitronics Solutions Ltd, the entire engagement was indeed suspect.
43. The allegation by the appellant that the report did not capture him negatively does not hold water since the issue here was not an audit on the financial department. The audit report was on the contract between the bank and Digitronics Solutions Ltd and the payment of Ksh 7.8 Million as per a special request from Central Bank. Purported work done by Digitronics Solutions Ltd was not traced by the audit firm.
44. The appellant claims on appeal that the report was prejudiced information and was not for the court's consumption. The contention cannot arise at an appellate stage as it is an afterthought since the report was produced in evidence without any objection. That notwithstanding, there was cogent evidence adduced of payment having been done for work not done. It is also in evidence how following planning a budget of Ksh 502 Million was presented which the appellant rejected and claiming that two contracts had been omitted. One of them being for Digitronics Solutions Ltd for payment of Ksh 7.8 Million for proof of concepts.
45. In order to prove conspiracy to defraud, the prosecution case must prove meeting of minds or common intention between the perpetrators to commit the offence. The appellant was found culpable for approving the documents and for supporting the invoice which was later approved by the Managing Director who could have been the master mind.
46. This was not a question of an omission to vet the documents before signing the invoice but a collusion with the ICT Director and Managing Director which proved an intention to defraud the bank. The insistence to have the contract included in the budget is evidence of some fraudulent intention and the fact of not acting alone in the matter. This was proof of common intention.
47. The book Archibold's Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell), at pages 3025 and 3026, also cited in our jurisprudence states that:

“.....The agreement may be proved in the usual way or by proving circumstances from which the jury may presume it....Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”
48. As to the argument that the appellant was not charged with the other person involved and that there was no explanation, evidence from the Investigating Officer and further summary by the trial court is clear that the crime involved more than one person. The Managing Director fled from court's jurisdiction and is a fugitive of law elsewhere, and, there are warrants of arrest in force against the directors of Digitronics Solutions Ltd directors could not be traced.



49. In the case of *Nicholas Akala Mumbo v Republic* [2019] eKLR , cited by the trial court , the accused was convicted at the lower court for conspiracy to defraud. The accomplice was not in court but the accused was the mastermind of the offence. The High Court upheld the conviction, it stated that:

“...appellant and his accomplices, one of whom was Hannington Nyaora, deceived the complainant that the subject land belonged to Hannington Nyaora as a result of which they defrauded the complainant of her money. The appellant was well aware that the land did not belong to the said person. The charge of conspiracy to defraud was sufficiently proved.”

50. The court acquitted the appellant and convicted him for the lesser offence of obtaining by false pretences having found that the accused had impersonated himself to defraud the complainant bank, the second person did not exist and the charge of conspiracy could not attach.

51. As already stated, the documentary and testamentary evidence proved that the transaction involved more than one person. The fact that others were not in court was not a reason to suspend charges where the Investigating Officer had traced one perpetrator.

52. On the question of the defence put up, the trial court considered the merit of the defence and arrived at the conclusions per the decision. The court compared the prosecution evidence with the defence put up and rightly found that the appellant could not disassociate himself with the transactions. He signed the invoice. His defence that the contract with Mysis captured a 3rd Party engagement to fill in the gaps was rebutted as proof of concepts was done by the company providing the service and thus it was specific to M/s Mysis Ltd. Secondly, evidence that no specific certificate of acceptance was found to relate to the work done by M/s Digitronics proved that the prosecution’s case on the fraud was unshaken.

53. As to whether the sentence was lawful, Section 317 of the *Penal Code* provides that persons convicted for the offence of conspiracy to defraud are guilty of misdemeanors and liable to three years imprisonment. The accused contends that the magistrate opted for a custodial sentence despite having chance to settle for a non-custodial sentence.

54. From the record, the court exercised its discretion and fined the appellant an amount of Ksh 200,000/=, this was under Section 28 of the *Penal code*. The provision related to fines and like other penal clauses have default sentences of imprisonment. According to the alluded to provision of the law the default sentence in the instant matter should have been one-year imprisonment.

55. The upshot of the above is that the conviction is affirmed. The appeal on sentence succeeds to the extent stated on the default sentence. For avoidance of doubt, the sentence meted out is set aside and substituted with a fine of Ksh. 200,000/- and in default, one-year imprisonment.

56. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 27TH DAY OF SEPTEMBER, 2023.

L. N. MUTENDE

JUDGE

In The Presence Of:

Mr. Amany for Appellant

Ms. Chege for ODPP



