



**Ngode v Republic (Criminal Appeal 256 of 2018)
[2025] KEHC 4853 (KLR) (Crim) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4853 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 256 OF 2018
CJ KENDAGOR, J
APRIL 8, 2025**

BETWEEN

BENARD OMONDI NGODE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon. E. Riany,
Senior Resident Magistrate in Chief Magistrate Milimani Law Courts
Criminal Case No. 839 of 2018 delivered on 6th December, 2018)*

JUDGMENT

1. The Appellant was charged with 16 counts, namely Count I to Count XVI. For these 16 counts, he was charged jointly with Charles Otieno Membo (1st Accused) and Danson Ochieng Ataro alias Pastor Dan (2nd Accused). The Appellant was the 3rd Accused.
2. On Count I, he was charged with conspiracy to defraud contrary to Section 317 of the *Penal Code*. The particulars were that on unknown dates and time and unknown place within the Republic of Kenya, jointly with others not before court knowingly conspired to make Parliamentary Service Commission Staff Medical Card with intent to defraud various Hospital facilities payable by the Parliamentary Service Commission.
3. On Count II, he was charged with making a document without authority contrary to Section 357 (a) of the *Penal Code*. The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Stephen Kiplagat purporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99004475, holder of Identity card number



28157346 namely Stephen Kiplagat by his employer Parliamentary Service Commission to enable the said staff access Medical Services.

4. On Count III, he was charged with making a document without authority contrary to Section 357 (a) of the *Penal Code*. The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Benard Muhindi Masinde purporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99004103, holder of Identity card number 13317053 namely Benard Muhindi Masinde by his employer Parliamentary Service Commission to enable the said staff access Medical Services.
5. On Count IV, he was charged with making a document without authority contrary to Section 357 (a) of the *Penal Code*. The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Joram Shisakhapurporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99004407, holder of Identity card number 28491290 namely Joram Shisakhaby his employer Parliamentary Service Commission to enable the said staff access Medical Services.
6. On Count V, he was charged with making a document without authority contrary to Section 357 (a) of the *Penal Code*. The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Benjamin Magut purporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99004317, holder of Identity card number 20168987 namely Benjamin Magut by his employer Parliamentary Service Commission to enable the said staff access Medical Services.
7. On Count VI, he was charged with making a document without authority contrary to Section 357 (a) of the *Penal Code*.
8. The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Job Wafula Wambulwapurporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99004659, holder of Identity card number 25106843 namely Job Wafula Wambulwaby his employer Parliamentary Service Commission to enable the said staff access Medical Services.
9. On Count VII, he was charged with making a document without authority contrary to Section 357 (a) of the *Penal Code*. The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Kennedy Solomon Oshuka purporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 9903922, holder of Identity card number 27687733 namely JOB Kennedy Solomon Oshuka by his employer Parliamentary Service Commission to enable the said staff access Medical Services.
10. On Count VIII, he was charged with making a document without authority contrary to Section 357 (a) of the *Penal Code*. The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Job Annalopurporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99004494, holder of Identity card number 25300807 namely Job Annaloby his employer Parliamentary Service Commission to enable the said staff access Medical Services.



11. On Count IX, he was charged with making a document without authority contrary to Section 357 (a) of the [Penal Code](#). The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Malachi Onditi Nyangate purporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99003971, holder of Identity card number 22577403 namely Malachi Onditi Nyangate by his employer Parliamentary Service Commission to enable the said staff access Medical Services.
12. On Count X, he was charged with making a document without authority contrary to Section 357 (a) of the [Penal Code](#). The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Geoffrey Auta Onchiri purporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99004325, holder of Identity card number 13479129 namely Geoffrey Auta Onchiri by his employer Parliamentary Service Commission to enable the said staff access medical services.
13. On Count XI, he was charged with making a document without authority contrary to Section 357 (a) of the [Penal Code](#). The particulars were that on unknown dates at unknown place within the Republic of Kenya, jointly with others not before Court, with intent to defraud, without lawful authority, made a certain card number 00888 in the name of Erick Owino Ogolo purporting it to be a genuine Parliamentary Staff Medical Card issued to staff number 99003600, holder of Identity card number 21688086 namely Erick Owino Ogolo by his employer Parliamentary Service Commission to enable the said staff access medical services.
14. On Count XII, he was charged with obtaining goods by false pretenses contrary to Section 313 of the [Penal Code](#). The particulars are that on 3rd day of April, 2018 at Nairobi Hospital in Nairobi within Nairobi County, jointly with others not before Court, obtained assorted drugs namely Atripla, Galvus Met and Lyricaall valued at Kshs.23,505.26/= by falsely pretending that you were an employee of Parliamentary Service Commission namely Charles Kiplangat Korir staff number 99004514 holder of identity card number 22082996 a fact that you knew to be false.
15. On Count XIII, he was charged with obtaining goods by false pretenses contrary to Section 313 of the [Penal Code](#). The particulars are that on 11th day of April, 2018 at Mater Misericordiae Hospital in Mater Hospital in Nairobi within Nairobi County, jointly with others not before Court, obtained assorted drugs namely Atripla, Galvus Met and Lyricavalued at Kshs.21,279/= by falsely pretending that you were an employee of Parliamentary Service Commission namely Erick Owino Ogolo staff number 99003600 holder of identity card number 21688086 a fact that you knew to be false.
16. On Count XIV, he was charged with obtaining goods by false pretenses contrary to Section 313 of the [Penal Code](#). The particulars are that on the 12th day of April at Aga Khan University Hospital in Nairobi within Nairobi County, jointly with others not before Court, obtained assorted drugs namely Atripla, Lyricaand Galvus Met all valued at Kshs.140,303.72/= by falsely pretending that you were an employee of Parliamentary Service Commission namely Benard Muhindi Masinde staff number 99004103 holder of identity card number 13317053 a fact you knew to be false.
17. On Count XV, he was charged with obtaining goods by false pretencss contrary to Section 313 of the [Penal Code](#). The particulars are that on 12th day of April, 2018 at Aga Khan University Hospital in Nairobi within Nairobi County, jointly with others not before Court, obtained assorted drugs namely Atripla, Lyricaand Galvus Met all valued at Kshs.15,298/= by falsely pretending that you were



an employee of Parliamentary Service Commission namely Benjamin Magut staff number 99003922 holder of identity card number 20168987 a fact you knew to be false.

18. On Count XVI, he was charged with obtaining goods by false pretenses contrary to Section 313 of the Penal Code. The particulars are that on 12th day of April at Nairobi Hospital in Nairobi within Nairobi County, jointly with others not before court, obtained assorted drugs namely Galvus Met and Lyric valued at Kshs.36,720/= by falsely pretending that you were an employee of Parliamentary Service Commission namely Geoffrey Auta Onchiri staff number 99004325 holder of identity card number 13479129 a fact you knew to be false.
19. The Charge sheet contained additional 5 counts, namely Count XVII to Count XXI. These 5 counts were charged on the 2nd Accused only, Danson Ochieng Ataro. The Court delivered a judgment on 6th December, 2018. It held that the prosecution had proved its case beyond a reasonable doubt against the 3 accused persons as charged accordingly with the offences. The Appellant was convicted for 16 counts, namely Count I to Count XVI. On sentencing, he was sentenced as follows; 1 ½ years in jail for Count 1, 4 years in jail for Count 2, 4 years in jail for Count 3 and 4 years in jail for each count from Count 4 to Count 11. He was also sentenced to 1 year in jail for each count from Count 12 to Count 16. The sentences were to run concurrently.
20. The Appellant was dissatisfied with the judgment and brought an appeal against the conviction and the sentence vide a Petition of Appeal dated 19th December, 2018. He listed the following Grounds of Appeal;
 1. That the learned trial magistrate erred in law and fact in failing to hold that the prosecution had not established its case beyond reasonable doubt.
 2. That the learned trial magistrate erred in law and fact in purporting to shift the burden of proof from the prosecution to the Appellant.
 3. That the learned trial magistrate erred in law and fact in holding that the Appellant had conspired with his co-accused persons to defraud Parliamentary Service Commission without a scintilla of evidence to support the finding.
 4. That the learned trial magistrate erred in law and fact in failing to find that the ingredients forming the offence of conspiracy to defraud contrary to section 317 of the Penal Code had not been established against the Appellant.
 5. That the learned trial magistrate erred in law and fact in failing to find that the ingredients forming the offences enumerated in the charge sheet of making a document without authority contrary to section 357 (a) of the Penal Code had not been established.
 6. That the learned trial magistrate erred in law and fact in failing to find that the ingredients forming the offences enumerated in the charge sheet of obtaining good by false pretenses contrary to section 313 of the Penal Code had not been established.
 7. That the learned trial magistrate erred in law and fact in failing to guarantee that the Appellant had a fair trial and fair hearing as mandatorily prescribed under Article 25 (c) and Article 50 (2) of the Constitution of Kenya respectively.
 8. That throughout the hearing of the matter the Learned Trial Magistrate depicted obvious bias and hostility against the Appellant for no reason at all culminating into an unfair trial.
 9. That the learned trial magistrate erred in law and fact when she denied the Appellant the right to recall and cross examine the Investigating Officer, John Nzive.



10. That the learned trial magistrate erred in law and fact when she denied the Appellant the right to legal representation when the Prosecution's key witness CPL, John Nzive was testifying.
11. That the learned trial magistrate erred in law and fact when she relied exclusively on the uncorroborated evidence of the investigation officer, CPL John Nzive.
12. That the learned trial magistrate erred in law and fact in admitting the evidence of a document examiner without calling its maker as mandatorily prescribed in law, and despite objections from the defense.
13. That the learned trial magistrate erred in law and fact in denying the Appellant a chance to file his submissions and highlight the same on a no case to answer.
14. That the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant on account of defective and untenable charges.
15. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the police failed and/or neglected to investigate the circumstances surrounding this case.
16. That the learned trial magistrate erred in law and in fact in proceeding with the case without first ensuring that the Appellant has been furnished with all the documents the prosecution intended to rely on.
17. That the learned trial magistrate misdirected herself in convicting the Appellant herein notwithstanding the glaring holes in the prosecution case following the failure of prosecution to produce any cogent evidence against the Appellant on all the charges laid against him.
18. That the learned trial magistrate erred in failing to take into account that no exhibit directly attributed to the Appellant and relating to all the charges was produced in court at all to warrant his conviction.
19. That the learned trial magistrate erred in law and fact in completely ignoring the defense case, his submissions, and authorities cited in support of his case, and in effect shifting the burden of proof in blatant disregard of the presumption of being innocent.
20. That the learned trial magistrate erred in law and fact in relying on inconsistent and massively contradictory evidence to convict the Appellant.
21. That the conviction is unsafe and against the weight of the evidence.
21. He asked this Court to allow the appeal, quash and set aside his conviction and sentence, and acquit him.

Appellant's Written Submissions.

22. The Appellant submitted that the lower Court should not have convicted him for the above charges. It argued that the prosecution did not prove its case beyond reasonable doubt. He argued that he was not found in possession of any PSC document or the recovered drugs. He argued that PW18's evidence purporting to connect him to the other accused persons was hearsay and inadmissible. He also argued that all prosecution witnesses stated that they did not have any evidence against him. He argued that the prosecution did not prove that he knew or had met the other accused persons before they were charged in court. For these reasons, he submitted that Count 1 on conspiracy to defraud.
23. In addition, the Appellant submitted that the prosecution did not produce enough evidence to show that he was guilty for Counts 2-11. He argued that the prosecution failed to adduce any evidence to



show that it was the Appellant who made (or drew) these PSC Staff Medical Cards/documents. He submitted that no evidence was called from a document-examiner to confirm the same and no evidence was adduced by any witness to the effect that they saw the Appellant make (or draw) these false PSC Medical Cards/documents. He argued that, for these reasons, the charges remained unproven and ought to be quashed.

24. Further, the Appellant submitted that the charges in Counts 12-16 were not proved. He argued that he was not found in possession of the assorted drugs. He also argued that the prosecution did not call any witness from Nairobi Hospital, Aga Khan or even Mater Hospital to confirm that indeed those drugs were procured from their hospitals by the Appellant. For these reasons, he submitted that these charges must fail because there was no complainant from the said hospitals and he was not placed at the scene where the drugs were allegedly taken from.
25. Lastly, the Appellant submitted that the trial Court found him guilty and convicted him for Counts 16 to 21, while it was clear that the Appellant was never charged of the same charges. He argued that this was a gross error that directly infringed on his right to a fair hearing and a right to be heard.

Issues for Determination.

26. Upon consideration of the facts of this case, the Grounds of Appeal and the submissions made by counsel for the Appellant, I find that there are 2 issues for determination;
 - a. Whether the Appellant's Conviction was safe.
 - b. Whether the Sentence imposed on the Appellant was lawful.
27. The role of this Court as the first appellate Court is well settled. In *Okeno v Republic* [1972] EA 32, the East Africa Court of Appeal gave an authoritative observation on the duty of the first Appellate court. It stated as follows;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] E. A. 424.”
28. The above authority was recently affirmed by the Court of Appeal in *Peter Kifue Kiilu & another v Republic* [2005] eKLR, where the Court held that the role of the first Appellate Court is not merely to scrutinize the evidence to see whether there was some evidence in support of the trial Court's decision.
29. Based on these authorities, this Court shall undertake a wholesome review of the evidence with a view to reaching its own conclusion. As I undertake this cause, I appreciate that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. I have reviewed the testimonies of all the witnesses and I have summarized them as follows;
30. PW1 was an officer of Parliament service commission (PSC). He went to Hardy Police Station on 17th April, 2015 after he had been informed that someone had been arrested with a medical card purporting



- he was an employee at PSC. The arrested person was Danson Ochieng Ataro. He was showed 8 medical cards found with the arrested person and vouchers from Nairobi Hospital and Aga Khan Hospital. He called officers whose named were on the cards to go and report at DCI offices to record statements.
31. On 16th April, 2018, he got an invoice from Alexander Oloo and a claim form that looked suspicious. He called Alexander Oloo who said he had never been to Nairobi Hospital for treatment and the signature on the form and the invoice was not his. On 27th April, 2018, he received invoices from Nairobi Hospital. 4 of them looked suspicious. They belonged to Benard Muindi Masinde, Joram Shikha Baraza, Charles Kiplangat Korir, and Stephen Kiplangat Enock. I called the 4 persons and said they had not been at the hospital on the dates in question and the signatures were not theirs.
 32. PW2-Job Wafula Wambulwa-worked for PSC as a legal counsel. He stated that on 18th April, 2018, he was away attending a training in Kampala Uganda when he was called and informed that someone had been arrested in Nairobi Hospital purporting to be him and with a medical card presented as his. He had his medical card in Kampala. He was shown the recovered medical card. It was different from his. The picture on the card was not his and the arrangement of names was also different. The name in the recovered card was Job W. Wamburwa. The medical card numbers are different. His real card was No. 01023 while the one on the recovered card was No. 00888. The font sizes were also different. He had never visited Nairobi Hospital.
 33. PW3-Benard Masinde- was a sergeant at arm at PSC. On 13th April, 2018, he was in Naivasha having a retreat when he was informed that his medical card had been used to get drugs from a hospital. He confirmed that he was in Naivasha and had not been to any hospital. He went to write a statement on 16th April, 2018 where he was shown the card that he been used to get drugs. He had his. The picture on the fake card was not his and the order of names was also different. His medical card number was also different from the one in the fake card. His real card was No. 00436 while the one on the recovered card was No. 00888. The signature in the prescription form was not his. He had not visited Aga Khan Hospital for the last 2 years. He also did not visit Nairobi Hospital on 12th April, 2018 because he was in Naivasha.
 34. PW4 was a Human Resource officer at PSC. He stated that in February, 2018 he realized that his card was missing and reported to the chief security officer who helped him get a new card. In April, 2018, he was called to DCI parliament where he was informed that his card was being used by people to get medicine. He stated that he was not at Nairobi Hospital on 3rd April, 2018.
 35. PW5-Onchiri- was an officer at PSC security department. On 18th April, 2018, he went to the CID to record a statement. He was shown medical cards and prescription forms with his name and a medical voucher from Nairobi Hospital for 12th April, 2018. Amongst them was a card with my full name. He had his original medical card with him. The picture on the fake card was not his and the staff card serial number was different. His real card was No. 00632 while the one on the recovered card was No. 00888. The staff number and ID number were the same but the order of names was reversed. He did not seek medication from Nairobi Hospital on 12th April, 2018.
 36. PW6 worked at PSC. On 15th April, 2018, he was informed by the security officers that his medical card had been fraudulently used. He went to Parliament Police Station. He had his original medical card with him. The forged one did not have his picture. His original card had a typo error spelt as Okolo yet the fake one had Ogolo. He did not visit Mater Hospital on 11th April, 2018 at 12.27 p.m. nor did he collect any drugs and the signature on the invoice was not his.
 37. PW7 was an employee at PSC. He was called on 13th April, 2018 and asked to report to the DCI's office. He was informed that some people were caught with medical cards and that one of the cards was



- in his name. The photo on the fake card was different from his. The order of names in the fake card was also different from the order in the real card. The fake card also had a different card number. He last went to Agha Khan Hospital in 2015. He has never been to Nairobi Hospital and did not collect any medication there.
38. PW8 was an employee at PSC. He went to record my statement with the DCI. At the DCI, he was shown a card with all my 3 names, ID number, and personal number but the photo on the card was not his. He had his card with him. The card number on the fake card was different from the number on his card. He did not visit Agha Khan Hospital on 7th April, 2018 nor collect any drugs. The signature of PMFI 4 (invoice) was not his. He did not visit Nairobi Hospital nor collect any drugs and the signature on the invoice was not his. The phone number was also not his.
 39. PW9 was an employee at PSC. On 13th April, 2018 he was informed that his medical cover had been forged and he went to record a statement. He was shown the card that had been recovered from Danson Ochieng Ataro. He stated that the photo on the card was not his and the order of names had been reversed. He had not visited Agha Khan Hospital on 12th April, 2018. The last time he was admitted at Galleria but he did not collect such drugs.
 40. PW10 was also an employee at PSC and is responsible for issuance of medical cards at PSC. On 14th April, 2018, he was informed that someone had been arrested with medical cards. He was called by the IO to confirm if the cards were genuine. The texture was different, font was different, medical card numbers were all similar, all bearing the same pictures. Their cards start with surname but the cards that had been recovered were starting with Christian names. The cards did not originate from him. He did not know any of the accused persons and he had not disclosed any particulars of any staff.
 41. PW11 was also an employee at PSC. On 6th June, 2018, he was informed that his medical card had been used by strangers to obtain medical services and the person had been arrested. He reported to DCI offices parliament. He had his medical card with him. He was shown the recovered card. It was an imitation of his card. The photo on the card was not his and the card number was different. He did not go to Agha Khan Hospital on 11th April, 2018 nor did he pick any drugs from there. The phone number on the card and the signature on the card were not his.
 42. PW12 was a police officer attached at Athi River Police Station. On 12th April, 2018, while on patrol along Galleria Shopping Mall, he was called by the security manager at the mall informing him that they had arrested a suspect at Galleria Hospital Branch. He rushed there together with his colleague and arrested Danson Ochieng. They searched him and found he had 8 medical cards and an invoice.
 43. PW13 was a police officer attached at DCI Kayole. He was informed that DCI parliament wanted Charles Otieno Membo. They went to Komarock area. They found Charles Otieno Membo in a certain house. They searched his room and recovered some items. They found a national Identity card no. 23008396. They also found another identity card No. 26352789 in name Kelvin Mutua Mutuku. They also found a staff medical card (PSC) in name of Job Amolo Staff No. 99004494 but with the staff's medical card the picture on it was for Charles Otieno Membo. He took him to Kayole Police Station where he drafted an inventory- PMFI-7 and the same was signed by the suspect.
 44. PW14 was an employee at PSC. He was called by the in charge medical department who informed him that the signature in some of the medical invoices were not similar to his. He went and confirmed that they were not his. He did not visit Agha Khan Hospital on 1st April, 2018 and that what was before the Court were not his prescription. He had not given anyone his card. He did not sign the invoices. He did not know who used his card. He made a complaint to Nairobi Hospital.



45. PW15 was an employee at PSC. On 16th April, 2018, he was called by principal HR and informed that his card had been used at Nairobi Hospital. He went to record a statement with CID. He was shown a card. The card was not his and he had not been to Nairobi Hospital. The card number and the signature were different. He did not know where the person got his details from.
46. PW16 was a cashier at Nairobi Hospital, Galleria Branch. On 12th April, 2018, he got a patient from PSC. The patient gave out his medical card but the card appeared suspicious. He doubted the age of the patient because even though the card said he was born 11th November, 1986, he looked much older. He gave him a form to fill to counter check the information in the database. In the form he gave out mobile number and a different person answered. When he went to the doctor, he produced prescription to pick drugs. He called PSC and he was told to ask the patient to give out his ID and the same refused. The patient was seeking medication worth Kshs.60,000/= . He called their security officers who came and arrested him. He had presented himself as Job W. Wambulwa.
47. PW17 was a forensic document examiner based at DCI. He was testifying on behalf of Daniel Ogutu who was in Mombasa Law Courts. On 26th June, 2018, he received unknown documents with unknown handwriting. C1-C4 were specimen handwriting of Benard Omondi Godo. The documents were accompanied by a Memo. He was requested to ascertain if the question handwriting circular by red ink was made by the same author as per C1-C4, B1-B3. On examination, he formed opinion the handwriting were by the same author i.e. Benard Omondi Godo.
48. He subjected the exhibits to image enhancement procedure using machine for better visibility and inspection to individual characteristics. He considered charter initialization and terminal stokes, Charter construction and arrangements, Natural pen lifts, Natural validation and movement of pen, pen pressure and ink flow, and character spacing. On cross-examination, he testified that he works with CL Ogutu and that he did not assist him to prepare the report. When subjecting the question handwriting, you use a machine and you are guided by the same. It was the same type of pen ball.
49. PW18 was a police officer attached at CID Parliament. He was among the police officers who went to collect the suspect Charles Otieno Membo who had been arrested and held at Kayole Police Station. They passed at his house and they searched it wherein they recovered some drugs and made an inventory. Some of the drugs included Atripla and had been issued to Kevin Mutua Mutuku for treating HIv They also recovered scanned cards for Nomada Stephen. It was the one that was used to make all these other cards, passport size photo for accused. They recovered the passport size photo Sony for the mix up.
50. They also recovered assorted invoices for various hospitals from Mater Hospital and Agha Khan Hospital for PC afford UN. They also recovered assorted printer name of PSC staff, with all the details with the last time they were seen. They established that Charles Otieno Membo was getting information from a staff at Mater Hospital Development House Branch.
51. Later on 24th April, 2018 at around 4:00 pm they visited Mater Hospital Development House Branch with information they had and asked the managers for Bernard Omondi Ngode and arrested him. They went to his house in Umoja 2 and did search at around 2:00pm and got an envelope under the sofa set seats with 2 print outs containing UN staff. In the print out, there was name Kevin Mutua Mutuku. There was also an identity card bearing name Kevin with picture of Danson Ochieng Ataro. All these were recorded in the inventory.
52. They also recovered another print out containing logging. These were the password and log in as the UN staff and it has a pass for the insurance company that covers UN staff signature. The same is handwritten. They made an inventory and the Appellant signed. In order to know who brought the



- password for signature insurance, he filled a memo and too to the handwriting expert and it confirmed it was the Appellant's handwriting. On cross-examination, he stated that Kevin Mutua works for UN.
53. DW1 was the 1st Accused person, Charles Otieno Membo. He stated that he knew the 2nd accused. He denied knowledge of the contents of the two envelopes recovered from his house. He claimed that a Mr. David Otieno had left the 2 envelopes in the house that morning, and had said he would pick them later in the afternoon. He stated that the photos alleged to be his belonged to David Otieno because they look alike. On cross-examination, he admitted that he know the 2nd Accused person through David Otieno.
54. DW2 was the 2nd Accused person, Danson Ochieng Ataro. He testified how he came to meet and know the 1st Accused person, DW1. He directed the Police how they would arrest the DW1. On cross-examination, he stated that he did not know David Otieno and he had never introduced DW1 to David Otieno. He confirmed he knew DW1.
55. DW3 was the Appellant. He stated that before his arrest he did not know any of the accused persons. He was not arrested with any of the cards from parliamentary service commission (PSC). At arrest, the IO found him with a list containing names of UN members' names and they are under Signa Insurance. I was also found with a log-in and a password belonging to Signa and Henna Insurance. He stated that the handwriting on the document produced by the document examiner was not his.
56. He stated that the UN list was supplied by the medical records manager from UN i.e. Collins Sudi because at that time they were told by management there was fraud going on by Signa card hence they had to be vigilant and he was told to be calling Signa Insurance. He produced the email print out. He also stated that he was not found in possession of any drugs. He did not go to Nairobi Hospital on 3rd April, 2018 but at work, same 11th April, 2018. He had never come in possession of those drugs as he did not suffer from HIV and diabetes. He did not give any information to the 2nd Accused person.
57. On cross-examination, he stated that the excel sheet containing named of UN staff under signa insurance was obtained from his house. This was after a meeting and given by Paul Nyakundi Registration and administration supervisor. Paul Nyakundi is not a witness in this matter. Collins Sudi was in that meeting. The excel sheet he had is similar to that of PSC staff.

Whether the Appellant's Conviction was safe.

58. Kenyan statutes do not define what constitutes 'conspiracy.' However, the Courts have circumvented this definitional loophole by making reference to authoritative legal texts and publications. The Black Law Dictionary 9th Edition defines conspiracy as follows;
- “An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement's motive and (in most states) action or conduct that furthers' the agreement; a combination for an unlawful purpose.”
59. The High Court in *Abdi & another v Republic (Criminal Appeal E033 of 2020)* [2024] KEHC 8021 (KLR) (Crim) made reference to scholarly works to define the elements of conspiracy. It held:
- “Be that as it may, the elements of the offence of conspiracy to commit an offence are articulated in Archibold: Writing on Criminal Pleadings, Evidence and Practice, pages 2589 and 2590, where the authors state as follows: -
- “The offence 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 agreement ... 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.”(Emphasis added)”

60. Nonetheless, Kenyan Courts have over the time interpreted the offense of conspiracy with a view to determining its ingredients and the jurisprudence in this area is fairly well settled. The Court of Appeal in *Gichanga v Republic* [1993] KLR 143 held that;

“With respect to the offences of conspiracy, the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money.”

61. The High Court in *Ann Wangechi Mugo & 6 others v Republic* [2022] eKLR also elaborated on how to prove conspiracy and held as follows:

“To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court (see *Republic v Anne Atieno Abdul & Others* [2017] eKLR). Further Halsbury’s Laws of England Vol. 25 observes that;

It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose.”

62. Courts have also appreciated the difficulties to be expected in proving conspiracy. In particular, courts have opined that it may be difficult to prove the intention of the conspirators by direct evidence. They have held that the intention of the conspirators can as well be inferred from their conduct.

63. This was restated in *Abdi & another v Republic (Criminal Appeal E033 of 2020)* [2024] KEHC 8021 (KLR), where the Court held as follows;

“167. Having evaluated the evidence adduced, I find that the trial was well guided in its finding on conspiracy. The intention of the conspirators cannot be supported by direct evidence “for not even the devil knoweth the mind of man”. Conspiracy by its nature is an opaque offence heavily guarded and clouded.

168. It is not easy to find direct evidence and indeed part of commission the offence is to conceal the evidence. Thus if the court were to insist on direct evidence per se, no one will be convicted of the offence. The knowledge and involvement in the offence can be inferred from the conduct of the parties with a common desire to commit a criminal offence.”

64. In the same case, the Court affirmed the reasoning of the lower court where the lower court had observed as follows;

“Conspiracy is complete when the agreement to enter into is formed, even if nothing is done to implement it. Implementation gives effect to the conspiracy, but it does not alter its essential elements....



Thus, the first element of the crime of conspiracy is the existence of agreement amongst the co-conspirators. But the prosecution does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The prosecution also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objective(s), or agreed to all the details, or agreed to what the means were by which the objective(s) would be accomplished. The prosecution is not even required to prove that all the people named in the charge were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known.

What the prosecution must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective

If it is established that a criminal agreement or conspiracy existed, then in order to find the accused person guilty of conspiracy the prosecution must also prove beyond a reasonable doubt that the accused person knowingly and intentionally joined that agreement or conspiracy during its existence. The prosecution need not prove that the accused person knew everything about the conspiracy or that he or she knew everyone involved in it, or that he or she was a member from the beginning. The prosecution also does not have to prove that the accused person played a major or substantial role in the conspiracy.”

Whether there was evidence of Conspiracy.

65. The Appellant submitted that he was convicted on the basis of uncorroborated evidence of PW18, the Investigating Officer. He agreed that the name Kevin Mutua was among the names in the list recovered from his house. However, he argued that this fact alone was not enough evidence to connect him to the conspiracy. He submitted that the presence of the name Kevin Mutua in the list was a coincidence since it was alongside other staff members of the UN. I shall relook at the evidence on this issue.
66. PW13 was a police officer who went to arrest Charles Otieno Membo (the 1st Accused in the trial). The officer told the Court that they searched Membo’s house and recovered several things. One of the things they recovered was an identify card number No. 26352789 in the name Kelvin Mutua Mutuku. They also recovered a staff medical card for PSC in the name of Job Analo staff number 99004494. However, they noted that this particular medical card had a picture of Danson Ochieng Ataro (the 2nd Accused person in the trial).
67. I shall also reproduce the evidence of PW18, who was among the police officers who searched the Appellant’s house, and see whether the two testimonies converge. PW18 told the Court that they arrested the Appellant at Mater Hospital and went to search his house in Umoja 2. He told the Court that they found an envelope under the sofa seats with 2 print outs. In the print out, there was name Kevin Mutua Mutuku. They also recovered an identity card bearing name Kevin with picture of the Danson Ochieng Ataro (the 2nd Accused person in the trial).
68. In my view, this evidence alone was enough to link and expose the conspiracy between the three accused persons. This is because documents containing the picture of Danson Ochieng Ataro (the 2nd Accused person) were recovered in both houses. (The Appellant’s house and the 1st Accused’s house). And what is more is that, in both cases, the names accompanying the picture were of different persons.
69. PW18 told the Court that, upon investigation, they established that the 1st Accused was getting information from a staff at Mater Hospital Development House Branch. The Appellant argued that



- this testimony was uncorroborated. I do not think so. I note that the Appellant was working at Mater Hospital Development House Branch, and that is where he was arrested. In addition, when the police went to search his house, they recovered an identity card bearing name Kevin but with the picture of the 2nd Accused.
70. In my view, PW18's testimony that the Appellant was part of the conspiracy was corroborated when they recovered an identity card bearing name Kevin with picture of the 2nd Accused in the Appellant's house. It cannot possibly be said that it was a mere coincidence that two faulty documents bearing the picture of the same person (2nd Accused) would be found in the both houses (Appellant's house and the 1st Appellant's house). The picture of the 2nd Accused appeared in Job Analo's medical card which was recovered from the 1st Accused's house. The picture of the 2nd Accused also appeared in Kevin's identity card which was recovered from the Appellant's house. Clearly, the picture of the 2nd Accused was a common denominator, and that, in my view, was enough corroboration.
 71. The Appellant did not deny the fact that the faulty identity card was recovered from his house. He even signed the inventory which had listed the faulty ID as one of the items recovered from his house. He did not question about it in cross-examination.
 72. I also note that the particulars of Kelvin Mutua Mutuku came up from the recovering in the two houses. When the police searched 1st Accused's house, they recovered drugs issued to Kelvin Mutua Mutuku for treating HIV I also note that, the same appeared in the list of names found in the Appellant's house. The Appellant argued that this fact alone may not be demonstrating any significant connection. However, in my view, although this fact alone cannot conclusively show any connection, it is a buildup and has collaborative value. It supports the belief that the name and particulars were extracted from the list and helped the 2nd Accused acquire the medication.
 73. In addition, PW18 told the Court that they recovered a printout containing log-in details from the Appellant's house. These were the password and log in as the UN staff. The same was handwritten. I note that the Appellant maintained that he was not the author of the handwritten document that contained the passwords. He maintained that the same was not in his handwriting. PW18 stated that, in order to know who brought the password for signature insurance, he filled a memo and took to the handwriting expert, who confirmed that the handwritten document was written by the Appellant.
 74. The Appellant does not deny the fact that the handwritten document was recovered from his house, and particularly from the envelope. He, however, maintains that it was not in his handwriting. I have looked at the record and it is clear that the Appellant owned up to the other contents of the envelope. He admitted that inside the envelope was a list of names of UN members under signa insurance. He also admitted that he was found with a log in and a password belonging to signa and henna insurance. All these were contents of the same envelope from which the handwritten documents had been found.
 75. PW17 was a document examiner who examined the handwritten document to ascertain its origin. From the record, the handwritten documents were 3 in number- and were marked as B1-B3. The Appellant submitted 4 specimen hand writing- and were marked as C1-C4. The examination confirmed that the handwriting in these documents were by the same author. PW17 gave a detailed account of how the handwritten document was examined. He explained that the documents were subjected to image enhancement procedure using a machine for better visibility and inspection to individual characteristics.
 76. In my view, the document examiner's report was sufficient proof that the Appellant was the author of the handwritten document. I find that the Appellant's claim that the document was not his handwriting was a mere denial.



77. In addition, from the Appellant's house, the police recovered print outs containing log in details, passwords and log in for the UN staff. They also recovered handwritten document containing the passwords. From the 1st Accused's house, they recovered the passport size photo Sony for the mix up, assorted printer, and scanned cards for Nomada Stephen that was used to make all these other cards. In my view, this showed that it was the 1st Accused who used to make the forged cards, which were to be used by him and the 2nd Accused person to acquire drugs from various hospitals.
78. The trial Court had the opportunity to see the exhibits and observe them. She made a factual observation in the following terms: "It came out that the [Appellant] is the one who supplied the information to the 1st Accused." This court did not have the opportunity to see the exhibits. It did not see the 2 print outs found in the Appellant's house. It also did not see the faulty or irregular identity card found in the two houses. The lower Court had this privilege and made that factual observation. I find no reasons to disturb this factual observation of the learned trial magistrate.
79. I have considered the Appellant's defense very carefully. However, in my view, the said defense did not shake or poke holes on the Prosecution's case. First, he did not give any explanation on how the faulty identity card bearing name Kelvin but with the picture of the 2nd Accused found itself in his house, and particularly in an envelope under the sofa seats. Secondly, he did not give any explanation on how the handwritten document containing passwords found itself in his house, and particularly in an envelope under the sofa seats. The same defense is dismissed as mere denial.
80. In my view, there was enough evidence to show that the Appellant was the one who supplied the information to the other accused persons. The totality of evidence revealed that the 3 Accused persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective. It was through the Appellant's assistance and participation that they could make the false documents and use the same documents to obtain the drugs. I thus find that the Appellant was rightfully convicted for Counts 1 to 16. His conviction by the lower Court for the 16 charges is hereby upheld.

Conviction for the Wrong Counts.

81. The Appellant submitted that the lower Court committed a grave error in convicting him in Counts XVII to XXI which he was not charged with. I have relooked at the judgment of the lower Court and I have confirmed that the Court did not convict him for counts XVII to XXI because the said counts only applied to the 2nd Accused.
82. However, I note that the lower Court committed an error during sentencing. In the sentencing, the lower Court stated as follows;

“Mitigation Considered.

- a. On count 1 one each of the accused persons to serve 1 ½ years in jail.
- b. On count 2 each of the accused persons to serve 4 years in jail.
- c. On count 3 each of the accused persons to serve 4 years in jail.
- d. On count 4-11 each of the accused persons to serve 4 years in jail for each count.
- e. On count 12-16 each of the accused persons to serve 1 year in jail for each count.
- f. On count 17 accused 3 to serve 2 years in jail.



- g. On count 18 accused 3 to serve 1 year in jail.
- h. On count 19-21 accused 3 to serve 1 year in jail for each count.
The sentences will run concurrently.”

83. I have relooked at the Charge Sheet on which the accused persons were charged. I have established that Accused 1 was Charles Otieno Membo, and Accused 2 was Danson Ochieng Ataro alias Pastor Dan. Accused 3 was the Appellant. I have also established that Counts 17 to 21 were preferred against the Accused 2 only, i.e. Danson Ochieng Ataro. Based on this, I agree with the Appellant that the trial court erred in sentencing him for Counts 17 to 21, yet he had not been charged for the same counts.

84. This Court has the requisite jurisdiction to rectify the above error under the slip rule. I am guided by the Supreme Court’s decision in Fredrick Otieno Outa v Jared Odoyo Okello and 3 others [2017] eKLR, where the court interrogated the Slip rule in the following terms;

“By its nature, the slip rule permits a court of law to correct errors that are apparent on the face of the judgment, ruling or order of the court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the judgment or decision of the court. By the same token, such errors must be of such nature that their correction would not change the substance of the judgment or alter the clear intention of the court. In other words, the slip rule does not confer upon a court any jurisdiction or powers to sit on appeal over its own judgment, or, to extensively review such judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior court demonstrates, this is the true import of the slip rule.”

85. The same reasoning was adopted by the Court in Dokota & 3 others v Republic (Crim Misc App E249 of 2021) [2022] KEHC 12412 (KLR), where the court applied the same principle to rectify an error on a sentencing ruling. It stated as follows:

“Lastly, is the issue of the error on the resentencing ruling to the extent that the same ought to refer to 1st applicant, Burea Dokota and Mohamed Gamicha Gumo (deceased), this court is convinced that this is an error on the face of the record curable under the slip rule.

If the honourable court ordered that the sentence do apply to Mohamed Gamicha Gamo, deceased at the time, while leaving out Burfa Jara Dokota, the 1st applicant, it must have been in error. And this court is convinced that the error by its nature, can be cured under the slip rule principle. To this end, I allow this ground of this application and order that the resentence of the court as ordered on May 21, 2019 be revised only to the extent that the resentence do apply also to Burfa Jara Dokota, the 1st applicant.”

86. I have considered the error in question. I am of the view that this was clearly a typo error or an oversight of the judicial officer. I am convinced that the error by its nature, can be cured under the slip rule principle. I therefore move to rectify the said error by ordering that the word ‘Accused 3’ captured in point (f), (g) and (h) of the sentencing highlighted above be substituted with the word ‘Accused 2.’

Disposition.

a. I find the Appellant guilty as charged in Count I to Count XVI. The lower Court’s judgment convicting the Appellant for the 16 counts is hereby upheld.



- b. The Court did not convict the Appellant for Counts XVII to XXI, but it committed an error by sentencing him for the same. However, I am of the view that this was clearly a typo error or an oversight of the judicial officer. The same is hereby set aside and rectified in the following terms; ‘The word ‘accused 3’ captured in point (f), (g) and (h) of the sentencing highlighted above be substituted with the word ‘accused 2.’
- c. I also note that this error does not have an impact on the length of the sentence imposed on the Appellant for Counts I to Count XVI. This is because the sentences for the 16 counts were to run concurrently.
- d. I have also considered the sentence imposed on the Appellant and I find nothing to persuade me that it was illegal. n the contrary, the sentence was very lenient in the circumstances.
- e. In the premises, this appeal fails and is dismissed in its entirety.

DATED, DLIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 8TH DAY OF APRIL, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant present

Mr. Musumba Advocate holding brief for Mr. Musiega Advocate for the Appellant

Mr. Omondi, ODPP for Respondent

