Kigo v Republic (Criminal Appeal E070 of 2023)
[2025] KEHC 12833 (KLR) (16 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12833 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E070 OF 2023

AK NDUNG'U, J

SEPTEMBER 16, 2025

BETWEEN

MOSES MACHARIA KIGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, Moses Macharia Kigo, was charged with Issuing bad cheque contrary to Section 316A (1) (a)(4) of the Penal Code. The particulars were that on the 5th day of September 2021, at Nyahururu Town, in Laikipia County within the Republic of Kenya, issued cheque numbers 01xxx,01xxx,01xxx,01xxx,01xxx,01xxx, 01xxx, 01xxx, 01xxx, 01xxx, 01xxx, 01xxx, 01xxx, 01xxx for Kshs. 7.5 million, in favour of Titus Muenene, from ABSA Bank Kenya PLC, Nakuru West Branch Account No. 20xxx, with knowledge that the said bank account had insufficient funds. After trial he was found guilty, convicted and sentenced to pay a fine of 25,000/= and in default to serve 3 months imprisonment.

2. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following grounds;

    1. That the learned trial magistrate erred in law and fact by making a finding that the prosecution had laid a basis for the existence of a sale transaction between the Appellant and the Complainant.

    2. That the learned trial magistrate erred in law and fact by making a finding that the Appellant was selling a parcel of land to the complainant.

    3. That the learned trial magistrate erred in law and fact by making a finding the Appellant issued 15 cheques as security for the purchase price paid for the sale of a parcel of land.

4. That the learned trial magistrate erred in law and fact by making a finding that the Appellant issued 15 cheques to the complainant.

5. That the learned trial magistrate erred in law and fact by making a finding that the Appellant issued bad 15 cheques (sic) to the complainant.

6. The trial magistrate erred in law and in fact by making a finding that the prosecution had proved the charge against the Appellant.

7. That the learned trial magistrate erred in law and fact by convicting the Appellant against the weight of the evidence on record.

3. The appeal was canvassed by way of written submissions.

4. For the Appellant, counsel opened the submission by challenging the alleged verbal agreement for sale of land on the basis that being an agreement for disposition of an interest in land, the same ought to have been in writing in compliance with Section 3(3) of The *Law of Contract Act*.

5. Further, that there was no acknowledgement by the Appellant of the receipt of the Ksh. 7,500,0000 neither was there acknowledgement by the Complainant of the receipt of the 15 cheques and there was no basis for the issuance of the cheques to act as security.

6. Counsel submitted that there was no evidence that PW3 ever worked for the Appellant and the circumstances under which he would be familiar with the Appellant's signature were not explained. It is urged that the cheques ought to have been subjected to examination by a document examiner.

7. It is submitted that the prosecution ought to have provided evidence of the persons mandated to sign cheques on behalf of Mugo wholesalers and further that a bank statement was necessary to show there were insufficient funds in the subject account.

8. In rejoinder, Counsel for the Respondent submitted that that there was evidence that PW1 gave Ksh. 7,500,000 to the Appellant being monies for purchase of a house that the Appellant had agreed to sell. That on the day the money was paid, the Appellant took PW1 and PW2 to view the said house and pictures were taken. That there was no formal agreement but the parties agreed that the Appellant would issue cheques worth Ksh 7,500,000 as security for the sum paid by PW1. That the agreed was based on trust as the parties had been friends and business partners.

9. It is submitted that the verbal agreement of the sale transaction and the agreement to issue cheques as security was made in presence of PW2 and PW3 and PW3 confirmed the issuance of the cheques as he was the one who was instructed by the Appellant to author the same. Counsel concludes that the verbal agreement coupled with the cheques issued as security and the site visit demonstrates a basis for a sale transaction.

10. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

11. It is opportune at this stage to have a recap of the evidence at trial.

12. PW1 testified that he had known the Appellant for over 20years. The Appellant approached him for financial assistance and offered to sell to him a house. Prior to this, PW1 had issues with K.R.A who had frozen his accounts and he was therefore dealing in cash.

13. He added that on 5/9/21, in company of PW2 he took Ksh 7,500,000 to the Appellant for the purchase of the house which he had been taken to and viewed. PW1 had asked for cheques as security for the monies paid since the day being a Sunday, it was not possible to do a formal agreement and it was agreed the agreement would be formalized the next Tuesday, 7th September. The Appellant issued 15 cheques

14. The Appellant then reneged on the agreement and PW1 banked the cheques but the same were returned with remarks "confirmation awaited."

15. On recall at a later date, and there being no objection from the defence, PW1 produced photographs he took at the scene which show the subject house and the Appellant and PW2.

16. PW2 testified that he accompanied PW1 to Nyahururu town when they met the Appellant who took them to a plot he (the Appellant) was selling.

17. After the site visit, the trio went to the Appellant's office at a super marker wherePW1 gave Ksh. 7,500,000 to the Appellant and the Appellant confirmed the amount. PW1 took photographs of the plot. No agreement was done and PW1 asked for cheques as security before a meeting set for Tuesday to do an agreement happened. Later PW2 was informed that the Appellant had refused to pull the deal through.

18. PW3 told the court that the Appellant was his uncle and he had worked for him for over 20 years. On 5/9/21, he passed by the office of the Appellant after he had inspected his insurance business. The appellant asked him to write cheques for Mr. Titus. He filled the cheques and left. He stated that when he was in the employ of the Appellant, it was normal for him to fill cheques and the amounts. He identified the cheques he filled and confirmed the signatures thereon belonged to the Appellant. He was familiar with the signature having worked for him for 20 years.

19. Pw4's, the then branch manager at ABSA bank Nyahururu testified that the subject cheques were received at the bank by the bank's tellers and duly stamped. Bank slips were issued. The cheques were returned on the basis of "confirmation awaited" from the drawer which confirmation was not made despite efforts to reach the client (the Appellant) who could not be reached

20. PW5, the investigating officer, gave a history of the complaint as narrated to him by the Complainant. He received the dishonoured cheques. The Appellant did not sufficiently explain why he had issued the cheques when the account had no money. The Appellant on interrogation denied receiving the money and argued that the cheques were stolen from him. PW5 noted that the list of cheques reported by the Appellant as stolen did not include the cheques issued to PW1.

21. In his defence, the Appellant gave an unsworn statement. He termed the charges as lies. He only came to know the complainant at Rumuruti Police Station. He met him there for the first time. He had no dealing with him. He added that he was not selling any plot to the complainant and there was no such an agreement.

22. He denied ever having seen PW2 before. PW2 never went to his office and he never took them to see a plot at Cosite. He denied that PW3 went to his office on the material day and he did not instruct him to author any cheques. He denied issuing the cheques.

23. I have carefully considered the evidence as recorded at the trial court. In the process, I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the learned submissions on record and case law cited. I have taken into account the applicable law.

24. Of determination is whether the prosecution proved its case to the required threshold in law. The determination would require the answering of 2 pertinent questions;

    a. Did the Appellant execute and issue the cheques in question to PW1?

    b. Were the cheques presented to the bank and dishonoured for lack of sufficient funds?

25. In the journey to finding answers to the above issue, the court is alive to the fact that the burden of proof in a criminal trial lies on the prosecution and it never shifts.

26. This issue is no longer novel and our courts have now settled the law on the matter. In Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR, the court, Justice R. Nyakundi, stated: -

> " As to what constitutes the burden of proof beyond reasonable doubt the case of Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373 provides as follows in a passage alluded to me considered the greatest jurist of our time Lord Denning: "That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail 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 of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."

27. In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. The burden of proof of an accused's guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. In crimes where certain presumptions are made, they place an evidential burden on the accused- never the legal burden of proof.

28. The sentiments of the Supreme Court on the issue of burden of proof merit space in this judgement for emphasis purposes. The court in the case of Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ) , the court stated: -

> " The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. Black's Law Dictionary, defines the concept as [a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production. With that definition, the next issue is: who has the burden of proof ...Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.2.The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof.

The person that will have the legal burden of proof will almost always have the burden of adducing evidence."

29. Finally on the matter, in Peter Wafula Juma & 2 others v Republic [2014] eKLR, F. Gikonyo J weighed in on the legal requirement as follows;

> " Nonetheless, the subject on shifting the burden of proof becomes more complicated when one realizes that the expression ''Burden of proof'' entails; 'legal burden of proof' and 'evidential burden'. The two should not be confused, and I will write something to elucidate on what each entails later. Of instant benefit to this appeal is that, after a long raging debate, dating back to the late part of 1700, on whether or not legal burden of proof could shift under any circumstances, it is now a well settled principle of law that, the legal burden of proof in criminal matters never leaves the prosecution's backyard. Viscount Sankey L.C in the case of H.L. (E)* woolmington V DPP [1935] A.C 462 pp 481 in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that; ''Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

30. Section 316A (1) (a) of the Penal Code provides as follows: -

> 'Any person who draws or issues a cheque on an account is guilty of a misdemeanor if the person –
>
> a. Knows that the account has insufficient funds.

31. To establish the offence of issuing a bad cheque under Section 316A(1)(a) of the Penal Code, the prosecution must prove that the accused drew and issued a cheque and that he or she knew at the time of issuing the cheque that there were insufficient funds to honour it.

32. A distinction must be drawn in circumstances where a cheque is post-dated in which case the requirement is to have sufficient funds on the date specified on the cheque and any presentation of the cheque before this date leading to its being dishonoured cannot disclose the said offence.

33. Section 316A (2) of the Penal Code further provides that Subsection (1) (a) does not apply with respect to a post-dated cheque. In the case of Abdalla v Republic [1971] EA 657 KLR 289 the court held that:

> " In our view the giving of a post-dated cheque is not a representation that there are sufficient funds to meet the cheque. It is a representation that when the cheque is presented on the future date shown on the cheque there will be funds to meet it...That the Appellant, in giving the post-dated cheque, was not representing that he had sufficient funds to meet it is clear from the undisputed facts. That he asked the treasurer not to present it without prior reference to him, which was not done, so as to give him an opportunity of making arrangements with his bank to meet the cheque"

34. Evidence from PW1 and PW2 was that the Appellant drew and issued cheques in favour of PW1 as security after PW1 gave the Appellant Ksh. 7,500,000 awaiting the execution of a formal agreement on a sale of a property between the Appellant as a seller and PW1 as a buyer which was to take place on 7th September 2021. Notably, all these cheques were dated 5/9/21.

35. PW3's testimony is that he filled the cheques on instruction by the Appellant. The cheques were in favour of PW1. They totaled to 7.5 Million.

36. In his defence the Appellant denied that he issued any cheques to PW1. He stated that he saw him for the first time at the police station. He added that he was not selling any plot to PW1 and there was no sale agreement. He denied receiving any money from PW1. At no time did he instruct PW3 to write cheques on his behalf.

37. I have taken time to evaluate the evidence herein. The evidence by PW1 and PW2 establishes a basis for the writing of the cheques by the Appellant as security. The evidence is corroborated by PW3 who confirms writing the cheques and leaving them for the signature of the Appellant. It is not contested that these cheques found their way to PW1 who on presenting the same to the bank were dishonoured. The Appellant suggests that he had lodged a complaint with the police over lost cheques. It was proved in evidence that the cheques issued to PW1 were not among the ones indicated as lost. There is no other way of explaining the possession of the cheques by PW1 other than that the Appellant executed and issued them to him.

38. I have pored through the evidence by the Appellant. At no time has he denied that the signatures on all the cheques are his. It is very telling that the issue of the authenticity of signatures and the Appellant's knowledge of the complainant were not raised and did not feature at all in cross examination or otherwise until the testimony of the Appellant in defence and their submissions. These were very key elements in the trial that ought to have taken center stage at the earliest in the trial and specifically in cross examination. The logical and safe inference is that the issues as raised are an afterthought and mere denials and brazenly untrue.

39. What I consider a feeble argument has been raised in the Appellant submissions to the effect that he had no authority to sign cheques on behalf of Mugo Wholesalers. This proposition is readily defeated by the Appellant's own letter to his bank dated 30/9/21.

40. I have racked my mind over the evidence. In particular, the denial by the Appellant that he did not know PW1 and PW2 is in light of the firm evidence by them on the matter unbelievable. It is inexplicable how strangers got access to his signed cheques in circumstances not reported to any investigative agency. My finding is that the Appellant is not particularly candid on the matter. He knew the complainant and he engaged in some arrangements with him leading to the issuance of the cheques. I do not believe him. Am quick to add that in doing so, and alive to the law on burden of proof as aforesaid, I have not shifted the burden of proof to the Appellant but rather reached this conclusion based on the strength of the evidence on record.

41. In Thomas Mwambu Wenyi v Republic [2017] KECA 756 (KLR), the court of appeal stated;

> "It is evident from the record that the two courts below considered evidence tendered in support of the prosecution case as well as the appellant's defence and gave reasons for the conclusions reached.
>
> The first appellate court had this to say about the appellant's defence.
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> > "24. On the issue of the appellants defence, I agree with the submissions by Miss Mandu that the same was considered by the trial magistrate as follows:-
> >
> > "If indeed there was a grudge between the father of PW1 and himself what mature would PW4 Micheline Mwaria neighbor have for stating she saw him washing

clothes that morning outside his house at about 11.00am. And also stating that she saw PW1 leaving his house."

The observations made above and reflection on the record by the 1st appellate court of how the trial court evaluated the appellants defence is a clear indication that the two courts below analyzed the appellant's defence and weighed it against the prosecution's evidence and found it ousted for the reasons given by each court in their respective judgments. We are therefore satisfied that no burden of proof was shifted to the appellant by the two courts below as claimed by the appellant.....

In Keter versus Republic [2007] 1EA135 the court was categorical that:-

"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

The material witness allegedly not called was the father to PW1. From the record the father of PW1 was not the prime mover of the prosecution process against the appellant. It was PW4 who set the ball rolling when she believed the story of PW2 and PW1 that the appellant had sexually molested the two minors. .....

The trial court discounted evidence of the alleged existence of a grudge between the appellant and the father to PW1 and found it baseless as it did not oust the testimony of PW1, 2 and 4, that the appellant was in his house on the material date and sexually molested the minors, which finding was affirmed by the first appellate court.

In Keter versus Republic (supra) the court held inter alia that;-

"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused"

The moment the two courts below concurrently disbelieved the appellant on the allegation of existence of a grudge between him and the father of PW1 as a basis for the alleged fabrication of charges against him, a factual conclusion was arrived at which this Court is not at liberty to re-examine.

42. In the Appellant's submission, there is a subtle invite to this court to explore the legal standing of the agreement said to have been reached by the parties. I choose to limit myself to the parameters of proof in respect of the current charge leaving room for ventilation of other issues between the parties to be litigated as the parties may choose in appropriate forum(s).

43. I take note that the criminal jurisdiction of this court is no substitute to the civil jurisdiction of our courts and in a matter like the one before court, the area of concern is whether a cognizable offence was committed by the appellant in which case all the ingredients of the offence have to be proved. I may mention in passing that it is to be borne in mind that in law, the degree of proof in the criminal and civil jurisdictions is different.

44. In light of the foregoing, issue no. 1 above answers in the affirmative.

45. As regards issue no. 2, that is, whether the cheques were presented to the bank and dishonoured for lack of sufficient funds, I restate the law hereunder;

Section 316A (1) (a) of the Penal Code provides as follows: -

> " Any person who draws or issues a cheque on an account is guilty of a misdemeanor if the person –
>
> a. Knows that the account has insufficient funds.

46. The operative words are "knows that the account has insufficient funds". The person who was to confirm this in his evidence is Francis Kairu (PW4), the manager at ABSA, Nyahururu branch. He confirms that the subject cheques were received at the bank. He states that the drawer was called as is the practice at the bank to confirm if he had issued the cheques. The drawer was not reached. PW4 did not present evidence of the calls. The cheques were returned with remarks "confirmation awaited".

47. PW4 did not address in his evidence the issue whether the relevant account had insufficient funds. The statement in respect of the account was not produced by the prosecution to confirm the status of the account. The prosecution had the duty to prove that there were insufficient funds in the account to meet the ingredients of the offence herein.

48. In Kamau v Republic (Criminal Appeal 74 of 2019) [2021] KEHC 307 (KLR) (11 November 2021) Majaja J stated as follows;

> " The Appellant does not deny that she issued bad cheques. Section 316(A)(1)(a) and (c) of the Penal Code states: 316. Bad Cheques
>
> 1. Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person –
>
> a. knows that the account has insufficient funds;
>
> b. .....
>
> c. has previously instructed the bank or other institution at which the account is held not to honour the cheque.
>
> (2) .....
>
> (3) .....
>
> (4) A person who is guilty of a misdemeanor under this section is liable to a fine not exceeding fifty thousand shilling, or to imprisonment for a term not exceeding one year, or to both. 12.
>
> The evidence is clear that Cheque No. 100313 for KES 250,000.00 dated 30.11.2021 was dishonoured due to insufficient funds while Cheque No. 100314 for KES. 125,000.00 dated 30 th December 2011 was dishounoured as payment was stopped by the Appellant. The prosecution proved that the Appellant was guilty of issuing bad cheques under section 316(A)(1)(a) and (c) of the Penal Code..... "

49. The particulars of the charge in this matter base the offence on alleged insufficiency of funds in the account. Such insufficiency was not laid before the trial court and therefore the conviction was not based on evidence.

50. In the circumstances the conviction was not sound. I find merit in the appeal. The same is allowed, conviction quashed and sentence set aside. The fine imposed and paid be refunded forthwith.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF SEPTEMBER, 2025.

A.K. NDUNG'U

JUDGE