



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Makali & 3 others (Criminal Appeal E002 of 2023)  
[2023] KEHC 26747 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26747 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E002 OF 2023**

**DK KEMEL, J**

**DECEMBER 19, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**LEVI MAKALI ..... 1<sup>ST</sup> RESPONDENT**

**LUKE OPWORA ..... 2<sup>ND</sup> RESPONDENT**

**TRUPHENA ATEMA MUTOKA ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPHINE WAMANYA AKHULA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal arising from the Judgement delivered on 3rd December 2021 in Criminal Case No. 605 of 2018 at Chief Magistrate's Court Bungoma by Hon. J. Kingori-CM)*

**JUDGMENT**

1. The Respondents were charged with two counts. Count one was an offence of conspiracy to defraud contrary to section 317 of the [Penal Code](#). The particulars were that on diverse dates between 22<sup>nd</sup> June 2017 and 7<sup>th</sup> August 2017 they jointly and fraudulently conspired to defraud Landex Group Limited of Kshs. 5,000,000/= (five million) by stopping the transfer of land parcel No. E. Bukusu/ S. Kanduyi/13394 to the said Landex Group Limited after having received the defrauded amount being the total purchase price for the said parcel of land.
2. Count two was the offence of cheating contrary to section 315 of the [Penal Code](#). The particulars were that on diverse dates between 22<sup>nd</sup> June 2017 and 7<sup>th</sup> August 2017, Levi Makali Simiyu and Luke Opwora, jointly by means of fraudulent trick obtained Kshs. 5,000,000/= (five million) from Landex Group Limited.
3. On 4<sup>th</sup> July 2018 all the Respondents took a plea of not guilty and the matter proceeded to full hearing.



4. Vide the lower Court Judgement issued on 3<sup>rd</sup> December 2021 the Respondents were acquitted under section 215 of the [Criminal Procedure Code](#) on both counts.
5. Being dissatisfied with the said judgement, the Appellant preferred this appeal as set out in its grounds of appeal as follows:
  - i. That the learned trial magistrate misdirected himself in law and fact by misconstruing the provisions of section 317 of the [Penal Code](#) to acquit all the Respondents.
  - ii. That the learned trial magistrate misdirected himself in law and fact by misconstruing the provisions of section 315 of the [Penal Code](#) to acquit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  - iii. That the learned trial magistrate misdirected himself in law and fact by acquitting the Respondents despite the fact that there was sufficient evidence and proof to show that they had conspired to defraud the Complainant by stopping the transfer of land parcel No. Bukusu/ S. Kanduyi/13394.
  - iv. That the learned trial magistrate misdirected himself in law and fact by acquitting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents despite the fact that there was sufficient evidence to show that they signed transfer documents and orchestrated the filing of Civil Suit No. 102/2017 at the Bungoma High Court to stop the said transfer.
  - v. That the learned trial magistrate misdirected himself in law and fact by finding that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent had interest in land parcel Bukusu/ S.Kanduyi/13394 yet there was no evidence adduced to support that claim.
  - vi. That the learned trial magistrate misdirected himself in law and fact in acquitting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents yet they admitted to receiving money from the Complainant and/or having knowledge that the Complainant had paid the purchase price and failed to transfer the land in dispute.
6. Ultimately, Counsel prayed that the order for acquittal be set aside and/or quashed and that this Court proceeds to convict and sentence the Respondents pursuant to section 348A (2) of the [Criminal Procedure Code](#).
7. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their submissions.
8. As a first appellate Court, i should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that i neither saw nor heard the witnesses and give due regard for that. See [Njoroge v Republic](#) (1987) KLR, 19 & [Okeno v Republic](#) (1972) E.A, 32
9. After carefully considering the rival arguments of parties and the record of appeal, the grounds of appeal may be collapsed into one ground namely whether the prosecution proved their case beyond reasonable doubt.
10. The legal burden of proof in criminal cases rests on the shoulders of the prosecution; to prove the guilt of the accused beyond reasonable doubt. Viscount Sankey L.C H.L.(E)\* [Woolmington v DPP](#) [1935] A.C 462 pp 481 puts it more subtly;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No



matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

11. In the case of *Andrew Omondi Owuor alias Antony Njenga v Republic*, Kabarnet High Court Criminal Appeal No. 4 of 2019, the Court held that: -

“It is equally important to point out that in order to prove conspiracy, it is enough for the prosecution to prove an agreement between either a known or an unknown person. The existence of the agreement may be inferred from the circumstances of the case; for conspirators do execute their conspiracies in secrecy.”

12. I have carefully read section 317 of the *Penal Code* and it reads;

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

13. According to the evidence of PW1, the director of the Complainant, the 1<sup>st</sup> Respondent is well known to him as he was introduced to him by a friend but that he did not know him prior to the incident. He told the Court that he met his friend on 22<sup>nd</sup> June 2017 where he mentioned to him that he had an aspiring candidate for Sirisia Constituency that had mentioned that he had a property he was interested in selling. He introduced him as Levi Simiyu Makali, the 1<sup>st</sup> Respondent herein. They exchanged contacts and further discussed at length about the sale. He established the acreage as ¼ acres and purchase price was negotiated at Kshs. 5,000,000/= . He sent a staff member to conduct due diligence and who reported back to him that everything looked to be in order from the physical visit of the property and the inspection of the title deed. She further did a search on the property where they established the land measured 9.136 acres and that the title bore the names of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The search was produced in Court as P. Exhibit 2. He insisted that both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do participate in the sale transaction and the parties agreed. An advocate from the law firm of Natwati & Company did the sale agreement and that the same was duly executed and he paid the full amount vide a bank transfer to the 1<sup>st</sup> Respondent, which was paid subsequently. A transfer of land documents dated 2<sup>nd</sup> August 2017 was signed which was produced in Court as P. Exhibit 6A and a consent which was also produced in Court as P. Exhibit 6C. According to him on 16<sup>th</sup> August 2017 when his lawyer perused the transfer of land, at the land’s office, she discovered that there was a restriction placed by Eldoret High Court prompting her to do another search on 14<sup>th</sup> September 2017 where she established the details as to the suit. He found out that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who are wives to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had instituted the suit claiming that there was no consent on their part.
14. He told the Court that he had several meetings with the 1<sup>st</sup> Respondent and their mutual friend and that he was assured that the problem would be sorted out.
15. DW1, the 1<sup>st</sup> Respondent herein testified in the lower Court that indeed he sold the land parcel E. Bukusu/ S. Kanduyi/13394 and that the same property was jointly registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He also told the Court that he never told his wife that he was selling the said parcel as that was the reason why he had the title deed. He further admitted that he never involved the 3<sup>rd</sup> Respondent in the sale and that he did sell the land to the Complainant and that he is ready to pass the title to the Complainant. According to him, he still owed the 2<sup>nd</sup> Respondent his money and that he



never stopped any of the transactions with regard to that property. He denied claims that he conspired with the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to institute the suit. On cross-examination, he told the Court that the Complainant was aware that he resided on the parcel of land with his family and that he was only made aware of the restraining orders on 8<sup>th</sup> September 2020 and that he had not informed his wife that they were to vacate the plot.

16. Under section 317 of the *Penal Code*, one of the components of the charge of conspiracy to defraud is that the conspiracy must be done with the intent to defraud and therefore it cannot be said to be a double charge

17. In *Black Law Dictionary 9<sup>th</sup> Edition at page 351* Conspiracy is defined as follows;

“An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreements motive, and (in most cases), action or conduct that furthers the agreement; a combination for unlawful purpose.

The agreement may be proved in the usual way or by proving circumstances 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 principle of an apparent criminal purpose in common between them.”

18. It is not disputed that there was an executed sale of agreement for land parcel E. Bukusu/ S. Kanduyi/13394 between the Complainant, 1<sup>st</sup> and 2<sup>nd</sup> Respondents for a purchase price of Kshs. 5,000,000/= that was duly paid as per the evidence of the Complainant and 1<sup>st</sup> Respondent. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their testimonies before the lower Court had no objections with the transfer of the property to the Complainant and that the 2<sup>nd</sup> Respondent also duly executed the sale agreement. The 2<sup>nd</sup> Respondent further admitted to keeping the title deed and that his wife knew he had an interest in the property and that she also had interests.

19. From the foregoing, it is clear that the Prosecution failed to establish any conspiracy on the part of the Respondents herein. Both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are still keen on completing the transfer of the property to the Complainant and that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who were not aware of the sale were simply safeguarding their legitimate interests in the property as wives of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

20. Bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses testify before it which advantage is not enjoyed by this Court, I find the factual findings of the trial Court are supported by the evidence on record. I find there no basis to interfere with those findings of fact. I hereby uphold the decision of the lower Court in respect to count one. It is instructive that the conduct of the parties and the transaction were civil in nature. There was no whiff of a criminal nature and hence the parties should resolve the same in a civil court. In any case, there is already a civil case lodged by the spouses of the respondents in which the complainant could easily seek to be enjoined as an interested party to protect his interest as a purchaser.

21. With regard to count two, the offence of cheating is established in section 315 of the *Penal Code* stated below;

315. Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity



of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years.

22. The Appellant argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cheated the Complainant by using a fraudulent trick to obtain Kshs. 5,000,000/= from him. There is no evidence on the lower Court record that links the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the offence or supports the charge. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent duly testified that they were still willing to effect transfer of the parcel of land to the Complainant as they had duly executed the sale agreement with the 1<sup>st</sup> Respondent admitting to have received the Kshs. 5,000,000/= which he spent in his political campaign. It is noted that the only impeding hurdle is the yet concluded ELC case No. 102/2017 which according to them was filed by their wives without their knowledge. I find that the transaction was purely a civil matter without any criminal connotation. The Appellant failed to link the Respondents with any hidden mischief between them and their wives such as a collusion with the aim of defrauding the complainant. Since the ELC case is ongoing, the complainant could still seek to be enjoined therein so as to protect his interests or even proceed to file a separate suit against the Respondents. I concur with the holding by the lower Court and find that the Appellant failed to prove its case under this count beyond reasonable doubt.

23. In view of the foregoing observations, I find that the appeal is devoid of merit and is hereby dismissed.

**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF DECEMBER 2023**

**D. KEMEI**

**JUDGE**

In the presence of:

Mwaniki for Appellant

Natwati for Wakoli for 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Bw'Onchiri for Change for 2<sup>nd</sup> and 4<sup>th</sup> Respondents

Kizito Court Assistant

