



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugwuku v Republic (Criminal Appeal E211 of 2022)  
[2025] KEHC 4317 (KLR) (Crim) (1 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4317 (KLR)

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

**CRIMINAL**

**CRIMINAL APPEAL E211 OF 2022**

**CJ KENDAGOR, J**

**APRIL 1, 2025**

**BETWEEN**

**ASHFORD MURIUKI MUGWUKU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence of Hon. Wandia Nyamu,  
P.M. in Milimani Chief Magistrates Court Criminal Case No. 480 of 2016)*

**JUDGMENT**

1. The Appellant was charged with the offence of stealing by an agent contrary to Section 268 (1) as read with Section 283 (c) of the *Penal Code*. The particulars were that on diverse dates between 7<sup>th</sup> March, 2012 and 11<sup>th</sup> April, 2014 at Rural Electrification Authority at South C area within Nairobi City County, being an agent of Equip Agencies Limited stole cash Kshs.4,286,240/= the property of the said Equip Agencies Limited which he had received from the said Rural Electrification Authority for or on behalf of Equip Agencies Limited. The lower Court found him guilty and he was convicted as charged. He was sentenced to a fine of Kshs.1,000,000/= or serve a sentence of imprisonment for 1 year.
2. The Appellant was dissatisfied with the conviction and the sentence and appealed to this Court vide a Record of Appeal dated 8<sup>th</sup> November, 2022. He listed the following Grounds of Appeal;
  1. The learned Trial Magistrate erred in law in failing to find and hold that, as Advocate acting for the complainant whose fees remained unpaid, the Appellant had a claim of right to the funds in question in the alleged charge, as special owner thereof within the meaning of definition of stealing under section 268 of the *Penal Code*. The learned Magistrate erred in law in failing to find that the receipt of the funds in question and retention thereof by the Appellant falls within the exception under section 268 (1) of the *Penal Code*, not amounting to stealing.



2. The learned Trial Magistrate erred in law in failing to find that the Appellant falls within the class 'Special Owner' as a person who holds a charge or lien upon the funds received for unpaid legal fees, under the [Advocates Act](#).
3. The learned Trial Magistrate erred in law in failing to find that the Advocate-Client relationship in existence, or dependent upon the holding possession of the funds in question in the charge, thereby misapprehended the application of section 268 (1) of the [Penal Code](#) vis a vis the charge herein.
4. The learned Trial Magistrate erred in law in failing to find that there existed an understanding and/or agreement that funds recovered by the Advocate/Appellant would be applied towards settlement of legal fees, costs and expenses payable to the Appellant, and that in the circumstances, any amounts of money received by the Appellant would form an item in a debtor and creditor account between them, and that the relationship of debtor and creditor would exist between the parties in respect of it, until and unless the accounts are settled, in terms of section 272 of the [Penal Code](#). The trial Court failed to construe the application of the law in this regard in the circumstances of this case, thereby, failing into error of law, misdirecting itself leading to erroneous conviction of the Appellant.
5. The learned trial magistrate did not have jurisdiction, and, thereby erred in disregarding the objections raised by the Appellant in this regard, in entertaining the charge in the absence of consent to prosecute from the Director of Public Prosecutions, or a Statutory Report thereof, which is requisite to such prosecution under sections 80 & 61 of the [Advocates Act](#) in the matter regarding this matter, which is subject of proceedings at the Advocates Disciplinary Tribunal, DT Cause No. 17 of 2018: Equip Agencies Ltd vs Ashford Muriuki Mugwuku, thereby exposing the Appellant to double jeopardy and grave injustice.
6. The learned trial magistrate erred in law in further disregarding civil suits in the commercial division between the Appellant and the Complainant for Taxation of Bills of Costs for work done by the Appellant in HCCC Misc. Appn. Nos. E064 of 2018, E089 of 2018, E063 of 2018, A.M. Mugwuku t/a Ashford & Co. Advocates Vs Equip Agencies Ltd, as well as Civil Appeal No. 56 of 2014; Unicom Ltd vs Ghana High Commission in the Court of Appeal at Nairobi for Taxation of costs due to the Appellant from the complainant. The trial court in so doing erred in law in convicting the Appellant thereby depriving the Appellant of his costs and legal fees due and payable for work done/services rendered. The conviction of the Appellant thereby infringes and violates the Appellant's fundamental right to property and/or amounts to deprivation of Appellant's right to property under Article 40 of [the Constitution](#).
7. The learned trial magistrate erred in law in failing to find this criminal charges preferred against the Appellant in the circumstances amounts to violation of the Appellant fundamental right to fair labour practices, right to fair remuneration for work done or services rendered as an Advocate to client under Article 42 of [the Constitution](#).
8. That in the circumstances, the trial court usurped the legal dispute resolution mechanisms and mandate of the Civill/Commercial Court jurisdiction of the Taxation Masters/Registrar of the court, as well as mandate of the Advocates Disciplinary Tribunal to determine what amounts to money owed by the Complainant to the Appellant on account of all the legal services rendered as Advocate. In so doing, the trial court proceedings offends section 9 of the Fair Administrative Act, 2015, that forbids court from assuming jurisdiction in matters like this, where a party does not exhaust internal/alternative or available statutory and special remedies under the primary



jurisdiction as constitutionally underpinned under Article 159 (c) of *the Constitution*, that gives rise to the doctrine of Exhaustion, which the trial court erred in disregarding.

9. The learned trial magistrate erred in law and in fact in convicting the Appellant against the weight of evidence tendered, both by the insufficient prosecution evidence and in disregard of overwhelming Defense evidence tendered and not taken into consideration.
10. In particular, the learned trial Magistrate erred in fact in finding that the payment agreement was not clear, when the prosecution case was that the Appellant has not been paid for work done, and he was to recover his fees and/or costs, and expenses from monies recovered through litigation he was handling, as was agreed in writing vide letters dated 9/3/2012 produced in evidence.
11. The Trial Magistrate contradicted herself and thereby erred in fact, in finding that the Appellant had every authority to pay himself as per the letter dated 9/3/2012, but proceeded to convict the Appellant of stealing on the other hand.
12. The Trial Court erred in fact, in disregarding the evidence tendered that the Appellant had full written authority to recover his fees from funds received on output of the work done and in the event of a dispute, the bills were subject to taxation and settlement through the civil courts or Advocates Disputes Tribunal.
13. The learned Magistrate erred in fact in finding that the Appellant was not entitled to payment for work done for the Complainant's sister companies owned, directed and controlled by the complainant who issued instructions thereon. The learned Magistrate erred in law and fact in so holding and thereby converted the Appellant to a busy body, or a pro bono advocate, which was not the case as evidence adduced by both prosecution and Defense show otherwise.
14. The learned trial Magistrate erred in law and fact in disregarding the Defense tendered by the Appellant and by further disregarding the documentary evidence tendered with regard to instructions and work done for the complainants sister companies in which PW1 is the Managing Director, namely Equip Agencies Ltd, Intertractor Co. Ltd, Unicom Limited and Bio-corn Products Ltd.
15. The learned Magistrate erred in disregarding the Original Registrar of Companies Certificates CR12 of the companies Equip Agencies Ltd, Unicom Limited and Bio-Corn Products all of which are owned, controlled, and managed by PW1 for which the Appellant rendered legal services whose costs/fees also formed the subject of the Advocates charge as lien.
16. The learned Magistrate thereby erred in fact as law, when she concluded that 'this court cannot assume that the letter gave him authority in all the other matters in sister companies'
17. The learned trial court Magistrate erred in fact and in law that
  - a. The court failed to determine and or define what amount of money if any, was stolen what the Appellant was entitled to in terms of payment for work done, when it made the finding that 'the Advocate had every authority to pay himself as per the letter dated 9/3/2012 for the services rendered to the complainant. But the amount was supposed to be reasonable...'
  - b. Finding that the Appellant did not inform the complainant of this payment, contrary to evidence adduced orally and documentary evidence;



18. The learned trial Magistrate erred in fact, when she accepted the Defense evidence of the certificates of taxation and Rulings thereon already awarded to the Appellant due from the complainant together with pending Advocate-Client bills, but proceeded to disregard the same or take them into consideration for their purposes meaning and of legal effect.
  19. The learned trial magistrate erred in law and fact in convicting the Appellant on the basis of evidence of the prosecution which was not incriminating, was ex-culpatory, insufficient to prove the charges, and did not support the charge or conviction.
  20. The trial court erred in failing to find that on the evidence adduced the charges were malicious, preferred with an ulterior motive for reasons inter alia;
    - a. Was as a result of ambush and illegal investigation of the Appellant's Bank account without a valid court order and notice to the Appellant as no prior demands or communication was made to the Appellant regarding the alleged charge.
    - b. The Appellant continued rendering legal services to the complainant up to 28/5/2018, when the complainant withdrew instructions following delivery of judgment in the Court of Appeal in favour of the Complainant in Civil Appeal No. 56 of 2014: Unicom Ltd –vs- Ghana High Commission (Azangalala, J, S. Gatombu Kairu, J, & A.K Murgor, J, JJA in which the Appellant was acting for the complainant-client, and for which the Appellant's legal fees and costs remain unpaid.
  21. The learned trial court erred in law, and contradicted or misdirected itself against the evidence adduced, in which no evidence sufficient or cogent to support the charge of theft was adduced.
  22. The learned Magistrate erred in law and fact, as it is evident that the Appellant had Advocate-Client business transactions with the complainant and the complainant has not fully discharged his/its part of the business obligations and if vice versa, which is denied, the complainant was at liberty to take appropriate civil actions against the Appellant.
  23. The trial court erred in the totality of the circumstances, in convicting and harshly sentencing the Appellant on defective and irregular charge, without any cogent evidence in support thereof and without giving any reasons of law supporting the said decision.
  24. The trial court could have made findings of various doubts and ambiguities as well as exculpatory evidence in the prosecution's case, but erred in law when it proceeded to find that the prosecution proved its case. In fact, the trial court did not find that the prosecution has proved its case to the required standard of proof, or beyond reasonable doubt, hence the convictions extremely unsafe.
3. The Appellant asked this Court to allow the Appeal and set aside or quash both the conviction and sentence in Nairobi Milimani Criminal Case No. CR. 480 of 2016, and set him at liberty.
  4. The Appeal was canvassed by way of written submissions.

### **The Appellant's Written Submissions**

5. The Appellant submitted that the key issue was to establish whether his actions could be deemed to be fraudulent and without a claim of right. He argued that his actions cannot be said to have been without a claim of right over the funds because he had previously acted and represented the complainant in several matters and he had not been paid for his services. He submitted the various Bills of Costs taxed in his favour were a sufficient proof that he had a claim of right over the funds. He argued that his claim



of right over the funds was also supported by the fact that PW1 had admitted that he had not paid the Appellant his dues. For these reasons, he submitted that his actions for retaining the complainant's funds could not be deemed as theft.

6. In addition, he submitted that his action of retaining the funds could not be deemed to be fraudulent because he retained the same with the consent of the complainant. He argued that he had an agreement with the complainant (Equip Agencies Limited) to the effect that he would obtain and recover his legal fees from the Complainant. He bases this claim on a letter dated 9<sup>th</sup> March, 2012 written by the Complainant addressed to him, the Appellant. On the basis of this letter, he argued that there was consent and permission from the Complainant that he would use the monies recovered in the litigation to offset his legal fees.
7. He submitted that the lower Court should not have convicted him as it did because the prosecution did not prove their case beyond reasonable doubt. He maintained that the conviction was unwarranted and the sentence was harsh and excessive in the circumstances.

### **The Respondent's Written Submissions**

8. The Respondent submitted that this Court should uphold the lower Court's conviction and sentence because there was sufficient evidence on record to support both the conviction and the sentence. It argued that the prosecution had established that the Appellant was an agent of the Complainant and that he received the funds on behalf of the Complainant. It submitted that the Appellant was not justified in paying himself legal fees from moneys that ought to have been remitted to the Complainant Company i.e Equip Agencies Ltd.

### **Issues for Determination**

9. Having considered the Grounds of Appeal and the submissions from both sides, the issues for determination are as follows;
  1. Whether the Trial Court had Jurisdiction to Entertain the Criminal Proceedings against the Appellant
  2. Whether the conviction was lawful.
  3. Whether the Sentence should be reviewed.

### **The Duty of the Court**

10. The role of this Court as the first appellate court is well settled. In *Okeno vs. Republic* (1972) EA 32 and *Mark Oiruri Mose vs. R* (2013) eKLR, the Courts established that a first appellate Court is duty bound to revisit the evidence tendered before the trial Court afresh, evaluate, analyze it and come to its own independent conclusion but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

### **Whether the Trial Court had Jurisdiction to Entertain the Criminal Proceedings against the Appellant**

11. The Appellant argued that the learned trial magistrate did not have jurisdiction, and, thereby erred in disregarding the objections raised by the Appellant in this regard, in entertaining the charge in the absence of consent to prosecute from the Director of Public Prosecutions, or a Statutory Report thereof, which is requisite to such prosecution under Sections 80 & 61 of the *Advocates Act* in the matter regarding this matter, which is subject of proceedings at the Advocates Disciplinary Tribunal,



DT Cause No. 17 of 2018: Equip Agencies Ltd vs Ashford Muriuki Mugwuku, thereby exposing the Appellant to double jeopardy and grave injustice.

12. It submitted that in the circumstances, the trial Court usurped the legal dispute resolution mechanisms and mandate of the Civil/Commercial Court jurisdiction of the Taxation Masters/Registrar of the Court, as well as mandate of the Advocates Disciplinary Tribunal to determine what amounts to money owed by the Complainant to the Appellant on account of all the legal services rendered as Advocate. In so doing, the trial court proceedings offends Section 9 of the Fair Administrative Act, 2015, that forbids Court from assuming jurisdiction in matters like this, where a party does not exhaust internal/alternative or available statutory and special remedies under the primary jurisdiction as constitutionally underpinned under Article 159 (c) of *the Constitution*, that gives rise to the doctrine of Exhaustion, which the trial court erred in disregarding.
13. I do not agree with the Appellant's suggestion that the trial Court did not have jurisdiction. A similar question arose in *Kamau John Kinyanjui v Republic* [2010] eKLR, in which an Advocate was charged with Theft by an Agent for mishandling client's money. In that case, the Court of Appeal upheld a High Court Decision in which the High Court had held as follows;

“The Appellant also referred us to the Provisions of the Advocates' Act and the Advocates (Accounts) Rules to support his contention that an Advocate-Client relationship is a special type of agency which has specific rules that governs (sic) it. He also referred to the Provisions of *Civil Procedure Act* and particularly Order III of the Civil Procedure Rules. After perusing the said Sections of the Law referred to us (sic), we do find that the fact that there is a different and Civil Procedure given by the Law to remedy a situation does not mean that where investigations have been undertaken and a criminal offence disclosed, the person found to have also contravened the criminal law cannot be charged with a criminal offence. In the instant case, it is our finding that the advocate-client relationship does not preclude the State from instituting criminal charges where it has been established that a criminal offence was committed. We, therefore, find the submissions by the Appellant to have no merit. The Appellant cannot hide behind rule to escape criminal liability when the same has been proved. The Appellant manifested his disregard for the said rules by transferring the funds from the clients' account to his own use in utter disregard of the self-same rules that he seeks to invoke in his aid.

After re-evaluating the evidence adduced by prosecution before the trial court and after hearing the submissions made on this Appeal, we find the prosecution did prove its case beyond any reasonable doubt. We find that the Appeal filed by the Appellant against conviction has no merit.”

14. Based on the above authority, I find that the lower Court had the jurisdiction to hear and determine the criminal prosecution against the Appellant.

#### **Whether the conviction was lawful**

15. Before I relook at whether the conviction was warranted, I find it prudent to restate the undisputed facts of this case. Both parties agree that the Appellant worked for the Complainant, Equip Agencies Ltd, as its advocate in which he acted and represented the Complainant in several court matters. To that extent, they all agree that there was an agency relationship between the Appellant and the Complainant, with the former being the agent of the latter.



16. The Appellant represented the Complainant in a Court case in which the Complainant sought to recover about 10 to 11 million from Rural Electrification Authority (REA). The parties entered into an out-of-court settlement of Kshs.4,286,240/= in favor of the Complainant Company - Equip agencies Ltd. REA paid the said Decretal amount to the Complainant through the Appellant. The amount was credited to the Appellant's client account. The Appellant did not deny that he had received a total of Kshs.4,286,240/= on behalf of his client, the Complainant.
17. The Appellant failed to remit the moneys to the Complainant Company and retained the received funds. He argued that he retained the monies with a view to recovering his dues for services he had previously provided to the Complainant and for which the latter had not settled. The parties dispute on whether it was lawful for the Appellant to retain the funds and pay himself for the services he had previously rendered to the Complainant. The prosecution argued that it was criminal because the Appellant did not have the express authority of the Complainant to pay himself legal fees from the recovered costs. It argued that the Appellant was mandated to remit the recovered funds to the Complainant Company.
18. This Court is being invited to re-evaluate the evidence and determine whether the above facts disclose the offense of stealing by Agent contrary to Section 268 (1) as read with Section 283 (c) of the [Penal Code](#).
19. Section 268 (1) of the [Penal Code](#) provides as follows;
  268. Definition of stealing
    - (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
20. Section 283 (c) of the [Penal Code](#) provides as follows;
  283. Stealing by agents, etc.

If the thing stolen is any of the things following, that is to say—

    - c. property which has been received by the offender either alone or jointly with any other person for or on account of any other person;
21. The ingredients of the offense of stealing by agent were stated by the Court of Appeal in the case of *Ong'are Moguche v Republic* [2019] eKLR, where the Court stated as follows;

“In our considered view, a charge under Section 283 of the [Penal Code](#) must be read together with the definition of theft in Section 268 of the [Penal Code](#). The ingredients of the offence of stealing by agent include:

  - (i) There must be a property that is stolen within the definition and meaning of stealing as per Section 268 of the [Penal Code](#).
  - (ii) There must be an agency relationship between an accused person and the complainant.
  - (iii) The property stolen must have been received by the accused person in any of the circumstances enumerated under paragraphs (a) to (e) of Section 283 of the [Penal Code](#).”



22. In my opinion, the (ii) and the (iii) ingredients of the offence have already been satisfied because the Appellant admits that there was an agency relationship between him and the Complainant and that he received the money on behalf of the Complainant. What remains to be determined is whether the prosecution proved the first ingredient - ingredient (i), whether the Appellant's actions were fraudulent and without claim of right. Thus, the question is whether it can be said that the Appellant retained the Kshs.4,286,240/= fraudulently and without claim of right.

23. Section 268 (2) of the Penal Code describes what constitutes a fraudulent intent. It provides as follows;

“(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;”

24. The Court in Robert Onchwari Orina & another vs Republic (2021) eKLR, interpreted the above provisions in the following terms;

“..... For an accused person to be convicted of the offence under Section 268 of the Penal Code, its incumbent upon the prosecution to prove that he or she dealt with the property of the complainant fraudulently without any claim of right or converts it into his or her own use, other than the general or special owner thereof. That intention is executed in a manner to deprive the rightful owner of the property permanently.

In R v Jones (1976) KLR 1 the Court observed that:

“On a charge of theft, it was necessary to prove a fraudulent taking or conversion without claim of right, and a person was deemed to have taken or converted money fraudulently if he did so without a claim of right and with intent to use it at his will, even if he intended to repay the money to the owner.”

25. The Court of Appeal in Kamau John Kinyanjui v Republic [2010] eKLR, also faced a similar case where an Advocate was charged with the offense of Theft by an Agent for mishandling clients' money. The Court pronounced itself as follows;

“He was receiving the money as a lawyer on behalf of his clients. For him to now turn around and claim that he did not know who those clients were and therefore, could not pay out the money is ridiculous and mischievous. He removed the money from the clients' account and hid it in a place only known to himself. No law entitles a lawyer to do that; if there was such



a law, it would only encourage what Kenyans now constantly refer to as “impunity”. In our considered view, there is no law which empowers an advocate to remove money which does not belong to him from his clients’ account and hide such money in an account known only to the lawyer. That, with respect to the appellant, is stealing the money and as the money was received for and on behalf of the client, the theft is described as theft by an agent. Ground 7 of the grounds of appeal must also fail.”

26. The Appellant argued that he had an express authority from the Complainant on how he would recover the outstanding fees. He relied on a letter written by the Complainant addressed to the Appellant dated 9<sup>th</sup> March, 2012. He said the letter gave him the consent and permission to retain and recover his fees from the monies recovered. I have seen the letter and I have evaluated its contents to ascertain whether it gave the Appellant the right to withhold and recover his fees from the recovered funds. The relevant part of the letter said as follows; “As agreed, you will obtain/recover your legal fees from the Plaintiff. This will also include the court fees to wit; filing fees, service fees etc.”
27. In my view, the letter cannot be said to have given the Appellant the right to withhold and recover his fees directly from the moneys recovered from the proceedings. It cannot be said to have given the Appellant the right to pay himself from any monies he would receive on behalf of the Complainant. If the Complainant wanted to give the Appellant such a right, nothing would have been easier than expressly stating so in the agreement. In my opinion, the letter only re-stated and reaffirmed the Appellant’s right to claim legal fees from the Complainant.
28. Be as it may, the Appellant’s conduct also points towards a fraudulent intent. Evidence on record shows that, the Appellant went mute once he received the funds. He did not write to the Complainant to notify them that he had received the monies on their behalf. The Appellant did not disclose the payment and he did not account to the Complainant on how he had handled the received funds. The evidence on record shows that it was the REA’s advocates that disclosed to the Complainant that the Appellant had received the funds.
29. Evidence shows that the Appellant received the last batch of the funds on 16<sup>th</sup> April, 2014 when REA remitted the funds to the Appellant’s Client Account. The Appellant did not disclose this fact to the Complainant. The Complainant remained in the dark about the payments until 1<sup>st</sup> December, 2015 when they were notified by REA that full settlement had been made to the Appellant in 2014. The Complainant testified that the Appellant never responded to their calls and that was why they reported the matter to the police. In my view, there was a deliberate intent by the Appellant to permanently to deprive the Complainant of Kshs.4,286,240/=.
30. I am satisfied on the totality of the evidence that the Prosecution proved its case beyond reasonable doubt. I have considered the Appellant’s defence and I find that it did not cast doubt on the Prosecution’s case. I thus uphold the conviction.
31. I also find that the sentence meted on the Appellant was fair and just. The same is upheld.

### **Disposition**

32. Both the conviction and the sentence are hereby upheld.
33. The Appeal is hereby dismissed.

It is hereby ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 1<sup>ST</sup> DAY OF APRIL, 2025.**



.....

**C. KENDAGOR**

**JUDGE**

In the presence of: Beryl,

Appellant present

Ms. Manyaga, Advocate for Appellant

Mr. Omondi, ODPP for Respondent

