Republic v Sayi & 2 others (Criminal Appeal E005 of 2022)
[2025] KEHC 4566 (KLR) (Crim) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4566 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E005 OF 2022

CJ KENDAGOR, J

APRIL 3, 2025

BETWEEN

REPUBLIC ..... APPELLANT

AND

WINSTON SAYI ..... 1ST RESPONDENT

BEAVERLY OTIENO ..... 2ND RESPONDENT

DUNCAN ODHIAMBO ..... 3RD RESPONDENT

(Being an appeal against the Judgment of Hon. M.W. Mutuku, Chief Magistrate in Milimani Criminal Case No. 369 of 2018)

JUDGMENT

1. The Respondents were jointly charged before the lower Court. The first count was conspiracy to defraud contrary to Section 317 of the *Penal Code*. The particulars were that between 25th September 2017 and 18th January 2018 at Hazina Sacco Limited Head Office Nairobi with others not before the Court, with intent to defraud, conspired together to steal Kshs.2,230,037.15/= the property of Hazina Sacco Society Limited.

2. The second count was fraudulent false accounting contrary to Section 330 (B) of the *Penal Code* as against the 1st Respondent alone. The particulars were that between 25th September, 2017 and 25th January, 2018 in Nairobi County, being a servant to Hazina Sacco Society Limited as FOSA teller aim accountant, with intent to defraud made false entries from the FOSA General Ledger (GL) account into FOSA salary account, account number 1991-1-503-00XXX8 domiciled at Hazina Sacco Society in the name of Monicah W. Wainaina, purporting to show that on the said period, Kenya shilling 2,230,037.15/= had been electronically transferred from FOSA General Ledger (GL) account.

3. The third count was stealing contrary to Section 268 (1) as read with Section 275 of the *Penal Code* with the particulars the trio between 16th October, 2017 and 18th January, 2018 at Hazina Sacco Limited FOSA jointly with others not before Court stole Kshs.2,230,037.15/= the property of Hazina Sacco Society Limited.

4. The fourth count was stealing contrary to Section 268 (1) as read together with Section 275 of the *Penal Code* against the third Respondent with particulars that between 13th January, 2018 and 18th January, 2018 in Homabay and Kisii town within Homa-bay and Kisii County respectively, jointly with others before court stole Kshs.466,900/= the property of Hazina Sacco Society Limited.

5. The court acquitted the Respondents on all counts under Section 215 of the *Criminal Procedure Code*. It found that the prosecution case was weak and had glaring loopholes, and thus, the ingredients of the offences were not proven beyond reasonable doubt.

6. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Petition of Appeal dated 20th January, 2022. It listed the following Grounds of Appeal;

    1. The Learned Trial Magistrate erred in law and fact by disregarding the evidence by the prosecution and its witnesses which proved the offences against the three accused persons.

    2. The Learned Magistrate erred in law and facts by disregarding to consider prosecution evidence which would warrant a conviction.

    3. The Learned Magistrate erred in law and in fact by considering extraneous matters to arrive at a wrongful conclusion that all the Respondents did not conspire to defraud the complainant.

    4. The Learned Magistrate erred in law and in fact by failing to appreciate the fact that the evidence adduced by the prosecution was unchallenged and collaborated.

    5. The Learned Magistrate misdirected himself in fact and law by failing to take into consideration the ingredients of the offenses facing the Respondents.

    6. The Learned trial Magistrate erred in law and in fact by failing to comply with the provisions of Section 169 (2) of the *Criminal Procedure Code* by failing to analyze the evidence on record, formulate issues for determination or reasons thereof as he was duty bound to do.

7. It asked the Court to allow the appeal, set aside the acquittal, and make any other order the court may deem fit in the circumstances.

8. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

9. The Appellant submitted that the lower Court was wrong to acquit the Respondents of the conspiracy charges. It submitted that it provided enough evidence to prove that the Respondents had conspired and that there was a meeting of their minds. It argued that it had proved that the 1st and 2nd Respondents were responsible for accounts opening, bank reconciliations, and processing and issuing of ATM cards. It submitted that it proved that the Respondents committed the crime of conspiracy to defraud through identity theft and processing of an ATM card without an application for it.

10. It argued that the agreement of their minds could be inferred from their conduct. It stated that it provided evidence to show that the Respondents were employees of the Complainant at the time the offence took place. In addition, it submitted that it proved that the fictitious account was opened when the 1st and 2nd Respondent were on duty and were responsible for account opening. Again, an ATM

card was processed and issued in respect of the fictitious account when the 1st and 2nd Respondent were in charge of the processes. Lastly, the 3rd Respondent after picking the ATM card did not handover to the bearer.

11. With all these facts, it submitted that it had proved that the 1st and 2nd Respondents were the common denominator in the transactions from the opening of the accounts to the withdrawal of money from the accounts and subsequent use of the ATM card by the 3rd Respondent who was the recipient of the ATM card. It argued that it had tendered crucial evidence to prove that the subject money was lost as a result of the conduct of the 1st, 2nd, and 3rd Respondents.

1st Respondent's Written Submissions

12. The Respondent urged this Court to uphold the trial Court's decision. It submitted that the prosecution had glaring loopholes and the ingredients of the offences were not proved to the established standards of beyond any reasonable doubt. He argued that the prosecution did not establish the common intention among the Respondents to defraud the Complainant. He submitted that the prosecution did not adduce any evidence of an express agreement among the Respondents to show that they committed the said offense in connivance.

13. He also argued that the lower Court was right to acquit him of the charge of fraudulent false accounting. It submitted that the prosecution did not adduce direct evidence connecting him to the fraudulent transactions. He submitted that, although his computer was used to post the transactions, he should not be blamed because he was not the only employee who had access to the particular computer. He also argued that PW8 was not a competent witness to analyze the system because she did not show that she possessed the necessary skills to examine any particular system. Lastly, he submitted that the Court was right to acquit him of the charge of stealing because he was not the beneficiary of the funds in question.

3rd Respondent's Written Submissions

14. The Respondent submitted that the lower Court was right in acquitting him of the conspiracy charges because the prosecution did not prove any explicit or implicit agreement between him and the other respondents for the purposes of defrauding the complainant. He argued that the prosecution did not tender any evidence to link him to the over-the-counter withdrawals. He also submitted that the Court was right in acquitting him of the theft charges because none of the prosecution witnesses testified that the ATM Card was used to withdraw a total of Kshs.466,900/=. He also argued that he should not be linked to the fictitious account because he was not a member/employee of the complainant or initiator.

Issues for Determination

15. Upon consideration of the facts of this case, the Grounds of Appeal and the submissions made by the Respective counsels, I find that there are 4 issues for determination;

    a. Whether the available evidence proves the offence of conspiracy to defraud against the three Respondents.

    b. Whether the available evidence proves the offence of Fraudulent false accounting against the 1st Respondent

    c. Whether the available evidence proves the offence of Stealing against the three Respondents.

    d. Whether the available evidence proves the offence of Stealing against the 3rd Respondent.

16. The role of this Court as the first appellate court is well settled. In Okeno vs. 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."

17. 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.

18. 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;

19. PW1 is an employee of Hazina Sacco, the Complainant. She testified that the 1st and 2nd Respondent were employees of the Complainant. She produced their employment letters. She testified that the 1st Respondent was an assistant accountant in the finance department-particularly FOSA department. She also testified that the 2nd Respondent was also an assistant accountant in the FOSA department. She testified that the alleged fraud and theft happened in finance department, and particularly the FOSA department.

20. PW2 stated that she was called by the DCI to inform her that her documents had been used to open an account at Hazina Sacco. She stated that her account name is Monica Wambui Gitari and she had a membership card and an ATM card.

21. PW3 was the branch secretary to Hazina Sacco, Homabay branch. He stated that on 6th January, 2018, he received a parcel from the head office. He stated that the parcel had 2 ATMs, one of them belonging to Monica Wainaina. He stated that he informed the 3rd Respondent, who was the chairman of the branch that he had received Monica's ATM. He said he informed the 3rd Respondent because the latter had been following up on the card. He said that the 3rd Respondent said that he would collect it on behalf of Monica Wainaina. He testified that the 3rd Respondent later picked the card but he did not sign to acknowledge receipt of the same. As a result, PW3 stated that he recorded 'collected by chairman' in the place where the 3rd Respondent should have signed.

22. PW4 stated that he was a FOSA accountant at Hazina Sacco tasked with confirming details on account opening, teller approval and handling bank reconciliations. He stated that on 6th February, 2018, he was working on FOSA bank reconciliations where he had just resumed from leave. He discovered that an amount of Kshs.1,076,400/= that had been outstanding in the previous bank reconciliation was still outstanding. He found out that the amount had been posted in the account of Monica W.

Wainaina. Upon further scrutiny, he found further amounts had been posted to that account. He stated that the account had been opened using another member account, i.e Monica Wambui Gitari. He stated that the 1st amount was posted on 25th September, 2017 of Kshs.606,171.15/=, 2nd posted on 1st November, 2017 of Kshs.1,076,400/=, 3rd posted on 2nd December, 2017 of Kshs.410,000/= and the 4th on December 2017 of Kshs.37,800/=.

23. In addition, he stated that the said money was posted using USER Name WSAI. He stated that the 1st Respondent opened the accounts and the same was approved by the 2nd Respondent. He also stated that Kshs.606,000/= was withdrawn over the counter when 1st Respondent was the teller while the 2nd Respondent was the supervisor who approved the withdrawal. On cross-examination, he confirmed that the 1st Respondent had sole access to his machine, and that the fraud took place when he was on leave.

24. PW5 was the Finance manager at Hazina Sacco. She stated that they noted there were fraudulent activities during a bank reconciliation exercise. She stated that as per the fraudulent entries, the initials were for the 1st Respondent, who was a teller at FOSA section. She stated that each person is given particular logging initials and the 1st Respondent's credentials were used.

25. PW6 stated that she lost her documents and ID in April, 2017 as a result of which she applied for a replacement. She said that she was later called by BFIU office where she was notified that she had registered an account with Hazina Sacco. She stated that she is not a member of Hazina Sacco.

26. PW7 was a subordinate staff at the complainant. He stated that on 27th December, 2017, he was given 2 cards to send to Homabay branch. The cards were for Monica Wainaina and Judith. He stated that the parcel in which the cards were parked was addressed to Henry, PW3. He also stated that he later confirmed that PW3 had received the cards.

27. PW8 was an internal auditor at the Complainant Sacco. She told the Court that she received instructions from the CEO to investigate account for Monica Wainaina account no. 1991-1-503-00XXX8 to get to understand what was happening. Upon her investigations, she found that the account was linked to a FOSA account where the ID number in the members account was different from the ID used in the FOSA account. She also established that the ID of Monica Wainaina is 28XXXX39 while that of Monica W. Gitare was 20XXXX31. She established that when she used the ID of Monica Wainaina she noted that she had no FOSA account.

28. In her testimony, she stated that she established that Monica W. Gitare was a member of Hazina Sacco but had no salary account. She stated that her investigation revealed that the 1st Respondent opened the account of Monica Wainaina using details of a real member Monica W. Gitare and the same was approved by 2nd Respondent yet the CEO had banned all applications for salary account. She stated that the said account had an ATM card. According to her investigation, the 2nd Respondent modified the details to read those of the non-existing member, and deleted the photo of the existing member. The investigation revealed that the 2nd Respondent applied for ATM and listed the same for dispatch to Homabay.

29. In addition, she established that there was no application form for the account opening, the account opened was a salaries account yet it had been banned, no signature or photo on the system, no document for the request of ATM and the modification of data was done without any request.

30. The three Respondents gave evidence in support of their Defense. DW1 was the 1st Respondent. He denied being involved in the creation of the account of Monica Wainaina but admitted that he was in charge of account creation. He stated that the 2nd Respondent called him to stand in for a teller who had

gone to the bank where he conducted the transactions in question. He stated that the 2nd Respondent told him that the client could not enter the hall and thus the money was withdrawn in her absence. He also admitted that he countersigned where the client had signed from outside. He stated that he did this under the instruction of the 2nd Respondent.

31. He stated that the same transaction was approved by the said supervisor because the client was unwell and needed to go to the hospital. He said that at one time he gave PW4 his password while he was away. In cross-examination, he confirmed that he had no evidence to show that he shared his password with the PW4.

32. DW2 was the 2nd Respondent. He stated that he worked in the FOSA Department between 12th January, 2015 to September, 2017 where one of his duties included being the custodians of PINs and ATMs. He confirmed that he had access to the system although each department has specific rights. He stated that in September, 2017-January, 2018 he was working in the loans department and was not handling any cash transactions.

33. Lastly, DW3 was the 3rd Respondent. He confirmed that he was the branch chairman of Homabay County. He denied collecting the ATM card for Monica Wainaina. He stated that the documents before the Court did not show the date he collected the card nor do they show that he signed for the same as required. He also denied withdrawing money from the said account.

Whether the available evidence proves the offence of conspiracy to defraud against the three Respondents

34. 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."

35. 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).

36. 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."

37. 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 Vs 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.

38. 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.

39. 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.

40. 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."

41. Applying the above principles to the facts and circumstances of this case, this court is being required to determine whether the prosecution proved that there was a meeting of minds to constitute the offence of conspiracy. The issue is whether the evidence before the lower court demonstrated that the Respondents were acting with the common intention of defrauding the complainant.

42. I have relooked at the evidence places before the lower Court, witness testimonies, and documentary evidence to ascertain whether the three respondents conspired to defraud the complainant.

43. From the available evidence, the prosecution did not prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding between the 3 respondents. In addition, the prosecution did 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. That being the case, the issue now turns to whether the alleged conspiracy can be inferred from the conduct of the respondents.

44. There was evidence to prove that the 1st and the 2nd Respondent were employees of the complainant. According to count 1, the alleged conspiracy happened between 25th September, 2017 and 18th January, 2018. There was evidence to prove that the 1st Respondent was working at the FOSA department during the period when the fraud is said to have happened. During his cross-examination, the 1st Respondent admitted that he was deployed at the FOSA department between September, 2017 and January, 2018.

45. There was also evidence to show that the 2nd Respondent was working at the FOSA department in September 2017, when the conspiracy is believed to have been hatched. In his cross-examination, the 2nd Respondent confirmed that he worked in the FOSA department between 12th January, 2015 to September, 2017. At this point, this court wishes to clarify an issue on whether the 2nd Respondent worked at the department as at September, 2017. This clarification is necessary because some parts of the evidence suggest that he was not in that department as at September, 2017.

46. I note that during PW1 cross-examination, PW1 stated that the 2nd Respondent was transferred from FOSA department to the loans department on 1st August, 2017. PW1 also stated that the 2nd Respondent was to report to the new station on 1st October, 2017. The 2nd Respondent confirmed this during his examination-in-chief where he stated that his transfer to the loans department would take effect from 1st October, 2017. I take the view that he must have worked at the FOSA department till the end of September, 2017, because he was required to report to the loans department on 1st October, 2017.

47. The prosecution claimed that the alleged conspiracy was executed through the fictitious account named Monica W. Wainaina. I shall relook the conduct of the three respondents to ascertain whether it can be said they had designed a scheme to defraud the complainant through the fictitious account.

48. According to PW8, who is the company's internal auditor, the fictitious account was opened on 26th July, 2017 and it was created/opened by the 1st Respondent. This was corroborated by PW4 who said that the account was created by the 1st Respondent while, he (PW4) was away on training. PW4 also testified that the 1st Respondent had sole access to his machine in terms of logging in. Although the 1st Respondent said he did not recall creating this account, in his Examination-in-chief, he admitted that his duties at FOSA department included opening of accounts.

49. The evidence showed that the credentials of the 1st Respondent were used in the commission of the offence. The 1st Respondent himself admitted that his initials were used, though making only a general denial that someone else could have accessed the computers using his password. He said his password was different and it was only used to log into his desktop. He did not give any plausible explanations as to who his secret password could find itself in the hands of another person. Although he claimed that he had at some point shared his password to PW4, he admitted in cross-examination that he did not have evidence to show that he had shared his password to PW4.

50. In my view, I find that the 1st Respondent opened/created the fictitious account in question while he was in charge of account opening at FOSA.

51. I have also relooked at the evidence to see whether the 2nd Respondent had a direct hand and involvement in the opening or creation of the fictitious account. According to PW4, the 2nd Respondent approved the creation/opening of the fictitious account. This was corroborated by PW8 who stated that the 2nd Respondent gave the approval on 28th July, 2017, thus officially concluding the registration of the fictitious account.

52. Several facts reveal that the 1st and the 2nd Respondent must have been working together with a common intent. Hazina Sacco had given the 2nd Respondent the responsibility to approve account opening. This responsibility is usually an internal control mechanism to oversight those charged with account opening and ensure that all the account opening requirements had been met. PW8 testified that there was no application forms to support the opening of the fictitious account. The 2nd Respondent went ahead, nonetheless and gave the approval without the physical application forms. It becomes questionable why the 2nd Respondent approved the account opening without seeing the application forms.

53. In addition, the PW8 testified that at the time the account was opened, the complainant had placed a ban on the opening of salary accounts. The ban on the creation of a salary account was contained on the minutes of the FOSA committee and was produced in court. The 1st and the 2nd Respondent did not controvert the presence of the ban on creation of salary accounts and did not deny their knowledge about it. In my view, for the 2nd Respondent to have approved the creation of the fictitious salary account in these circumstances, it must have been a deliberate scheme by the two.

54. I have also relooked at the evidence to see the movement of funds in and out of the fictitious account. PW4 testified that Kshs.606,000/= was withdrawn over the counter when the 1st Respondent was the teller and the 2nd Respondent was the supervisor. The 1st Respondent admitted in his examination-in-chief that he was the teller when Kshs.606,000/= was withdrawn from the fictitious account. He also admitted that the client did not walk to the counter, and that it was the 2nd Respondent who carried

the money to the client. He said that he did not see the client receive the money but he admitted that he countersigned the documents.

55. The 1st Respondent tried to show that he was not aware of the irregularities around the over-the-counter withdrawals of the Kshs.606,000/=. He claimed that he trusted the 2nd Respondent because he was his supervisor. I do not believe the 1st Respondent was telling the truth. First, I do not think that it was a mere coincidence that on that day, he was just called to stand in for a teller. I also note that it was the same fictitious account he had created with the connivance of the 2nd Respondent. And what is more is that, he countersigned the withdrawal documents, thus legitimizing the withdrawal. If indeed he was innocent as he claimed, it would have been prudent for him, while countersigning, to indicate that he had not actually seen the real client sign the forms and record that they had been signed in the presence of the 2nd Respondent. He did not do so.

56. In my view, the totality of this evidence leads this court to the conclusion that the 1st and 2nd Respondent were working together with a common intention to defraud the Complainant.

57. The last issue to determine is whether the 3rd Respondent was part of the conspiracy. His participation revolves around the receipt and possession of the ATM card to the fictitious account.

58. PW8 testified that the 2nd Respondent applied for an ATM card for the fictitious account on 13th October, 2017 and listed the same dispatch to go to Homabay. This was corroborated by PW4. PW8 testified that the ATM was send to Homabay as a parcel and was received by PW3. PW3 testified that he informed the 3rd Respondent about the arrival of the said ATM because, according to his testimony, the 3rd Respondent had been following up on the card. PW3 said that the 3rd Respondent did not sign the form to show he had received the ATM card on behalf of Monica. Out of due diligence and given that PW3 could 'force' the 3rd Respondent sign the form, PW3 indicated in the forms that the card had been collected by the 3rd Respondent. PW3 also explained to the CEO that the card had been collected by the 3rd Respondent. There was also evidence to show that the aforesaid non-member Monica Wangeci Wainaina was neither aware of the opening of the account nor privy to any of the subsequent dealings therein.

59. While receiving the ATM card, the 3rd Respondent explained to PW3 that Monica Wainaina had been transferred to Rongo, and so he promised to dispatch the card to Monica. I have reasons to believe PW3 was telling the truth because his testimony was corroborated by PW7 and PW. I find that, these facts place the 3rd Respondent right in the middle of the conspiracy to defraud the complainant. He was part of the elaborate scheme. PW10 testified that the Complainant had lost Kshs.2,230,037/= through the fictitious account. This was corroborated by PW11 who testified that an audit had revealed a loss of Kshs.2,230,037.15/=.

60. Before I pen off, I wish to comment on the competence of PW8, on whether he was a competent witness to give evidence on the issues she testified in Court. This is because the lower Court held that PW8 was not a competent witness to have analyzed the system on behalf of the complainant company.

61. Section 125 (1) of the *Evidence Act* concerns competence of witnesses. It provides as follows:-

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause." (Emphasis added).

62. PW8 was an internal auditor at the Complainant company. She stated that she was instructed by the CEO to investigate the fictitious account in question and report on the same. The lower Court disregarded her testimony on grounds that she did not demonstrate that she possessed the necessary training and skills to conduct the audit. I do not agree with the lower Court on this particular finding.

63. In my view, PW8 did not have to demonstrate to the Court that he had any special training or skills because she was not called as an expert witness but rather as a normal prosecution witness. I also hold the view that any issues on the competency or otherwise of PW8 to testify as a prosecution witness could be handled adequately through cross-examination and submissions. I have looked at the record and I have confirmed that the respondents cross-examined the PW8 at length and they had an opportunity to test her testimony and evidence.

64. Based on the above analysis, I find that the offence of conspiracy to defraud in count 1 was proved beyond reasonable doubt. I find the three respondents guilty of count 1 and convict them for the same.

65. I have carefully re-evaluated the evidence that was adduced before the trial Court with respect to the 2nd, 3rd, and 4th counts. I have also considered the submission by the parties during the hearing of the appeal. However, in my view, the evidence that was adduced by the prosecution in support of the three courts was not sufficient to warrant a conviction for the three counts. I therefore acquit the respondents of the 2nd, 3rd, and 4th counts.

66. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 3RD DAY OF APRIL, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl