Tattani alias Jillo Boku v Republic (Criminal Appeal E002 of 2025)
[2025] KEHC 6699 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6699 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E002 OF 2025

FR OLEL, J

MAY 14, 2025

BETWEEN

SALES BOKU TATTANI ALIAS JILLO BOKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE DELIVERED ON 11TH NOVEMBER 2024 BY HON C. WEKESA (SPM) IN MARSABIT SPMCR NO E157 OF 2013)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of obtaining money by false pretenses contrary to Section 313 of the *Penal Code*. The particulars were that on diverse dates between 19th March 2019 and 2nd July 2023 in Marsabit Central sub-county within Marsabit county, with intent to defraud, obtained Kshs 12,577,850/= from Hoko Halake Ruricha by falsely pretending that you were in a partnership in upgrading the North-Horr to Elbesso Road and constructing a bridge at Darte Tender, a fact you knew to be false or untrue

2. On count II the Appellant was charged with the offence of obtaining money by false pretenses contrary to section 313 of the penal code. The particulars were that between 1st March, 2019 and 2nd July, 2023 at Marsabit town in Marsabit central sub county within Marsabit county, with intent to defraud, obtained Kshs 2,000,000/= from Hoko Halake Ruricha by falsely pretending that you were in a joint ownership of a motor vehicle registration number KDH xxxC Toyota land cruiser, green in color, a fact you knew to be false or untrue

3. During the trial, the prosecution called four witnesses who testified in support of their case. The appellant was placed on his defence, gave sworn evidence in support of his case. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offences he was charged

with and proceeded to sentence him to serve three (3) years' imprisonment on each count. The said sentences were to run consecutively.

B. Facts At Trial

4. PW1 Huko Halake Rurich testified that he was a resident of North Horr sub-county and worked at the Sub-County Hospital situated therein. He knew the appellant as they were neighbors at home, and he was a man he trusted since he had known him from his childhood. The Appellant had approached him in 2018 and proposed that they enter into a partnership to sell goats for profit within North Horr. Initially, he gave him Kshs 250,000/= in the presence of his wife and continued to monitor the said business.

5. Later, the Appellant again urged him partner to start a different business which involved the repair/ maintenance of the road from North Horr to Elbeso, and also to build a bridge at Darate Tender. The Appellant informed him that he had secured this tender from Kenya Rural Roads Authority and it was worth Kshs 375,000,000/=. The agreement was that he would get his share of profit from the sums invested in the said construction project. The complainant enumerated at length the specific instances when he sent different sums of money to the Appellant and produced lengthy Mpesa and bank statements from Equity Bank to prove his assertion as to the amount of money sent to the Appellant.

6. The complainant further testified that in November 2021, the Appellant convinced him to partner with him and buy a Land Cruiser, which they would use for public transport. It was agreed that they would each contribute Kshs 2,000,000/= towards its acquisition. He applied for a loan of Kshs 2,500,000/= from Equity Bank (K) Ltd and sent Kshs 2,000,000/= to the Appellant vide his account numbers 101xxxxx, and 101xxxxxxxxx. The Appellant then proceeded to buy land cruiser registration No KDH xxxC (hereinafter referred to as the suit motor vehicle), which he unfortunately registered exclusively under his name.

7. He kept pestering the Appellant for returns, but the Appellant would offer one excuse after the other to delay refunding his money and/or paying profits arising therefrom. The Appellant also convinced him to open two new accounts, being KCB Account No 130xxxxxxx and Equity Bank Account No 101xxxxxxxxx , where the contract sum would be deposited, but eventually no sum was ever paid therein from KERRA. PW1 also referred to a text message from the appellant dated 19.01.2022, assuring him that he would receive this sum, but all that was in vain.

8. The complainant eventually lost his patience as he had not received any returns, and his quest to push the Appellant to give him his share of profits had also fallen on deaf ears. He complained to the Appellants' Uncle and the village elders, but their intervention did not bear any fruit. The appellant eventually went underground and switched off all his phones. He therefore compiled evidence of all payments made and reported the matter to the police for investigation.

9. Under cross-examination, PW1 confirmed that over a period of time, he gave the appellant money through cash, Mpesa, and through his bank account. He had evidence to prove his transactions and regretted not having received anything in return. Even for the suit motor vehicle, he had paid Kshs 2,000,000/= into the appellant's account, but contrary to what was agreed upon, the appellant had gone ahead and registered the suit motor vehicle under his name, and the bank. His inquiries had also revealed that out of the Kshs 2,000,000/= deposited towards the purchase of the suit motor vehicle, the appellant had only paid the car dealer Kshs 1,600,000/= and used the balance thereof for other purposes, which he was not aware of.

10. PW1 further confirmed that he was convinced that the appellant had secured the tender to construct the North Horr to Elebeso road from KERRA, as he had shown him documentation relating to the said tender and he believed that the said tender documents was genuine, though he did not keep a copy of the said tender document. He also confirmed that he had given the appellant money for a period of about five years from 2018 to 2023.

11. Finally, PW1 also testified that he trusted the appellant and that is why he had agreed to partner and do business with him. He had tabulated the total sums advanced to the appellant; for the construction of North Horr road, he had given the appellant a total of Kshs 12,577,850/= through cash, Mpesa, and direct bank transfer, while for the suit motor vehicle, he had advanced him Kshs 2,000,000/=. The police had also investigated his claim and confirmed through forensic audit that the appellant had falsely received the sums claimed.

12. PW2 Albert Kimani Maina stated that he was a digital forensic expert attached to the Anti-terrorism forensic laboratory based at Upper Hill, Nairobi. On 23.12.2023, he received request number 611/2023 to exploit a device model Huawei Y7 containing SIM card Number 0725xxxxxx and to pair it with four Safaricom phone numbers (0729xxxxxx, , 0769xxxxxx , 0740xxxxxx , 0707xxxxxx). Further, he was requested to retrieve incoming and outgoing messages from 01.12.2020 to the date of examination. He undertook the examination and made two extractions. The first was a logical extraction, while the second extraction related to eleven (11) screenshots capturing various payments made to the Safaricom SIM card numbers provided. He proceeded to produce his report as Exhibit 6.

13. Under cross examination PW2 confirmed that his report contained accurate information of the transaction between the parties based on extracted massages. He further confirmed that there was only one relevant SMS massage extracted between the parties though in total there were 5143 columns contained in his 126-page report. He also confirmed that he did not tabulated the amount of money exchanged and had left that assignment to the investigating officer.

14. PW3 PC Moses Lolio testified that he was a DCI officer stationed at Marsabit police station and confirmed that he was the arresting officer in this case. During investigations, the appellant had gone underground, and he was assigned to trace him. Luckily, they got information from an informer that the appellant had been seen at Isiolo. Together with his colleagues Timothy Okoth and Pc Justice Munene they travelled to Isiolo and managed to trace and arrest the appellant at his residence.

15. They searched his premises and recovered his identity card Number 299xxxxx , his Huduma card Number 1029xxxxxx , Huduma card for Kame Dido Number 1028xxxxxx , Equity ATM Card Number 0101xxxxxxx , Cooperative Bank ATM Card Number 0119xxxxxxxxxx . Further, they recovered six SIM cardholders, a brown wallet, and a phone IMEI Number 8633xxxxxxxxxx . He further testified that he prepared an inventory of the said items, which inventory was signed by all the parties, and he produced it as an Exhibit before the court. Under cross-examination, he confirmed that his role was only to arrest the appellant and did not carry out the investigations.

16. PW4 Constable Duncan Wachira confirmed that PW1 had made a complaint against the appellant for the offence of obtaining money by false pretense vide OB NO 26/9/9/2023, and he had been assigned to handle and investigate the said complaint. The complainant narrated at length how the appellant had convinced him to partner in a tender to construct a road and bridge along North Horr to Elbesso, which tender was valued at Kshs 375,000,000/=. He was to finance this project and get his share of profit upon conclusion.

17. On 07.10.2021, the complainant had also transferred to the appellant a sum of Kshs 2,000,000/= which was to be used to purchase a Toyota Land Cruiser, which was to be used for public transport

business and profits jointly shared. PW1 had later established that the appellant proceeded to buy motor vehicle registration Number KDH xxxC green in colour and had it registered solely under his name and Equity Bank, contrary to what was agreed upon.

18. The appellant had kept a record of all financial transactions in a notebook, which indicated the various dates and amounts received by the appellant. Other sums of money were sent to the appellant via Mpesa and through his various bank accounts. PW4 further stated that he sought court orders to access and investigate the various bank account's and phone numbers held by the appellant and produced as Exhibits the various statements (both bank and Mpesa) which covered the relevant period, when the transactions took place. He established that the appellant had obtained from the complainant a sum of Kshs 12,577,850/= in reference to upgrading Elbaso road and further obtained Kshs 2,000,000/= for the purchase of the suit motor vehicle.

19. The appellant went underground and eventually was arrested at Mayatta Kiwanjani within Isiolo town. He prepared an exhibit memo form and forwarded it to PW2 to undertake forensic analysis of the complainant's SIM and the accused's various SIM numbers recovered during investigations.

20. The forensic audit was to retrieve the outgoing and incoming conversation chats between the parties, and he referred to the forensic report produced by PW2, which had confirmed several messages exchanged between the parties. In particular, there was a particular message, where the appellant was instructing the complainant to open two new accounts at KCB and Equity Bank -Marsabit where the sum of Kshs 375,000,000/= to be received from KERRA would be deposited. The appellant had sent this test message to PW1 on 17.11.2022.

21. Under cross-examination, PW4 affirmed that he got a court order, which he used to access the appellants various bank accounts and had used the information extracted to build his case. He also confirmed that the evidence adduced before court convincingly proved that the appellant had falsely obtained the sums claimed from the complainant.

22. The Appellant was placed on his defence and offered to give sworn evidence. He stated that he was 34 years old and was a businessman dealing in transport business and also sold livestock for profit. He further testified that he had not obtained any money from the complainant, and the documentary evidence adduced by the prosecution did not support this contention. Similarly, the complainant had no stake in the suit motor vehicle, and his evidence in relation thereto was false. He also urged the court to find that the chargesheet as drawn was defective, as the amount claimed and evidence adduced before court differed.

23. Under cross-examination, the appellant reaffirmed that the suit motor vehicle belonged to him and he gotten funds to purchase the same from his company Jibo Investments. The appellant also confirmed that the complainant gave him Kshs 2,000,000/= which was to boost their livestock business and was not meant to be used to buy the suit motor vehicle.

24. The trial court considered the evidence adduced and found the Appellant guilty of the offence he was charged with and thereafter sentenced him to serve two three-year imprisonment terms, which were to run consecutively. The Appellant, being dissatisfied with the conviction and sentence passed, filed his Amended petition of Appeal dated 13.03.23, and raised the following grounds of Appeal;

    a. That, the learned Trial Magistrate erred in matters of law and fact by failing to note that the charge sheet was defective.

    b. That, the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution witnesses gave contradicting and paradoxical testimonies.

c. That, the learned trial magistrate erred in matters of law and fact by convicting and sentencing him in counts 1 and 2 which related to cumulative payments of the same subject matter and by imposing a manifestly excessive sentence considering the circumstances of the case. whereby the trial court was influenced by the complainant counsel without considering the independence of the court

d. That, the learned Trial Magistrate erred in matters of law and fact by failing to note that there was no written agreement between the appellant and the complainant of the case.

e. That, the learned Trial Magistrate erred in matters of law and fact by relying on the shallow evidence adduced by the prosecution witnesses to convict the appellant without analyzing and scrutinizing the same.

f. That, the learned trial Magistrate erred in matters of law by failing to order in her judgment that the appellants 6 years imprisonment sentence to commence from the date of arrest in order to include time spent in custody while undergoing trial in compliance with section 333(2) of the Criminal procedure Code.

g. That the learned trial magistrate erred in fact and law by failing to appreciate that this was a case of clear frame-up.

h. That, key and vital witnesses in the case were not brought to court.

D. The Appeal

25. The merits of this Appeal were canvassed by way of written submissions. The Appellant submitted that the trial Magistrate erred in convicting him based on contradictory evidence that had several discrepancies. The said evidence was therefore doubtful and made his conviction unsafe. He also faulted the trial magistrate for failing to consider his truthful and merited defence, which had discredited the prosecution's evidence and raised credible doubt on its veracity.

26. Secondly, the Appellant submitted that the learned magistrate had erred in convicting him based on a defective charge sheet, which indicated that the amount unlawfully obtained as Kshs 12,577,850/=, while the complainant in his testimony before the court had indicated that the amount owed as Kshs 10,536,000/=. The investigations officer (PW4) had also contradicted PW1 and stated that the amount owned was Kshs 15,561,000/=.

27. The transactions (exchange of money) were also alleged to have occurred between 19th March 2019 and 2nd July 2023, but the prosecution had also referred to an amount of Kshs 250,000/= as being received in 2018, which was outside the period the offence is alleged to have occurred. Based on the foregoing, it was clear that the facts as stated in the charge sheet were at variance with the particulars provided in the charge sheet, and the same was not curable under Section 382 of the *Criminal Procedure Code*. Reliance was placed in the case of Isaac Omambia Vrs Republic (1995), eKlr & Kiarie Vrs Republic (1984), KLR 739.

28. The final issue raised by the appellant was that the trial magistrate erred in handing him a sentence which was manifestly excessive considering the circumstances of this case. He further faulted the trial magistrate for failing to apply the provisions of Section 333(2) of the *Criminal Procedure Code* and the judiciary sentencing policy guidelines, which obligated the court to take into account the period already spent in custody.

29. He thus prayed that his conviction and sentence be quashed and he be set free in the interest of justice.

30. The ODPP opposed this appeal through their submissions dated 17th March 2025. They submitted that they had proved that the appellant had received various sums of money from PW1, purporting to have a contract to repair the road from North Horr to Elbeso, and also to build a bridge at Darate. The total amounts received for this project were Kshs 12,577,850/=, while a further Kshs 2,000,000/= was received by the appellant, with respect to the suit motor vehicle, which he had also misrepresented as being jointly owned with PW1 but which turned out to be solely registered under his name and the bank.

31. They had proved in his instant case that the appellant had knowingly made false representations by his words and conduct, and thus had proved their case beyond reasonable doubt. Reliance was placed in the case of Abdifatah Mohammed Ibrahim Vrs Republic (2020) Eklr & Gerald Ndoho Munjuga Vrs Republic (2016) Eklr.

32. As regards the appellant's complaint that the chargesheet was defective, the respondent submitted that a variance in the amounts stated therein did not amount to a defect and no prejudice had been caused to the appellant as he was aware of the offense he had committed. The complaint was therefore untenable. Reliance was placed in the case of Otieno Vrs *Republic (Criminal Appeal 38 of 2020)*,(2023)KEHC 24122 (KLR).

33. Finally, on sentence passed, the prosecution submitted that the appellant was convicted on two counts related to two separate events/transactions between him and the complainant. The appellant was therefore rightly sentenced to consecutive sentences in line with section 14(1) of the *Criminal Procedure Code*. Emphasis was placed on Ahmed Abolfathi Mohammed & Another Vrs Republic (2018) Eklr, Criminal Appeal No 135 of 2016. It was however, conceded that section 333(2) of the *Criminal Procedure Code* was not considered during sentencing and the applicant could benefit from the same.

C. Analysis & Determination

34. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion, while taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence, and/or seeing their demeanor. This court is guided by the Court of Appeal case of Okeno – VS – Republic (1972) EA 32 where it was stated as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

35. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from

the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

36. Having considered the lower court record, the grounds of appeal, and the submissions of the appellant, I do find the following as issues for determination;

    a. Whether the prosecution proved their case beyond reasonable doubt?

    b. Whether the charge sheet was defective?

    c. Whether the sentence passed should be reviewed?

37. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

38. The Appellant was charged with the offence of obtaining money by false pretenses contrary to section 313 of the penal code. The penal code defines "false pretense" under section 312 as, "Any representation, made by words, writing or conduct, of a matter of fac, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, id false pretence."

39. The essential elements of the offence of obtaining by false presence can be summarised as obtaining something capable of being stolen, obtaining the money through a false pretence and obtaining the money with the intention to defraud. See Francis Mwangi & Another v Republic [2015] eklr.

40. In Abdifatah Mohammed Ibrahim Vrs Republic (2020) Eklr, the court observed that;

> " The operative word under the said section is "representation", which is applicable in the following circumstances;
>
> a. A representation by words, writing or conduct.
>
> b. A representation is either past or present.
>
> c. A representation that is false.
>
> d. A representation made knowing it to be false or believed not to be.
>
> Therefore, the operative words in the instant case is a Representation by words or conduct made knowingly to be False or believed not to be true. This is clearly the basis of the prosecution case herein.

Obtaining something capable of being stolen.

41. The Appellant did give detailed evidence of the various cash transaction he made In favour of the appellant which was to cover for his capital contribution made in construction of North Horr to Elbesso Road, construction of the bridge at Darte Tender and purchase of the suit motor vehicle registration Number KDH xxx C Toyota Land Cruiser. The total amount obtained over a period of five years totaled to Kshs 14,577,8500/=. This evidence was corroborated by the forensic examiner (PW2) and the investigating officer (PW4) who produced a bundle of documentation showing the money trail.

42. This court is thus satisfied that indeed monies exchanged hands and find that this ingredient was proved beyond reasonable doubt.

Obtaining money by false pretense and/or obtaining the money with the intention to defraud.

43. PW1 testified and explained at length how the appellant obtained money from him under the pretext that he had secured a contract from KERRA worth Kshs. 350,000,000/= to repair North Horr - Elbesso road and also to construct Darte Bridge. This fact was corroborated by the appellant, who had sent a test message to PW1 on 17.11.2022, instructing him to open new bank accounts at KCB and Equity Bank (k) Ltd – Marsabit branch, where the said amount of Kshs. 350,000,000/= would be deposited, but this too turned out to be a pipe dream.

44. Further, PW1 testified that the appellant convinced him in late 2021 to enter into a public transport business with him. To that end, they both were to contribute Kshs. 2,000,000/= each towards the purchase of the said motor vehicle. He secured a loan from Equity Bank (K) Ltd and deposited the said sum into the appellant's bank account. The appellant on his part deposited part of this sum, being Kshs 1,600,000/= with the car dealer and took a loan from Equity Bank (k) Ltd to cover the balance. The suit motor vehicle was subsequently registered under the appellant's and Equity Bank (K) Ltd's name. The appellant also proceeded to operate this vehicle under his sole use to his detriment.

45. PW1 recorded all the transactions in his notebook, and his evidence was corroborated by the evidence of PW2, who did a forensic examination of the data obtained from the appellant's phone. PW4 also produced all exhibits including Mpesa Statements and Bank statements to further corroborate PW1's evidence.

46. The appellant in response, gave a general denial defence and avoided rebutting specific incriminating evidence laid on his doorstep. There is no doubt whatsoever that the prosecution concisely proved that the appellant knowingly obtained the complainant's money by means of false representation, which he made knowing or believing the same not to be true.

47. The trial Magistrate therefore, cannot be faulted for convicting the appellant as she properly evaluated the facts and the law to correctly convict the Appellant. His appeal on this score, therefore fails.6

Defective charge sheet.

48. The Appellant submitted that the charge sheet was defective as on count I, it was alleged that he had obtained Kshs 12,577,850/= from PW1, who in turn contradicted this information as he testified that he had lost Kshs 10,536,000/=.PW1 had further testified that the first Kshs 250,000/= given to him in 2018, which was before the period stated, he is alleged to have obtained the amounts claimed. Finally, he also pointed out that PW4 had also contradicted PW1 by stating that the sums lost were Kshs 15,561,000/=.

49. There was variance between the particulars provided in the charge sheet and the evidence adduced, which was not curable under Section 382 of the *Criminal Procedure Code*.

50. Section 134 of the *Criminal Procedure Code* provides for what the components/ingredients of the charge sheet constitute;

> " Every charge sheet of information shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

51. In determining whether a charge sheet is defective or not, the Court of Appeal in Sigilani versus Republic (2004)eKLR 480 held as follows;

> " The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clean and unambiguous manner so that the accused maybe be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

52. The court of Appeal in Bernard Ombuna Vs Republic also addressed the issue of a defective charge sheet in the following terms;

> " In a nutshell, the test of whether a charge sheet is fatally defective is subjective rather than formalistic. Of relevance is whether a defect on the charge sheet prejudices the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

53. In BND Vrs Republic (2017) eklr it was held as follow's

> " our case law has given crucial pointers. Two cases are pertinent: the case of Yosefa vr Uganda (1969) E.A. 236- a decision of the court of Appeal- and sigilani Vrs Republic (2004) 2 KLR 480- A high court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence.....The answer from our decisional law is this: The test whether a charge sheet is fatally defective is a substantive one: was the accused person charged with an offence known to law and was it disclosed in a sufficient and accurate fashion to give an accused adequate notice of the charges facing him? If the answer is in the affirmative it cannot be said in any way other than a contrived one that the charges were defective..... The question is did this prejudice the appellant and occasion miscarriage of justice? I do not think so.
>
> There is no question in my mind that the accused person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him."

54. Section 382 of the *Criminal Procedure Code* also gives guidance on whether, even with such a defect, justice could still be met or whether the defect on the charge sheet is curable. The said Section provides that;

> " subject to the provision's hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revered or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge proclamations, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings.
>
> It follows therefore that the court in determining whether a defect caused injustice has to have regard to whether the objection should have been raised at an earlier stage in the proceedings".

55. Applying the above test, it is clear that the appellant fully participated in the proceedings and cross-examined all the witnesses. Before he testified in defence, he stated that,

> " I remember taking plea, understand the charge and the evidence adduced by the prosecution witness. I know it is time to put up my defence".

56. This denotes that he understood the particulars of the charge he faced. The appellant also did not raise any objection as to the facts raised in the charge sheet, and asuch cannot be said to have been prejudiced in any manner. His allegation that PW1 and PW4 gave varying figures, too is not supported by the evidence on record. This ground of appeal, therefore, cannot hold and is dismissed.

Sentence

57. The appellant faulted the trial magistrate for sentencing him to serve, "consecutive prison term" instead of a "concurrent prison term". The imposition of a sentence is within the discretion of the trial court.

58. Section 12 of the *Criminal Procedure Code* (Chapter 75 of the Laws of Kenya) stipulates as follows:

> " Any court may pass a lawful sentence combining any of the sentences which it is authorised by law to pass."

59. Section 14 of the *Criminal Procedure Code* provides for circumstances in which a court can direct sentences to run concurrently or consecutively, and it states, in part, as follows:

> 14
>
> (1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the

punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorise a subordinate court to pass, on any person at one trial, consecutive sentences: -

a. of imprisonment which amounts in the aggregate to more than fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction is competent to impose, whichever is less or

b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

60. Therefore, as a general principle, the practice is that if an accused person commits separate and distinct offences in different criminal transactions, even though the charges are tried in one trial, it is not illegal to mete out a consecutive term of imprisonment (see BMN v Republic NYR CA Criminal Appeal No. 97 of 2013 [2014] eKLR & Ahmed Abolfathi Mohammed & Another Vrs Republic (2018) Eklr, Criminal Appeal No 135 of 2016.)

61. This is also emphasized Paras. 7.13 and 7.14 of the Sentencing Policy Guidelines, 2016, which provide as follows;

7. 13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.

7. 14 The discretion to impose concurrent or consecutive sentences lies in the court.

62. The Appellant was convicted on two counts. The two counts relate to two separate events/transactions between him and the complainant and therefore he was rightly sentenced to serve consecutive sentence.

63. The final issue raised by the Appellant was that the trial Magistrate erred in failing to consider the period he spent in custody during sentencing, and he ought to benefit from the provisions of Section 333(2) of the *Criminal Procedure Code*. This ground of Appeal was conceded by the state.

Disposition

64. The upshot, having considered the entire record of Appeal and submissions made, I do find that the Appeal as against conviction fails and is hereby dismissed.

65. The Appellants' sentence of three years on each count to run consecutively is upheld, but time shall run from 15th September 2023, when he was arrested

66. Right of Appeal 14 days

67. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MARSABIT THIS 14TH DAY OF MAY 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 14th day of May 2025.

In the presence of;

Present in Court - Appellant

Mr. Otieno - For O.D.P.P

Jarso - Court Assistant