



REPUBLIC OF KENYA



KENYA LAW
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**Ndung'u v Republic (Criminal Appeal E001 of 2025)
[2025] KEHC 6542 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E001 OF 2025**

DR KAVEDZA, J

MAY 19, 2025

BETWEEN

DAVID MWAURA NDUNG'U APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. C. Njagi (PM) on 16th December 2024 at Kibera Chief Magistrate's
Court Criminal Case No. 1459 of 2018 Republic v David Mwaura Ndungu)*

JUDGMENT

1. The appellant was charged and, after a full trial, convicted for the offence of obtaining money by false pretences contrary to section 313 of the *Penal Code*. After a full trial, the appellant was sentenced to pay a fine of Kshs. 500,000 in default to serve one year imprisonment. In addition, he was ordered to compensate the complainant the sum of Kshs. 1,000,000 in default to serve one and a half years imprisonment with both sentences running consecutively.
2. Aggrieved, the appellant filed the present appeal challenging his conviction and sentence. In his petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He argued that the sentence imposed was illegal due to the principle of double jeopardy. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. The prosecution's case was as follows: PW 1, Pascalina Wanjiku Mugo, testified that she was approached by her friend Margaret, who introduced her to the appellant, David Mwaura Ndungu, as



a person seeking a loan of Kshs. 1,000,000 to facilitate a fuel supply transaction in Nyanza. The parties met and agreed that the appellant would repay the sum within one month, with a 10% monthly interest. An agreement to that effect was drawn. PW1 issued a cheque in the name of Lewa Construction, a company associated with the appellant. She identified the appellant in court and confirmed that, to date, only Kshs. 170,000 had been repaid. The full amount due was Kshs. 1,100,000.

5. PW2, Margaret Muthoni Njoroge, proprietor of Haba na Haba Solutions, confirmed that she had previously transacted with the appellant. She arranged the loan, holding the logbook of motor vehicle KCJ [Particulars Withheld] as security. She later discovered the logbook had been fraudulently transferred, and the appellant had become unreachable. She witnessed the execution of the agreement and identified the appellant as the borrower.
6. PW3, Inspector James Wanjohi, investigated the complaint. He confirmed the complainant took a welfare loan to fund the advance to the appellant and produced the relevant documentation, including the agreement, cheques, certificate of incorporation, logbook, welfare form, and bank statement. He noted that the appellant issued two dishonoured cheques and presented a logbook belonging to his son, fully aware it could not serve as valid security.
7. In his sworn defence, the appellant admitted receiving the funds and producing the agreement and incorporation documents. He claimed non-payment was due to pending government obligations for fuel delivery, evidenced by delivery notes and correspondence. He expressed willingness to repay, attributing the delay to financial hardship.
8. After the close of the defence, the appellant was convicted and sentenced accordingly.
9. The appeal was canvassed by way of written submissions, which have been duly considered, and there is no need to rehash them.
10. Section 313 of the *Penal Code* provides as follows:

“ Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”
11. The prosecution is required to establish that the appellant obtained something capable of being stolen; obtained it through a false pretence; and with the intention to defraud. The first ingredient, a false representation of fact, is evidenced by the appellant’s claim that he required a loan of Kshs. 1,000,000 to supply fuel to Nyanza and would repay the full amount with interest within one month. The second ingredient, knowledge that the representation was false or reckless as to its truth, is inferred from the appellant’s conduct, including failure to repay the loan, refusal to answer the complainant’s calls, and the discovery that the logbook offered as security had already been transferred to a third party. This indicated a lack of genuine intention or capacity to honour the loan agreement.
12. The third ingredient, intent to defraud, is demonstrated by the appellant’s presentation of a logbook not registered in his name as collateral, knowing it could not lawfully be used to secure the loan. Furthermore, the appellant issued two cheques to the complainant, which were later dishonoured, reinforcing the inference that the appellant misled the complainant to part with her money under false pretences.
13. The fourth ingredient, actual inducement, is established by the fact that the complainant, relying on the appellant’s representations and assurances, both directly and through PW2 Margaret, issued



a cheque in the name of Lewa Construction, a company owned by the appellant. The complainant borrowed the funds from her welfare scheme specifically to finance the loan.

14. The appellant engaged in a deliberate scheme to deceive the complainant and secure funds without a genuine intent to repay, satisfying all elements of obtaining money by false pretences. The prosecution's case was coherent and credible. The appellant's defence, though noted, failed to cast a reasonable doubt on the prosecution's evidence. Accordingly, the conviction is found to be sound and is hereby upheld.
15. The appellant was sentenced to pay a fine of Kshs. 500,000 in default to serve one year imprisonment. In addition, he was ordered to compensate the complainant the sum of Kshs. 1,000,000 in default to serve one and a half years imprisonment with both sentences running consecutively.
16. During the sentencing proceedings, the trial court considered that he was a first offender, the pre-sentence report on record, and the appellant's mitigation. The sentence imposed was also legal and within the court's discretion.
17. In the premises, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MAY 2025

D. KAVEDZA

JUDGE

