



**Keriasek v Republic (Criminal Appeal 56 of 2019)
[2024] KEHC 8433 (KLR) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 56 OF 2019**

**JM NANG'EA, J
JULY 15, 2024**

BETWEEN

JAMES SAYIALEL KERIASEK APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant is dissatisfied with the trial court's judgment dated 27/7/2017 in which he was convicted of the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code and sentenced to a fine of ksh.100,000 in default to serve out a period of 2 years in prison. The particulars of the charge were that on 24/11/2012 at Kimathi Street, Nairobi, within Nairobi City County the appellant jointly with others not before court with intent to defraud obtained Ksh.2,340,000 from Hussam Deeb (hereinafter referred to as "the complainant") by falsely pretending that they had acquired a tender to supply sugar to Tuskys and Naivas supermarkets in Nairobi, a fact they knew to be false. They entered pleas of not guilty.
2. The grounds of appeal as per "Petition of Appeal" filed on 11/07/2019 are condensed as follows:
 - a. That the learned trial magistrate erred in law and fact in convicting the appellant against the weight of evidence adduced before the trial court.
 - b. That the learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution to the appellantAnd
 - c. That the learned trial magistrate erred in law and fact by failing to exercise caution while writing the judgment following a trial he didn't conduct.



3. After a full trial only the appellant was convicted while his co-accused were acquitted of the offence pursuant to Section 215 of the *Criminal Procedure Code*.
4. The evidence presented before the lower court is that the 2nd accused in the case (Francis Thandi Ngugi) had introduced the complainant to the appellant and the 3rd accused (Stephen Mburu Kinyua) as his cousins who could assist him (the complainant) to procure a contract for supply of sugar to Naivas and Tuskys supermarkets. The parties held several meetings after which the appellant availed Local Purchase Orders (LPOs), purportedly issued to his firm known as Neo B 12 Systems and General Supplies by the said supermarkets for the complainant's perusal . It was, however , noted that some of the LPOs were not dated while others had expired. The appellant took back the faulty LPOs and later returned with another set. To facilitate the transaction, the complainant was invited to join an account already opened by the appellant in the name of the above stated firm and the 3rd accused with Co-operative Bank. The partners were to share profits accruing from the transaction.
5. The prosecution evidence is that the complainant was to deposit the sugar's expected purchase price of Ksh.2,340,000 into the joint account and be made a joint signatory thereto. The 2nd accused was also introduced as a signatory to the account.
6. The complainant lamented that despite making the cash deposit, the accused persons failed to procure the supply of sugar. The accused also frustrated his attempt to get his cash back by failing to sign for withdrawal of the money from the bank. Instead, he was convinced that they could get the sugar from Mumias Sugar Company. On the strength of the promise by the accused persons, the complainant signed for withdrawal of Ksh.2,340,000 to purchase 520 bags of sugar from the said Sugar Company. it was agreed that the money would be sent to one Kibet the appellant purportedly knew as a manager in Mumias Sugar Company. Kibet is said to have subsequently sent the requisite invoice for payment.
7. Still the complainant never got the sugar supply despite the appellant having supposedly travelled to Mumias to arrange for loading and delivery of the consignment . The 2nd accused later revealed to the complainant that the said Kibet was in fact a broker and not a manager as represented. The accused persons couldn't be reached through their phones subsequently. The complaint was lodged with the police leading to arrest of the accused persons.
8. The Legal Officer of Tuskys Supermarket Head Office in Nairobi (PW7) disowned the LPOs purported to emanate from them. He told the court that Neo B12 Systems and General Supplies was not among its approved sugar suppliers and could not therefore have been awarded any contract to make supplies for the company. The witness added that the company only sourced its sugar supplies directly from the manufacturers.
9. During police investigations Co-operative Bank confirmed opening of the account in question; deposit of the sum of Kshs.2,340,000 and subsequent withdrawal of the amount on 5/01/2013 and transfer into the bank account of the said Kibet. The bank's records relating to the transaction were tendered in support of the prosecution case.
10. The appellant gave a sworn defence telling the court that he is a Systems Analyst in the employ of the Teachers Service Commission at the material time. While confirming the transaction in question, he denied defrauding the complainant. According to him, he had won a tender to supply sugar to and obtained genuine LPOs from Naivas and Tuskys supermarkets . He and his co-accused who were his business associates then embarked on the task of sourcing for the sugar. Along the way the complainant joined them in the business leading to execution of a business agreement dated 24/11/2012 among them. It was agreed that the complainant would provide funds for purchase of the sugar which funds would be deposited in a business account already opened by the appellant and the 3rd accused. The



appellant further told the court that the complainant did deposit a sum of Ksh.2,340,000 into the account for the purpose of buying the sugar. It was part of the agreement of the parties that if the business deal failed, the complainant would be refunded his money.

11. The appellant continued to state that he approached Mumias Sugar Company to sell them the sugar. The above named Kibet issued an invoice on behalf of Mumias Sugar Company on the strength of which the complainant agreed to sign for withdrawal of the funds to pay for the sugar.
12. After payment for the sugar was made into the personal account of Kibet, the appellant procured a lorry to transport it to Nairobi for delivery to the buyers. The lorry driver allegedly refused to let the appellant into the lorry to accompany the consignment saying that he was not allowed to carry passengers. He and Kibet decided to trail the lorry in a different vehicle but they couldn't catch up with it. The lorry driver could not also be reached on phone.
13. The appellant therefore reiterated his denial of the charge contending that he never benefited from the complainant's funds. He blamed Kibet for defrauding them in concert with the lorry driver, adding that he was also a victim.
14. The 2nd and 3rd accused also gave sworn evidence confirming the appellant's testimony. They refuted the allegations of fraud saying that theirs was a legitimate business deal that went sour.
15. It is trite law that a first appellate court has the legal duty of re-evaluating the trial court's findings of fact and law to reach its own conclusions while taking into account that it didn't have the advantage of watching the demeanour of witnesses (see case law in *Okeno – vs- Republic* (1972) EA 32).
16. Upon analysis of the relevant facts and the applicable law, the trial court found that the appellant was part of a conspiracy hatched to defraud the complainant. The court held in pertinent part that "accused 1 (read the appellant) was the originator of the whole scheme. He approached accused 3 who in turn approached accused 2. Accused 2 only incorporated the complainant as he did not have the money. No act to show the other accuseds were acting in conceal with the accused 1(sic)". The learned trial magistrate was persuaded that the appellant made false representation to the complainant that he had a tender for supply of sugar and that the purchase price had been received by Mumias Sugar company which then duly released the consignment.
17. The appellant's advocates submit inter alia that the trial court unlawfully shifted the burden of proof from the prosecution to the accused persons. In particular it is contended that the onus was not on the accused persons to produce the LPOs in question and /or show that they were in fact issued to the appellant. They contend that, in any event, the accused persons were not afforded an opportunity to get the LPOs in question and produce them in court. Reference is made to the judicial determination in *Lenkokwal Mandellah V. Republic* (2021) eKLR in which it was underscored that the prosecution's burden of proving a charge never shifts to the accused person. Moreover, the defence Counsel point out that the evidence from Tuskys Supermarket through PW7 claiming that the LPOs were not genuine had been expunged from the record following a High Court order.
18. It would appear that the prosecution didn't put in submissions in reply.
19. The record indeed shows that my senior brother (Justice J. Ngugi) vide ruling dated 15/11/2016 prohibited the prosecution from calling further evidence to challenge the defence evidence, having already closed its case.
20. I agree with the appellant that the trial court wrongly ordered him and his co-accused to produce the contentious LPOs in court as this amounts to compelling them to unlawfully present evidence that incriminates them contrary to Article 50(2)(i) of the *Constitution* as also noted by Justice Ngugi. Since,



however, the appellant admits that he had obtained the LPOs, the burden of producing them and showing that they were genuine shifted to him. This is not to say that the general burden of proof, which always remains with the prosecution, has been shifted to him. It is only the onus of giving evidence that shifts in particular circumstances as in this case regarding the LPOs. The appellant failed to discharge this onus of giving relevant evidence. He therefore made a false representation to the complainant that they had tenders for supply of sugar and in the process defrauded him of his money. As noted by the trial court, there is no evidence from Mumias Sugar Company showing that it sold and delivered the sugar to the appellant since the invoice allegedly issued by the said Kibet did not emanate from the company

21. In the circumstances the appellant was rightly convicted of the offence on the evidence. All the grounds of appeal accordingly fail and the appeal is dismissed.

JUDGEMENT DELIVERED VIRTUALLY THIS 15TH DAY OF JULY 2024 IN THE PRESENCE OF :

The Prosecution Counsel, Mr Gacharia

The Appellant's advocate, Mr Achillah

The Court Assistant. Ms Amina

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J. M. NANG'EA

JUDGE

