



**Njuki v Republic (Criminal Appeal E017 of 2023)
[2024] KEHC 4936 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E017 OF 2023
DKN MAGARE, J
MAY 13, 2024**

BETWEEN

ESTHER WANJIRU NJUKI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This is an appeal from the Original Conviction and Sentence in the Chief Magistrate Court at Nyeri Law Courts in Criminal Case Number 1545 of 2021, delivered by F. Muguongo CMs on 07/03/2023.
2. The appellant was convicted on two counts and appealed to this Court and set forth five substantive grounds as follows: -
 - a. That, the learned trial magistrate erred in both law and fact in failing to appreciate the appellant fair trial was violated gravely by the prosecution by failing to provide details that the prosecution intended to use in its case contrary articles 25 and 50 (2), (c), (j), of *the constitution* of Kenya.
 - b. That, the learned trial magistrate erred in both law and fact in failing to appreciate the fact that appellant fair trial was violated gravely by the prosecution by failing to prove its case on the second count, how she was incorporated to be in the deal hence insufficient evidence to convict and sentence which occasioned a prejudice.
 - c. That, the learned trial magistrate erred in both law and fact in failing to appreciate and receive my bank statement slip that proved that I was also a victim of losing huge amount of money via operating a general shop as a wholesaler and a retailer.



- d. That, the learned trial court erred in law by failing to re-evaluate, analyze and caution herself of the alleged identification evidence. (PW2) Mary Njoki bearing the fact that she did not know me, she was vital witness and a complainant of this case.
 - e. That, the learned trial magistrate erred in law by finding my alibi defense as weak whereas I owed the necessary explanation of my part on the non- commission of the crime.
 - f. That, and without prejudice to the instant appeal, the learned trial magistrate erred in not observing that the two counts emanated from the same transaction hence the sentence ought to run concurrent to lesser the manifestly harsh and excessive sentence.
3. There are two other grounds but they do not amount to grounds of appeal and I thus dismiss them.
 4. The appellant was charged with obtaining by false pretence contrary to Section 313 of the Penal Code.
 5. The first count was that between 1/8/2020 and 30/3/21 at unknown place with intend to defraud obtained from Lawrence Ndiritu Kibuku cash Kshs. 2,591,110/= by falsely pretending that you owned an old STOVE made of Gold and Mercury and that you would enjoin the said Lawrence Ndiritu Kibuku in the business of exporting the said stove to United States of America, a business that would give good return, a fact you knew to be false.
 6. The rest of the counts were related to the first one. The court gave direction that matter proceed by way of submissions.
 7. The appellant highlighted and stated that she also lost her money in the transaction. She did not refund the money to the complainant.

Respondents submissions

8. The prosecution stated that the duty of the court is circumscribed in the case of *Selle and another Vs Associated Motor Board Company and Others* [1968] EA 123, where the law lords held by as follows; -

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
9. They stated that her rights were not violated and as such the complaint was misplaced. They stated that the evidence of PW1 and 2 was cogent that they transferred money to her account and the Investigating officer commented the evidence.
10. In her defence she said that she gave the money to Peter. They stated that she raised an alibi defence at a very late stage. They relied on the case *R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS* (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated:

“If a person is Appellant of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution



an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

11. On sentence, they stated this court cannot alter a sentence unless the trial court overlooked some material facts. they stated that the sentence was a proper one and sought reliance in the case of Ogolla s/o Owuor, (1954) EACA 270 wherein the predecessor of this Court stated:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263).” See also In Omuse - v- R (Supra) while in the case of Shadrack Kipkoech Kogo –v- R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)”

12. They conceded the fact that the sentence should run concurrently not consecutively.

Appellants submissions

13. In her submission, the appellant amended the grounds of appeal, abandoned some grounds and they introduced others. The court shall proceed on the basis of the original memo appeal.
14. On the 1st ground, they stated their right to fair trial was breached, they relied by the Court of Appeal in Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR, wherein they posited as doth: -

“We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by *the Constitution*. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in *the Constitution* and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an Appellant person and the state.”

15. They said that she was not given all the evidence that was relied on as such her right to fair trial was affected.
16. She also stated that she was not brought to court within 24 hours contrary to Article 49 (1) (f) of *the Constitution*.
17. She then stated that the case was not proven beyond reasonable doubt as there were no documents of incorporation of the first complainant.



18. They stated that the court should be wary of conviction based on identity as held in the case of *Roria v Republic (1967) EA 583 (P584)*.

“A conviction resting entirely on identity invariably causes a degree of uneasiness as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.

There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity.”

19. It was not clear from the submissions where the issue of identification arose from. She stated that from the evidence it was clear that there was no intention to defraud.
20. They stated that there was sufficient evidence to obtain a conviction.
21. On grounds 5, she stated that the two counts were emanating from the same transaction therefore the sentence should run concurrently.

Evidence

22. The substance of the charge was read on 20/5/21. The Appellant was released on bond. On 22/6/21 a surety was approved.
23. On 15/3/22 Lawrence Nderitu Kibuyu testified that in 2020 she was invited to a harambee to her home. Prior thereto the appellant had told the complainant that the grandfather owned a very expensive stove. The appellant asked the complainant to get phone numbers ID Number, KRA, PIN, they open several documents.
24. Some money was sent to the Appellant name. They opened 28 accounts to which they expected money to be sent from the United Bank of America.
25. The Appellant later asked for more money for insurance and transport. The appellant indicated that the stove had reached USA and she had been paid kSh. 76,193,577/= . They sent more money. Several other people also sent money all totalling to Ksh. 2,591,110/=
26. The Appellant thereafter gave funny excuses till after sometime the complainant went to the police. In cross examination she raised an issue over Victor Alicia’s bank account. She did not raise any issue with the deposits as raised by the complainant.
27. PW2, testified that he was informed by PW1 about the business of selling a stove for Ksh. 56,000,000. They paid some money in several branches. On cross examination, he stated that he never met the Appellant but sent money to her.
28. They then sent the investigating officer for testimony and the Appellant had no objection.
29. The investigating officer Letting Kibonei testified how he recorded statements, he filed a miscellaneous application to allow him investigate 3 phone numbers belonging to the appellant and Catherine Karimi Njuki.
30. She arrested the appellant with 2 phones with 3 lines the same one he was investigating. After acquiring all the evidence needed he released the phones.
31. On cross, examination he stated that the appellant enlisted PW1 to source for other potential buyers.



32. The appellant gave sworn testimony upon being put on defence. She stated she has no relationship with second complainant but had one with the 1st complainant who was a co- worker at Magumando distribution from 2017.
33. She stated that, 1,311,750 was sent to her line but anon behalf of Lawrence Nderitu. He stated that in 2019 someone called Peter told her about a gold stove that will fetch good money.
34. She admitted owning the 3 numbers she sent the money to Peter who went missing.
35. On cross examination. She admitted she introduced Lawrence PW1 into the business of selling gold stove

Analysis

36. The offence of obtaining by false pretence is provided under Section 313 of the Penal Code. The said section 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.”

37. The main ingredients of the offence are (1) receiving property or money (b) from a promise (1) knowing that the same is false or heard a reckless disregard whether its truthful. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own conclusion. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“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.”

38. The Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not



which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

39. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions. In *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal held that:

“An Appellant on a first appeal 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 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; 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.”

40. As I evaluate the evidence I must bear in mind that the burden of proof is on the prosecution. This burden stays with the prosecution throughout. It is never shifted to the Appellant as an accused person. In the case of *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, Justice R Nyakundi stated as hereunder: -

“It is the law in Kenya as entrenched in *the constitution* under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The *evidence Act* Cap 80 of the Laws of Kenya at section 107 (1) provides thus: “whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”

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 flows in a passage alluded to me considered the greatest jurist of our time Lord Denning;

“That degree is well settled. It needs not reach certainly, 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.”

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. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. So likewise at the close of the prosecution case under section 307 (1) of the Criminal Procedure Code the prosecution must satisfy by way of the evidence presented so far that a prima facie case exist to warrant the accused person to be called upon to answer.

41. In this case the appellants admits to have received the money. Her defence was two-fold that she received the money on behalf of the first complainant and that she gave the money to Peter Alicia. In this case, she did not get instructions from PW1 to disburse the money. At least no evidence to that effect was proved. The evidence of PW1 was unshaken as to why the money was sent.



42. The was received for a specific purpose and that purpose was to buy a stove the appellant now or ought to have known does not exist.
43. She opened several accounts to receive money and as a result deprived the owners of the money permanently.
44. The Court of Appeal HM Okwengu, JM Mativo & JM Ngugi, JJA in the case of *Litunya v Republic (Criminal Appeal 270 of 2019)* [2024] KECA 338 (KLR) (5 April 2024) (Judgment) stated as follows regarding sentence: -

“It has been said time and again that sentencing is an exercise of discretion by the trial court. For instance, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR this Court restated that: “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

45. In this case the court in his wisdom or otherwise found that an appropriate sentence was: -
- i. Count I A fine of Kshs. 2,000,000, in default, to serve two years.
 - ii. Count II- A fine of Kshs. 1,000, 000/=, in default one year in prison
46. The sentence was to run from the date of sentencing. This was not a sentence granted without an option of a fine. Once a sentence is meted out in terms of a fine it follows as a corollary that sentence must as of necessity be consecutive. Though the state conceded, there was no basis for such a concession. It is a concession that does not take into consideration the principles that guide fines as a sentence.
47. I will dismiss the concession with the contempt it deserves.
48. Secondly there was a concession that this is part of the same transaction even where the same excuse is given but to two different people but it does not make it the same transaction. This was not a transaction but a scheme to defraud using a non-existent excuse. It is a different transaction.
49. By depriving the owners of the money permanently the offense of obtaining by false pretence was complete.
50. The only error I see on the sentence is the commencement date. Section333(2) of the criminal procedure Code provides as follows; -

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.



(2) 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.”

51. The Appellant was arrested on 18/5/2021. The surety was approved on 22/6/2021, after, 14 days in custody. The surety was discharged on 7/3/2023. Therefore, the sentence should have stated on 18/5/2021 for 14 days and continues from 7/3/2023, being the date of re-arrest. The sentence will therefore restart start from the day of re-arrest on 7/3/2023 after discounting the period between 18/5/2021 to 22/6/2021, when she was released on bond.
52. From the nature of the defence given that the money was withdrawn in cash to be given to an unknown person is a lie. Its defence no reasonable court can believe. It does not answer the question of obtaining by false pretence. It in fact solidifies the case. I therefore dismiss grounds 2, 3 and 4 and 5.
53. The second issue is whether her rights were violated. I have perused the file and notice that the appellant was brought within a reasonable time to court and none of her rights under A 50 and 49 were breached.
54. In any case failure to be arraigned in at within 24 hours is not a ground for acquittal. It’s a ground for a constitutional reference for reinforcement of rights.
55. On sentence, the appellant attacked on two fronts.
 - i. that the sentence is manifestly excessive.
 - ii. that their sentence ought to be have been concurrent and not consecutive.
56. What is the same is the modus operandi using the same excuse to steal does not make it the same transaction I hold and find that this were two different crimes perpetuated on two different people therefore the court was correct in ordering a consecutive sentence.
57. Lastly, was the issue whether the sentence was harsh. This was a crime committed blatantly over a very long time. The appellant was not pricked by her conscience, to have mercy on the complainants. She admitted in court that she has not refund the money. She was the last person with the money.
58. I am therefore unable to agree with the Appellant that the sentence was excessive taking to consideration the blatant nature of the offence, the sentences are lenient.
59. Nevertheless, I may not it aside without a cross appeal. The court therefore must defer to the discretion of the trial magistrate.
60. I find and hold that she considered all relevant factors including the appellant has not to date refund the money.
61. The appellant is not a proper person to be unleased quickly the public to go back and continue defrauding.
62. In the circumstances there is no merit on both conviction and sentence. Accordingly, I dismiss the appeal in limine.



Orders

- a. I affirm the conviction and sentence as a proper one. The sentence shall run consecutively as ordered by the court.
- b. However, given that, the Appellant was arrested on 18/5/2021. The surety was approved on 22/6/2021, after, 14 days in custody. The surety was discharged on 7/3/2023. Pursuant to section 333(2) of the criminal procedure CODE, the sentence should have stated on 18/5/2021 for 14 days and continues from 7/3/2023, being the date of re-arrest. Therefore, I substitute the order that the sentence runs from the date of sentencing to the date of arrest upto the date of release on 22/6/2021 and re-starting from 7/3/2023.
- c. The appeal is dismissed.
- d. Right of appeal 14 days.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 13TH DAY OF MAY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Ms Kaniu for the state

Appellant present in open court

Court Assistant- Brian

