



**Omundo v Republic (Criminal Appeal 94 of 2023)  
[2024] KEHC 4579 (KLR) (Crim) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4579 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL 94 OF 2023  
CM KARIUKI, J  
MAY 6, 2024**

**BETWEEN**

**ANDREW OBAE OMUNDO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was charged with 3 offenses namely: - Count I identity theft and impersonation contrary to section 29 of the *Computer Misuse and Cyber Crimes Act*, Count II unauthorized access contrary to section 14 of the *Computer Misuse and Cyber Crimes Act* and count III access with intent to commit an offense section 15 (1) of the *Computer Misuse and Cyber Crimes Act*.
2. The circumstances are that on diverse dates between July 27, 2018 and May 11, 2022 at an unknown place within the republic of Kenya, the Appellant fraudulently used electronic identification at KCB Agent to withdraw Kshs. 732,033/- from Inua Jamii ATM cards account number 1254xxxx75, 123xxxx05, 123xxxx24, 123xxxx64, 123xxxx07 and 1235XXXX71.
3. During the trial, the prosecution called a total of 5 witnesses to prove their case, eventually, the Appellant was found guilty on all counts and was sentenced to serve 2 years imprisonment on count I and II- and 5 years imprisonment on count iii. The court ordered the sentences to run consecutively.
4. Being dissatisfied and aggrieved with the aforesaid judgment, the Appellant preferred the instant appeal against the conviction and sentence on the following grounds: -
  - I. That the learned trial magistrate erred in law and fact by convicting the Appellant yet failed that his defense was cogent and believable.



- II. That the learned trial magistrate erred in law and fact in failing to appreciate that the prosecution had failed to establish their case to the required standard i.e. beyond a reasonable doubt.
- III. That the prosecution failed to call other witnesses who were on appellant side thus caused a miscarriage of justice since the witnesses had different opinions about the commission of the offense and that would have accorded him a chance to be acquitted.
5. Reasons wherefore the Appellant prays that the appeal be allowed and the conviction quashed, the sentence be set aside and the Appellant be set at liberty.
6. Appellant's Written Submissions
7. The Appellant submitted that the trial court having received his mitigation, he was sentenced to serve a very harsh sentence and that being a first offender the sentence was not proportionate with the charges against him. He pleads with the court to order his sentence to run concurrently.
8. It was asserted that the learned trial magistrate did not comply with Section 333(2) of the *Criminal Procedure Code* because he was arrested on 13/05/2022 and convicted and sentenced on 15/11/2022 showing that he spent 6 months in remand. He prayed that this court consider the same in each count and reduce his sentence in accordance with the Judiciary Sentencing Policy Guidelines.
9. In conclusion, the Appellant prayed that the court order his sentence to run concurrently, reduce his sentence, and consider 6 months in each count that he spent in remand.
10. Respondent's Submissions
11. The respondent submitted that the elements that the prosecution needed to prove were: -
- i. Whether the Accused was in possession of the ATM cards
  - ii. Whether the Accused knowingly transferred or used another person's identity
  - iii. Whether the Accused had lawful authority to use another person's identity
  - iv. Whether the Accused had withdrawn Kshs. 732,032/-
  - v. Whether the Accused had an intention to commit, aid, or abet unlawful activity through the use of another person's identity
12. As to the first question, it was asserted that PW2 stated that the Accused on May 10, 2022 went to her shop in possession of 3 ATM cards. PW2 became suspicious when the Accused managed to withdraw money from 3 cards yet the program supported one person per card and reported the matter and the Accused was arrested. It has been established that the Accused had in his possession 10 ATM cards.
13. On the second issue, the respondent stated that the Accused used his fingerprint to withdraw the said amount from the accounts which became a cause for alarm as he was not the holder of the said accounts. On the third issue, pw1 stated that he is registered for cash transfer for the elderly, and also since he supported an orphan, he had also registered for government support for the orphaned girl and was to receive the funds through Equity Bank.
14. When he went to the bank to get money for the elderly, he was informed that he had also received money for orphan support but upon checking his account, the money was missing yet there was someone who was withdrawing money using his card and ID. PW1 stated that he did not know the Accused and he had never asked him to withdraw money on his behalf at any point.



15. On the fourth issue, PW4 produced a bank statement for 10 cards that were in possession of the Accused and they showed that Kshs. 732,033 has been withdrawn from 27<sup>th</sup> July 2018 to May 11, 2022. On the fifth issue, the Accused testified that a bank official by the name of Julius used to send him to look for elderly people and get their names and IDs for registration then once registration was done, he would use the Accused's fingerprint so that the transactions would go through showing that there was no doubt that the Accused knew his actions constituted fraudulent acts and that he had the intention to defraud the society.
16. On the sentence passed, the respondent contended that the sentence passed was within the law and it has not been demonstrated that the trial magistrate committed any illegality, impropriety, or mistake in sentencing the Appellant. Further, the sentence imposed will deter the Appellant from committing a similar offense subsequently as well as discourage others from committing a similar offense. In conclusion, the Appellant prayed that the court dismiss the application and uphold the sentence.
17. Analysis and Determination
18. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyze it, and come up with its independent findings. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to assess their demeanor. (See *Kiilu & another vs. Republic* [2005] 1KLR 174 and *Okeno v Republic* [1972] EA 32)
19. As stated above the Appellant was charged with 3 counts as follows: -Count I identity theft and impersonation contrary to Section 29 of the *Computer Misuse and Cyber Crimes Act*, Count II unauthorized access contrary to Section 14 of the *Computer Misuse and Cyber Crimes Act* and; Count III access with intent to commit an offense Section 15 (1) of the *Computer Misuse and Cyber Crimes Act*
20. Section 29 of the *Computer Misuse and Cyber Crimes Act*, provides that: -  
A person who fraudulently or dishonestly makes use of an electronic signature, password, or any other unique identification feature of any other person commits an offense.
21. Section 14 of the *Computer Misuse and Cyber Crimes Act*, provides that: -  
A person who causes whether temporarily or permanently, a computer subsystem to perform a function, by infringing security measures with intent to gain access and knowingly such access is unauthorized, commits an offense.
22. Section 15 (1) of the *Computer Misuse and Cyber Crimes Act*, provides that: -  
A person who commits an offence under section 14 with intent to commit a further offence under law, or to facilitate the commission of a further offence by that person or any other person, commits an offence.
23. Having thoroughly gone through the trial record, Samuel Karanja Nganga, PW1, enrolled for the Inua Jamii cash transfer program registering himself and his granddaughter. As elaborated by the trial magistrate, Inua Jamii is a cash transfer program for vulnerable Kenyans whose aim is to cushion them and improve their standard of living. To aid this, the government incorporates the account-based model system due to its security features and to enable the elderly to access banking services of their choice with ease.
24. PW1 testified that he was summoned to the police station and shown a card bearing his name, Pexh. 3 which he was unfamiliar with as he had his card. He stated that he used to withdraw money from Equity Bank and at one time, he was informed that an orphan's money had been deposited into his



- account but upon withdrawal, he was told that there was no money. He stated that he was not aware of any withdrawals made via KCB Bank as he had only been using Equity Bank. He was then given a temporary card and later informed that two people had been withdrawing money from his account using his identity card. He was then summoned to the police station and informed that a suspect had been arrested and that the money had been withdrawn either 3 times or within 3 years.
25. PW2 testified that on May 11, 2022, the Appellant went to her shop and told her he had been sent from KCB Bank. At the time, she was giving out cash for the elderly and orphans. The Appellant had 3 cards. She requested his ID card and inserted it into the biometric machine. The Appellant placed his fingerprint and the system approved the transactions and receipts came out. She gave him a total of kshs. 24,000/- but was concerned as to how he had done 3 transactions at a go on different cards so she resorted to report to Wanjohi Police Station. The Appellant was arrested on the following day when he had come with 7 more cards to withdraw. PW3 who was PW2's employer corroborated her testimony.
  26. PW4, PC Victor Muchana testified that he had recovered several cards from the Appellant after he had been arrested by Wanjohi Police Station. He went to the social service office and he was given a list of 10 cards belonging to several people including PW1 although he could not establish if the other beneficiaries were alive or dead because their telephone numbers were not going through. He went to KCB Bank where he established that the withdrawals from the cards were made from 2018 to 2022.
  27. On the other hand, the Accused in his defense submitted that on the material day, he was in Nakuru when he decided to go home and address some family issues. He decided to pass through Naivasha but diverted to Wanjohi to take water. He entered a shop and bought a charger. He wanted a sim replacement and the shop owner referred him to PW2's shop who told him to wait but shortly after, she returned with the police and was arrested. The police took his ID card, Huduma number, NHIF charger, and phone.
  28. In cross-examination, he denied having withdrawn money from PW2's shop and narrated that in 2018, he assisted the elderly in maintaining a queue during registration, Julius Munene used to work at KCB Bank and he assigned him fieldwork, to look for the elderly and take their names and ID numbers. That another KCB Bank official namely Vionna used to give him cards for destruction.
  29. Accordingly, I find that the prosecution proved their case against the Appellant beyond reasonable doubt on all 3 counts. The evidence of PW2 proved that the Appellant went to her shop and withdrew money from 3 ATM cards. The ID numbers and mobile phone numbers recorded in respect to those transactions tally with the Appellant's ID numbers. Further, the Appellant was arrested while at PW2's shop where I believe he had gone to procure similar transactions seeing as he had 7 more cards with him. Further, I find that the Appellant's defense is far from the truth. PW4 produced bank statements for the 10 cards and in total Kshs. 732,033 had been withdrawn from July 27, 2018 to May 11, 2022. The cards in question were found in possession of the Appellant and not the named beneficiaries.
  30. Additionally, the Appellant used his fingerprint impression in withdrawing the money as proved by PW2 and PW3. PW2 stated that the machine required the ID card of the beneficiary and his thumbprint. In this case, she inserted the ID card for the Accused who placed his fingerprint, and the transaction was approved for the 3 cards. PW3 corroborated her testimony. Further, she led to the Appellant's arrest after she reported her suspicions to the police concerning the dubious transactions.
  31. I concur with the trial magistrate that the Appellant intended to defraud and did defraud the ultimate beneficiaries owing to the testimony that implicated him. I also agree with the trial magistrate's finding that the prosecution established its case to the required standards and find that the actions of the Appellant were extremely unlawful considering that the government is using taxpayer's money and donor funding to make the lives of vulnerable Kenyans bearable.



32. I therefore uphold the conviction of the Appellant on all three counts as held by the trial court. Therefore, the appeal on conviction fails.
33. The trial magistrate proceeded to sentence the Appellant as follows: -Count 1: fine of Kshs. 200,000/- or 2 years in prisonCount 2: fine of Kshs. 200,000/- or 2 years in prisonCount 1: fine of Kshs. 3,000,000/- or 5 years in prison
34. The sentences were to run consecutively.
35. However, section 14(1) of the *Criminal Procedure Code*, also allows the trial magistrate in the exercise of discretion to authorize the sentences to run concurrently. It provides:-
1. “Subject to subsection (3), when a person is convicted at one trial of two or more distinct offenses, the court may sentence him, for those offenses, to the several punishments prescribed therefore 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.”
36. In *Muthangya Mutembei v Republic* [2019] eKLR the court held as follows:-
- Where a trial judge or magistrate is faced with multiple charges or offences an appropriate decision on the aggravating and mitigating factors has to be borne in mind in each distinct sentence. Where an offender has been charged and convicted with two or more counts involving the same transaction in a charge sheet or information as provided under section 135 (1) and (2) of the *Criminal Procedure Code* at the trial, the practice is to direct that the sentences should run concurrently.
37. From the record, the Appellant had been charged with three offences with every charge comprising the same transaction. The offenses the Appellant was charged with flow from each other and appear to constitute a single transaction connected. The Court of Appeal has defined the phrase ‘same transaction rule’ in the case of *Republic v Saidi Nsabuga S/O Juma & another* [1941] EACA and revisited it in *Nathan v Republic* [1965] EA 777 where the court stated as follows:
- “If a series of acts are so connected by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offenses constituted by these series of acts are committed in the course of the same transaction.”
38. In *Muthangya Mutembei v Republic* [*supra*] the court stated that:-
- The one transaction rule requires that where two or more offenses are committed in the course of a single transaction the sentencing court should consider an order for concurrent instead of consecutive sentences. In applying the above principle to the instant case, one has to be satisfied that the offenses committed fall under the sequence of a single transaction.
39. Consequently, it is my considered opinion that where the Appellant has committed more than one offense in the same transaction, the sentence imposed should run concurrently. In *Sawedi Mukasa S/o Abdullah Aligwaisa* 1946 13 E.A.C.The court considered the issue of consecutive as opposed to concurrent sentences and held the view that it was good practice to impose concurrent sentences where a person commits more than one offense at the same time and in the same transaction save in very exceptional circumstances.



40. The Judiciary of Kenya [Sentencing Policy Guidelines](#), 2016-page 15 paragraph 4.1, lists the objectives of sentencing as follows:

Sentences are imposed to meet the following objectives:

- i. Retribution: To punish the offender for his/her criminal conduct in a just manner.
- ii. Deterrence: To deter the offender from committing a similar offense subsequently as well as to discourage other people from committing similar offenses.
- iii. Rehabilitation: To enable the offender to reform from his criminal disposition and become a law-abiding person.
- iv. Restorative justice: To address the needs arising from criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, it promotes a sense of responsibility through the offender's contribution towards meeting the victims' needs.
- v. Community protection: To protect the community by incapacitating the offender.
- vi. Denunciation: To communicate the community's condemnation of the criminal conduct.

41. Further, in No.T.13 the guidelines state as follows:-

1. "Where the offense emanates from a single transaction, the concurrently. However, where the offenses are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively."

42. As stated earlier, the offenses charged were committed in the same transaction and therefore I find in the circumstances of this case the trial court erred in imposing consecutive sentences. Taking all these into account, I set aside the order that the sentence should run consecutively and substitute thereof with an order that the sentence meted should run concurrently, which will take into account the period already served by the Appellant.

43. In the end, the court makes the order;

- i. Appeal on conviction is dismissed and conviction upheld.
- ii. The appeal succeeds partially to the extent, that the sentence meted out shall run concurrently, which will take into account the period already served by the Appellant.

**DATED SIGNED AND DELIVERED AT NYANDARUA THIS 6<sup>th</sup> DAY OF MAY 2024**

.....  
**CHARLES KARIUKI**  
**JUDGE**

