



**Mundia v Republic (Criminal Appeal E183 of 2022)  
[2024] KEHC 4293 (KLR) (Appeals) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4293 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPEALS**

**CRIMINAL APPEAL E183 OF 2022**

**LN MUTENDE, J**

**APRIL 11, 2024**

**BETWEEN**

**PATRICK MWANGI MUNDIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal arising from the original conviction and sentence in Criminal Case No. 1901 of 2019 at the Chief Magistrate's Court Makadara, by Hon. C. M. Njagi - SRM on 1st July, 2022)*

**JUDGMENT**

1. Patrick Mwangi Mundia, the Appellant, was charged with three (3) counts as follows:

Count I – Obtaining money by false pretence contrary to

Section 313 of the *Penal Code*.

Particulars being that on the 1<sup>st</sup> day of March, 2019 at Thika Road Mall area in Kasarani Sub-County within Nairobi County, jointly with others not before court with intent to defraud, obtained Kshs.500,000/- from Stephen Kitonga Mutisya by falsely pretending that he was in a position to sell a vehicle Registration Number KCE 415T Toyota Fielder Silver in colour a fact he knew to be false.

Count II - Conspiracy to commit a felony contrary to Section 393 of the *Penal Code*.

Particulars being that on the 1<sup>st</sup> day of March, 2019 at Thika Road Mall area in Kasarani Sub-County within Nairobi County, jointly with others not before court, conspired together to obtain cash Kshs.500,000/- from Stephen Kitonga Mutisya with pretence that he would sell a vehicle Registration Number KCE 415T Toyota Fielder Silver in colour a fact he knew was false or untrue.

Count III – Making a document without authority contrary to Section 357(a) of the *Penal Code*.



Particulars being that on the 1<sup>st</sup> March, 2019 at Thika Road Mall area in Kasarani Sub-County within Nairobi County, jointly with others not before court with intent to defraud, without lawful authority or excuse made a logbook serial No.K14xxxxxU purporting it to be a logbook issued by National Transport & Safety Authority (NTSA).

2. At the outset the Appellant denied the charges hence the case was set down for hearing. Subsequently the Appellant requested to enter into a plea bargain agreement with the State/Prosecution. He admitted the charges, was convicted and sentenced to serve three (3) years imprisonment.
3. Aggrieved, the appellant proffered an appeal against sentence on grounds that: the trial court sentenced him without specifying the count; the court did not consider Section 333 of the [Criminal Procedure Code](#), and the charge (count 2) was defective.
4. The appeal was disposed through written submissions. The appellant urged that he had the right to plea bargain. The State Counsel did not have the right of declining to accept the plea bargain. That the matter delayed for two (2) years because of the Covid-19 pandemic hence forcing him to change plea. That the sentence did not meet the threshold set in the policy guidelines. That having pleaded guilty he saved court's time the period served of two (2) years should be taken into consideration. That the count of conspiracy to defraud is a misdemeanor such that the sentence imposed was illegal.
5. I have considered averments by the appellant. This being a first appeal, the court is enjoined to reassess and analyse what transpired at trial and come up with an independent conclusion. Section 348 of the [Criminal Procedure Code](#) provides that:
  - (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.
  - (2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.
6. From the reading of the law where an accused pleads guilty to the charge and is convicted on his own plea of guilty, the conviction cannot be impugned. What is questionable is the legality of sentence. The exception to the rule is where the plea was equivocal and where circumstances leading to conviction were in violation of a fair trial.
7. The contention of the appellant is that the second count was defective as he did not commit a felony. Section 393 of the [Penal Code](#) provides thus:

Any person who conspires with another to effect any of the purposes following, that is to say—

- a. To prevent or defeat the execution or enforcement of any written law; or
- b. To cause any injury to the person or reputation of any person or to depreciate the value of any property of any person; or
- c. To prevent or obstruct the free and lawful disposition of any property by the owner thereof for its fair value; or



- (d) To injure any person in his trade or profession; or (e) To prevent or obstruct, by means of any act or acts which if done by an individual person would constitute an offence on his part, the free and lawful exercise by any person of his trade, profession or occupation; or
  - (f) To effect any unlawful purpose; or
  - (g) To effect any lawful purpose by any unlawful means, is guilty of a misdemeanour.
8. The provision of the law refers to conspiracy with another person to commit an act or omission which would amount to a felony. The statement of the offence was clear. The particulars of the offence clearly stated that he conspired with others to obtain Kshs.500,000/- on pretence that he would sell the suit motor vehicle. Obtaining by false pretence is a misdemeanour enacted under Section 313 of the [Penal Code](#) while Section 317 and 394 of the [Penal Code](#) refer to the offence of conspiracy to defraud.
  9. Looking at facts as presented by the Prosecution they disclosed the offence of obtaining by false pretence but not conspiracy. Facts were that the Appellant was alleged to be an agent who purportedly was selling the vehicle and the police established his alias name to be Raphael Karanja. The facts as presented could not establish the elements of the offence of conspiracy to commit a felony.
  10. On count 3, Section 357 (a) of the [Penal Code](#) provides thus:  
Any person who, with intent to defraud or to deceive—
    - a. Without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing;
    - b. ....  
is guilty of a felony and is liable to imprisonment for seven years.
  11. It is apparent that facts presented do not conform to the offence. The original logbook having been in possession of the owner and the appellant having not had any original logbook the offence could not see the light. The charge was defective ab initio.
  12. As to whether the trial court complied with the law on the question of sentence, in the case of *Shadrack Kipkoech Kogo vs. Republic*, Eldoret Criminal Appeal No.253 of 2003 the Court held that:  
“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred. (See also *Sayoka vs. Republic* (1989) KLR 306)”
  13. In the instance case the trial court sentenced the appellant to three (3) years imprisonment without clarifying the count and giving directions on the other two (2) charges. The law clearly requires the court to determine each charge separately with a corresponding sentence then give directions on whether the sentence was to run concurrently or consecutively. This was not the case hence the sentence meted out was an omnibus sentence which was erroneous. (Also see *Mohamed Warsame S.T. Musa Aboker Majelo v. R* (1956) 23).



14. The committal warrant signed by the Magistrate shows that the appellant was convicted for the offence of obtaining by false pretence for which the sentence of three (3) years was meted out. Thereafter the court did not pronounce itself on counts II and III.
15. On the question of releasing the appellant for having been in custody, he was not a first offender. The only mitigating factor would be having pleaded guilty and saved judicial time. Having been a repeat offender, the sentence meted out was not excessive.
16. Section 333(2) of the CPC provides that:

Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
17. The Appellant was arrested on 29<sup>th</sup> May 2019 and following grant of bond his surety was approved on 23<sup>rd</sup> December, 2019. This period should have been considered by the trial court.

Having been sentenced on 1<sup>st</sup> March 2022, he has been incarcerated for two (2) years (24 months). In addition to the seven (7) months he was in custody for thirty one (31 months) I find the sentence to be sufficient.
18. The upshot of the above is that counts 2 and 3 are called to this court and accordingly quashed. The term served is deemed sufficient, therefore, the appellant shall be released forthwith unless otherwise lawfully held.
19. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**L. N. MUTENDE**

**JUDGE**

In the presence of:

Appellant

Ms. Arunga for DPP/Respondent

Court Assistant – Gladys

