



REPUBLIC OF KENYA



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**Mbui v Republic (Criminal Appeal 90 of 2023)
[2025] KEHC 2210 (KLR) (Crim) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 90 OF 2023
CM KARIUKI, J
FEBRUARY 6, 2025**

BETWEEN

EDWIN NJUGUNA MBUI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgement of the Honourable Magistrate Daffline Nyaboke Sure (SRM),
which was delivered on the 26th day of July 2022 in Criminal Case No. E2363 of 2021)*

JUDGMENT

1. Before this Court for determination is the Appellant’s Appeal dated 21 September 2022. The Petition is based on the following grounds: -
 - i. The learned magistrate erred in Law and, in fact, failed to appreciate that the charge sheet was defective and that the Appellant pleaded without understanding the charge he was pleading to.
 - ii. That the learned magistrate erred in Law and fact in failing to appreciate that the offense of obtaining by pretense was not proved, even after the defense counsel drew her attention during cross-examination.
 - iii. The Learned Magistrate erred in Law and, in fact, in failing to find that the Appellant’s receipt of the money could not in any way amount to the offense of obtaining by pretense, as indeed the complainant testified that he was giving the money in “appreciation.”
 - iv. The learned magistrate erred in Law and fact in finding the accused guilty of count 3, yet the documents/exhibits were not subjected to any forensic analysis.



- v. The learned magistrate erred in Law and fact in finding the accused guilty of count 4, yet the documents were not subjected to any forensic analysis.
- vi. The learned magistrate erred in Law and fact in finding the accused guilty of count 5, yet the documents were not subjected to any forensic analysis.
- vii. The Trial Magistrate erred in Law and fact by failing to appreciate the fact that PW1 and PW2 were not competent witnesses as they did not have the authority to testify on behalf of Kinangop Dairy Limited.
- viii. The learned Trial Magistrate failed to appreciate the contradictions and inconsistencies that undermined the prosecution's case.
- ix. That the learned magistrate erred in Law and, in fact, in sentencing, the sentence meted out was excessive in the circumstances.

2. Appellant's Submissions

3. On the first ground, it was submitted that an accused person is entitled to not only be charged with an offense recognized under the Law but also to be furnished with all the necessary details of the offense so as to enable him to appreciate the nature of the charge(s) against him and to prepare for an appropriate defense. It was submitted that in counts 3, 4, and 5, the prosecution stated that the Appellant made and altered the document. However, in the course of proceedings and hearing, they did not prove how he made or uttered the documents with intent to defraud, nor did they prove that the Appellant supplied the said documents. It is, therefore, their contention that the prosecution did not prove their case beyond reasonable doubt, and they did not furnish all the necessary information concerning the charges against the Appellant.
4. On grounds number 2 and 3, it was submitted that throughout the prosecution case, the witnesses testified having sent the money to one Ms. Catherine and Mr. Washington but not to the Appellant herein. PW5 Nancy Wangui stated that she sent Kshs 30,000 to Washington Kimani Mwangi. Kshs 15,000 to Catherine Mugure Kaira, and Kshs 30,000 was sent to Washington by her husband. Further PW6, CPL Nick Odhiambo testified that Kshs 20,000 was sent to Washington Kimani by Emma Njeri, who was also a prosecution witness. The Appellant asserted that the monies sent were not through duress or undue influence as all the parties involved had mutually agreed on the same. Reliance was placed on *Gerald Ndoho Munjuga vs. Republic* [2016] eKLR, where Mativo J cited the case of *Dr. Edwin U. Onwudiwe vs Federal Republic of Nigeria, Joseph Wanyonyi Wafukho -versus- Republic* (2020) eKLR, *Stephen Ndungwa versus Republic* (2020) eKLR.
5. The Appellant argued that the offense of obtaining money by pretense was not proved against the Appellant. This is because there was no undue influence meted upon the complainants by the Appellant herein, but it was an agreement that was arrived at consensually by all the parties involved in the transaction. Also, the promises made by the Appellant related to an event that was to take place in the future.
6. On ground numbers 4, 5, and 6, it was averred that the prosecution witness (PW-6) admitted not having subjected the documents they alleged to have been uttered by the Appellant. This means that they did not seek to establish whether the Appellant was indeed the author or utterer of the documents presented in Court. It is, therefore, our submission that the prosecution did not indeed prove that the Appellant actually uttered the documents. Reliance was placed on *David Mutsotso Wendo vs Republic* (2019) eKLR, where Justice Odunga quoted the Court of Appeal case of *Joseph Mukuha Kimani vs. Republic* [1984] eKLR, *Kilee v Republic* [1967] EA 713 at p 717.



7. Wiregardrds to ground number 7, it was stated that PW1 and PW2 were employees of Kinangop Dairy Limited and are legal persons under the Company’s Act with the power to sue. The Appellant was charged with the offense of uttering a false document, a fake employment letter without lawful authority, purporting to offer employment at Kinangop Dairy. It was asserted that the two witnesses had to get written authorization from the company, which was not the case here.
8. groundsber 9 and 10, it was averred that the sentence of 10 years imprisonment is harsh and excessive. Reliance was placed on Republic vs Sharif Mohammed Hija (2016) eKLR. The Appellant asserted that the learned magistrate’s sentence was excessive in the circumstances aneededeed to be interfered with. He urged the Court to quash the said sentence in all the counts so that the Appellant is set at liberty.
9. Respondent’s Submissions was not in the file at the time of drafting this judgement

10. Analysis and Determination

11. The role of the Court is to re-evaluate, 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).
12. The Appellant herein was charged with the offense of making a false document contrary to Section 357 (a) of the *Penal Code*. The brief particulars are that with the intention to defraud and without lawful authority, the Appellant made employment letters purporting them to have been prepared and issued by Kinangop Dairy Limited, KDL, hereinafter in Count 3.
13. In Counts 4 and 5, the Appellant was charged with the offenses of uttering a document with the intention to defraud. The brief particulars are that, jointly with others not in Court, the accused knowingly uttered a fake employment letter to PW3 and PW4.
14. In count 6, the Appellant is charged with the offense of conspiracy to defraud. The brief particulars are that with others not before the Court, they conspired to defraud Nancy Wangu and Humphrey Njoroge Kshs. 50,000/- pretending they were in a position to secure an employment opportunity for Charles Mura Kimani with KDL.
15. The Appellant’s grounds of appeal raised issues that the charge sheet was defective. It was submitted that in counts 3, 4, and 5, the prosecution stated that the Appellant made and altered the document. However, in the course of proceedings and hearing, they did not prove how he made or uttered the documents with intent to defraud, nor did they prove that the Appellant supplied the said documents. It is, therefore, their contention that the prosecution did not prove their case beyond reasonable doubt, and they did not furnish all the necessary information concerning the charges against the Appellant.
16. The Law on drafting a charge sheet is found under Section 134 of the *Criminal Procedure Code*, which states as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offense or offenses with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offense charged.”



17. Further, in the case of *Isaac Omambia v Republic* [1995], the eKLR court considered the ingredients necessary in a charge sheet and stated as follows:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code*, which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offense or offenses with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offense.”

18. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR quoted the *Isaac Omambia* case with approval and further stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *YONGO v R*, [198] eKLR that:

“In England, it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- i. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offenses not disclosed in that evidence or fails to charge an offense which is disclosed therein,
- ii. when for such reason it does not accord with the evidence given at the trial.”

19. The Appellant stated that he did not understand the charges he was pleading to. In his submission, he averred that the prosecution did not prove how he made or uttered documents with intent to defraud, nor did they prove that he supplied the said documents regarding counts 3, 4, and 5, thus making the charges defective.

20. I have gone through the trial record, and it is my opinion that the charges in each count and the respective particulars were read out to the accused in a language of his choice, and he pleaded not guilty. Furthermore, when the charges were amended, the same was done. It is also worth noting that counsel represented the Appellant. At no point did the Appellant or his counsel object to the charges that had been pleaded to. Further, the Appellant, through his counsel, cross-examined the witnesses, indicating that they understood the charges.

21. The case of *Peter Sabem Leitu v R*, Cr further guided the Court of Appeal. App No. 482 of 2007 (UR), where the Court held thus:

“The question, therefore, is, did this defect prejudice the Appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the Appellant, and he responded. As such, he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offense of robbery with violence as well as the date the offense is alleged to have occurred. These particulars were also read out to the Appellant on the date of taking the plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the Appellant.”



22. Accordingly, the test of whether a charge sheet is defective or not is substantive. It should ensure that no miscarriage of justice was occasioned, which is prejudicial to the Appellant, by the error and/or defect in the charge sheet. I hold that in the circumstances of this case, no injustice was occasioned towards the Appellant, and he did not suffer any prejudice as a result of the charges he pleaded to. It is my considered finding that ground 1 of the appeal lacks merit, and it must fail.
23. In regards to count 3, the Appellant was charged with the offense of making a false document contrary to Section 357 (a) of the *Penal Code*. The brief particulars are that with the intention to defraud and without lawful authority, the Appellant made employment letters purporting them to have been prepared and issued by Kinangop Dairy Limited.
24. Further, in Counts 4 and 5, the Appellant was charged with the offenses of uttering a document with the intention to defraud. The brief particulars are that jointly with others not in Court, the accused knowingly uttered a fake employment letter to PW3 and PW4.
25. I have thoroughly analyzed the trial record and the Appellant's submissions. PW3, Emma Njeri Wangeci, stated that the Appellant was known to her because they both lived in Kahawa West. It was her testimony that she met the accused sometime in November 2021 and expressed that she was looking for a job and the Appellant told her that he could secure her a job in KDL, where he worked. She stated that the Appellant sent her a job advert through WhatsApp; then, on 15th November 2020, she received a call from one Washington Kimuri Mwangi, who identified himself as the marketing auditor of KDL. He told her the application was approved and that she was supposed to buy mbuzi for the HR, which was Kshs. 35,000/-. She sent Kshs. 10,000/- on diverse dates and a further Kshs. 3,900/- which she was told was for clearance documents.
26. Afterward, Washington told her she would be contacted on when to report. After a day, Catherine Mugure Kaka telephoned her and introduced herself as the procurement officer at KDL. She told her that she was to report on 7th December 2020, but she was to clear the balance of Kshs. 11,000/- which she sent in two batches, i.e., Kshs. 10,000 and Kshs. 1,000/- to Catherine. She testified that she was told to pay Kshs. 35,000 initially by the Appellant, then by Washington. Catherine then sent her a reporting letter via email, which told her to print, sign, scan, and send it to her. The reporting date had been changed to 4.1.2021, and she was to report to Nyandarua.
27. On 4.4.2021, she reported to KDL with her papers only to learn that there was nothing like that, and they were directed to the police station to make a report.
28. PW4, Janice Kathure Muchema, testified that PW3, who was her friend, introduced her to the KDL jobs. She believed that the job was genuine when PW3 sent her her appointment letter, and she also told her the connection was through the Appellant. PW3 sent her Catherine's number, which informed her of various positions, and she then requested her CV and cover letter, which she sent through email. Catherine told her she qualified for the job, but HR was requesting Kshs. 50,000/- for mbuzi. She sent Kshs. 8,000/- at first, then Kshs. 42,000/-. She was further asked to send Kshs. 5,000/- for medical, but she did not send it. After pestering Catherine for her appointment letter, she was sent an appointment letter and guarantee forms, which she printed, signed, scanned, and sent back. She was to report on 4.1.2021. She asserted that on that day, she met the HR at KDL, who did not recognize the appointment letter, and they then reported to the Engineer Police Station.
29. PW5 Nancy Wangu testified that KDL offered her brother-in-law, Charles Mura, a job, and they had to pay Kshs. 50,000/- as appreciation money. She received the job advertisement from Catherine and paid Kshs. 15,000, her husband and a friend paid Kshs. 15,000/- and Kshs. 5,000/- respectively to Washington and Catherine. They later learned that the job was false after going to KDL to verify it. The



Appellant's sister approached her and agreed to refund the money, but the same thing did not happen. He stated that the Appellant told them that he was the HR of KDL and that he sent the employment documents to Charles to sign.

30. On her part, PW2 Olivia Mole Mwachofi, the head of Human Resources and security in KDL, testified that in January 2021, she encountered PW3 and PW4's case, who stated they had reported to work after being hired. She saw their hiring documents, which were not familiar to her. On MF1, she stated that the document indicated employment as a sales supervisor, and the signatory was Olivia Mwachofia, which is not her name. The document style was also different from KDL letters; the font was different, it was updated, and it was missing staff numbers and footers. She also stated that the technical details were not in tandem and that a sales supervisor does not report to a depot manager as indicated in the letter, which was not specific on where the person was to be stationed. Additionally, all fresh employees are given probationary contracts and a letter of appointment.
31. MF2 was another letter of employment as a market auditor, and it had the same discrepancies as MF1. She confirmed that she did not draft the letter or the guarantee forms and that they did not emanate from KDL, but the police told her that they were from the Appellant.
32. It was her testimony that the Appellant was an employee of KDL from 2018 to 2019. However, he was terminated because he sold KDL products in a distributor's area, which was not allowed. He returned many expired products, traveled for excess kilometers without permission, drove the company truck yet had a driver, and also misused a client's account to make a transaction.
33. PW6 No. 73726, CPL Nick Odhiambo, the investigating officer, testified that he received two complaints from PW3 and PW6 stating their cases as enumerated above. He testified that PW3's Mpesa statement reflected the transactions between Catherine, in,e, and Washington and that Shadhass sent Kshs. 34,9—/- in total.
34. PW6 received a data report for the various telephone numbers belonging to the Appellant, Washington, and Catherine. The number registered to the Appellant was paired with a phone mode Vell com Technology limited, model no. C3322. The number registered to Catherine and Washington was also paired with the same phone, and the data revealed that all of them were operating around Kahawa West. It was his testimony that this same phone was recovered from the Appellant when he was arrested.
35. He also purportedly received the employment letters and guarantee form from KDL and stated that he saw the email that had sent the letters, which came from antium80@yahoo.com. The investigating officer pointed out that he had received other complaints from other complainants, but the Appellant had paid them back.
36. Consequently, it is evident that, whereas the Appellant was arrested, Catherine and Washington were never arrested. I agree with the trial magistrate that: -
"There is no dispute that PW3 and PW4 received their appointment documents from Ms. Catherine. From most statements, PW3, PW4, and PW5 made payments to either Washington or Catherine. The Appellant was an employee of KDL at one time but was terminated due to disciplinary issues. PW2 did not author the appointment documents, yet her name was manipulated in the documents"
37. The offense of making a document without authority is set out in Section 357(a) of the [Penal Code](#) as follows: -
 - a. "Any person who, with intent to defraud or to deceive:



- a. without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing.”

38. From the definition, the offense constitutes the following ingredients: -

39. proof of the making, signing, or execution of a document and that the same was done by the accused,

40. proof that the making, signing, or execution was without lawful authority or excuse and

41. proof that the making, signing, and execution were with the intention to defraud or deceive.

42. As regards the offense of uttering a false document, the same is defined under Section 357(b) of the [Penal Code](#) as;

“Any person who, with intent to defraud or to deceive

- (b) knowingly utters any document or electronic record or writing so made, signed or executed by another person.”

43. Section 348 of the [Penal Code](#) establishes the intent to defraud. It reads: -

An intent to defraud is presumed to exist if it appears that at the time when the false document was made, there was in existence a specific person ascertained or unascertained capable of being defrauded thereby. This presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

44. In *Peter Thurairara v Republic* [2022] eKLR, it was stated that: -

“In Law, a document is classified false when it purports to be made by a person who did not make or authorize its making, or if its contents be altered materially, or if the whole or part of it is shown to have been made by or on behalf of a person who is fictitious or deceased or where it is indeed shown to have been made by a living real person or by his authority the intention is to pass it as having been made by another not being the maker. Put differently, a document is false when, among other things, it purports to be what it is not; when altered without authority so as to affect its effect and alter the purport thereof or when signed without authority in the name of the person as the author or where the person shown as the author is fictitious or dead.”

45. Accordingly, P.exh. 1-5 were obtained from a ‘Ms. Catherine’ who was never arrested. PW3 asserted that she knew the Appellant from Kahawa West, who promised to organize a job for her at KDL, where he worked, and she was also the one who introduced PW4 to the Appellant. The Appellant was lying because he had already been terminated from KDL at the time of making these assurances to PW3. The Appellant also sent PW3 a job advert via WhatsApp. Consequently, both PW3 and PW4 began receiving telephone calls from Catherine and Washington about the job offer and ‘appreciation money,’ which they both sent to them, and they received employment documents from a ‘Yahoo email’ said to be from Catherine. The link to Catherine and Washington was the Appellant herein.

46. Although the Appellant and the said Catherine and Washington were using different telephone numbers to contact the victims, it was later proven that these numbers were operating around the same area, i.e., Kahawa West, and were connected to the same mobile phone, which was recovered from



- the accused, during his arrest. I agree with the trial magistrate's conclusion that the accused definitely colluded with Catherine and Washington and that it appears that they were together when making calls, receiving money, and sending the appointment letters.
47. Additionally, the Appellant, who was a former employee of KDL, had some knowledge of KDL employment practices and definitely knew who the HR Manager was, and all he had to do was skew her name in the false appointment letters. From the trial evidence, he was undoubtedly the mastermind and was behind the making and uttering of the false documents. He was the primary link to KDL and also to Catherine and Washington in the procurement of the false documents intended to lie to the victims that they had secured jobs from KDL. They presented these documents on their alleged date of reporting only to learn that they had been duped. From PW2's evidence, I am convinced that the documents were falsified and did not emanate from her or KDL. I agree with the trial magistrate that it was the Appellant who introduced PW3 to the transaction that culminated in her receiving the false documents. The same was extended to PW4, who received the same false documents.
48. Accordingly, I find that counts 3, 4, and 5 were proved by the prosecution beyond a reasonable doubt and uphold the trial magistrate's conviction on them.
49. As to whether the ingredients of the offense of conspiracy were proved,
50. Section 317 of the *Penal Code* provides for the offense of conspiracy to defraud in the following terms:
51. 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 misdemeanor and is liable to imprisonment for three years.
52. The Black's Law Dictionary 9th Edition at, page 351 defines conspiracy as:-
- “An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreement's motive, and (in most states), action or conduct that furthers the agreement; a combination for an unlawful purpose.”
53. In Archibold's Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell), on pages 3025 and 3026, it is observed as follows:-
- “The offense of conspiracy cannot exist without the agreement, consent or combination of two or more persons..... so long as a design rests in intention only, it is not indictable; there must be an agreement...
- 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.”
54. Accordingly, in order to prove an offense of conspiracy to defraud, the elements to be proved are the existence of an agreement and the intention to defraud the public. It requires that a shared purpose between them or among the subject parties is proved. Common intention is set out in Section 21 of the *Penal Code* as follows:
- When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and the prosecution of such purpose, an offense is



committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offense.”

55. I note that the Appellant is charged alone, yet conspiracy is an offense involving several accused persons. A person cannot conspire alone and cannot be charged alone with conspiracy. In *Ronald Kiptoo Yator vs. Republic* [2019] eKLR, the Court relied on the case of *Christopher Wafula Makhoha vs Republic* [2014] eKLR in holding that the charge of conspiracy to defraud must involve two or more persons and not a single accused person
56. However, there is authority in *R v Anthony* [1965] 2 QB 189 (Lord Parker CJ, Marshall & Widgery JJA) and *Ongodia and Erima v Uganda* [1967] EA 137 (Bennett, Sheridan JJA & Russell Ag J) that an accused person may be convicted even where the co-conspirators are unknown. That is rare and exceptional, given that conspiracy is an offense whose commission involves more than one person, and for a single individual to be charged and convicted, there must be overwhelming evidence that that person was part of the agreement to commit the offense planned.
57. Applying the above principles to the facts and circumstances of this case, it is my considered view that even though the Appellant’s co-conspirators were not arrested, the prosecution proved beyond reasonable doubt that there was a meeting of minds to constitute the offense of a conspiracy to commit a felony by the fact that it was proven that the Appellant, Catherine, and Washington were using the same phone and different lines to contact the complainant. It is also clear to me that the Appellant was at the heart of this conspiracy, and he even went ahead and falsely represented himself as KDL’s HR to dupe the complainants. He enlisted Washington and Catherine as his co-conspirators in contacting the complainants and collecting money from them whilst sending fake employment documents. I also take judicial notice that other counts against him were dismissed because he paid the complainants.
58. In regards to the sentences, the trial magistrate imposed 3 years each on counts 3, 4, and 5 and 1 year on counts 6, with an option of Kshs. 100,000/- as acceptable to run consecutively. The sentences were legal and proper; however, whereas the sentences in counts 4 and 5 relate to crimes committed against different complainants and within different transactions on different dates, count 3 relates to similar complainants and transactions. Therefore, I uphold the sentence in count 3 for 3 years, count 4 for 3 years, count 5 for 3 years, and count 6 for 1 year; however, the sentence in count three shall be served concurrently with that in counts 4, 5 and 6 which shall be served consecutively for the aforementioned reasons, i.e., the Appellant shall serve 7 years in total.
59. Thus, court makes the orders that;
- i. The appeal on conviction is dismissed.
 - ii. I uphold the sentence in count 3 for 3 years, count 4 for 3 years, count 5 for 3 years, and count 6 for 1 year; however, the sentence in count three shall be served concurrently with that in counts 4, 5 and 6 which shall be served consecutively THUS, the Appellant shall serve 7 years in total from the date of the sentencing.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
6TH DAY OF FEBRUARY, 2025**

CHARLES KARIUKI
JUDGE

