



REPUBLIC OF KENYA



KENYA LAW
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**Kamundi v Republic (Criminal Appeal E073 of 2022)
[2024] KEHC 13945 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E073 OF 2022
BK NJOROGE, J
OCTOBER 3, 2024**

BETWEEN

FRIDAH GAKII KAMUNDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the decision of Hon. G. Omodho (PM) delivered on 27/10/2022.
This arose out of Criminal Case No. 780 of 2018 at Kiambu Law Courts.)*

JUDGMENT

1. This is an Appeal against the decision of Hon. G. Omodho (PM) delivered on 27/10/2022. This arose out of Criminal Case No. 780 of 2018 at Kiambu Law Courts.

The charges

2. The Appellant is the original 2nd accused in the Lower Court. She was charged jointly with the 1st Accused one Alexander Irungu Wanjiru. She faced two counts with her co-accused as follows.
3. Court I: Making a document without authority contrary to Section 357(a) of the Penal Code. That Alexander Irungu Wanjiru and Fridah Gakii Kamundi on diverse dates between 20th January, 2025 and 2nd April, 2016 at Mater Hospital within Nairobi county, with intention to deceive without lawful authority, made Mater Hospital Procurement Policy document (MH – PUR – POLO1 (2) dated 20/1/2015 purporting it to be a procurement policy document made by Mater Hospital.
4. Court II: Conspiracy to defraud contrary to Section 317 of the Penal Code. Alexander Irungu Wanjiru and Fridah Gakii Kamundi. On diverse dates between 20/01/2015 and 2/04/2016 at Mater Hospital in Nairobi within Nairobi County, jointly with intent to deceive conspired to alter Procurement Policy Tender document MH -PUR- POLO1 (2) dated 20.1.2015 in favour of Kenya Medical



- Engineering Company to win a tender for renovation of St. Mary's Ward at Mater Hospital valued at Kshs.14,082,150/- without following due competitive bidding procedure a fact you knew to be false.
5. The Prosecution called a total of 9 witnesses. Upon the close of the prosecution case, the Trial Court delivered a ruling placing the accused person on their defence. They elected to give sworn statements and were cross-examined by the Prosecuting Counsel. None of the accused persons called any witnesses.
 6. The Trial Court delivered a Judgment where it found that the prosecution had proved its case against the 1st accused on Count II only relating to the offence of conspiracy to defraud. It acquitted him of the offence of making a document without authority. This was in respect to Count II. He was fined a sum of Kshs.100,000/- or in default to serve a prison term of 2 years.
 7. As to the Appellant, the Trial Court found that the prosecution had proved its case on both Counts I and II. She was therefore convicted and sentenced to pay a fine of Kshs.100,000/- on each Count or in default to serve a prison term of 2 years.
 8. It is this conviction and sentence that has triggered this Appeal.
 9. When this matter came up before this Court on Appeal, the Court inquired whether there was an Appeal filed by the 1st Accused. The Counsel for the Prosecution and the Appellant confirmed that there was no such Appeal.
 10. The Court therefore proceeds to consider this Appeal as filed by the Appellant only.
 11. The Appellant raises the following 7 grounds in her Appeal.
 - a. The Learned Trial Magistrate erred in law and facts by convicting and sentencing the Appellant on inconsistent, doubtful and contradictory evidence.
 - b. The Learned Trial Magistrate erred in law and facts by convicting and sentencing the Appellant when there was no evidence to support the charge of conspiracy to defraud.
 - c. The Learned Trial magistrate erred in law and fact by contradicting herself regarding access to the computers, security features and access credentials of the 1st and 2nd accused persons computers. This contradiction has occasioned grave injustice to the Appellant.
 - d. The Learned Trial Magistrate erred in law and fact in holding that the Defence did not challenge the Prosecution's evidence on alteration of the Procurement Policy document.
 - e. The Learned Trial Magistrate erred in law and fact in holding that there was a meeting of minds between the 1st and 2nd accused when the 2nd accused's credentials were used to amend the Procurement Policy document which readily gave powers that were immediately exercised.
 - f. The Learned Trial Magistrate erred in law and fact in taking into consideration extraneous matters in arriving at the erroneous Judgment.
 - g. The Learned Trial Magistrate erred in law and fact by holding that the Prosecution had proved its case against the Appellant beyond reasonable doubt.
 12. This matter was flagged down for the Rapid Results Initiative (RRI) for the month of June, 2024.
 13. The parties agreed to dispose of the Appeal by way of written submissions. The Appellant's Counsel filed submissions dated 3/6/2024. The Counsel for the Prosecution/Respondent opted not to file any written submissions. He chose to rely upon the decision of the Trial Court.



14. The Appellant's Counsel in his submissions challenged the conviction on Count I. He argues that there was no cogent evidence produced to show that the Appellant changed the policy document in issue. That the forensic evidence produced did not tie the Appellant with the changes made to the policy document. He further argued that the document was readily accessible by other persons who could change it. That the Appellant had no access to the document on 20/1/2015 as she was not the Quality Assurance Manager. She was then based at Development House in Nairobi. That there was no link between F. Kamundi MATERSERVER3 and the access credentials issued to the Appellant. He further argued that the Appellant as the quality assurance Manager did not create documents. The Policy document was already in existence on 20/1/2015. Her work was to receive various documents from the various departments. She would then upload them on the intranet. The Quality Assurance Manager had authority to edit documents based on the recommendations of various Heads of Departments.
15. He further went on to submit that no authority was exhibited as proof that the Appellant had acted against or contravened certain authority of Mater Hospital.
16. On the Count relating to conspiracy to defraud, it was submitted that there was no agreement between the two accused persons. The crucial nexus or the benefit that the Appellant accrued from such acts was not demonstrated.
17. To the Appellant's Counsel, any contradictions in the Prosecution's case should have been resolved in the Appellant's favour. That the evidence tendered by the Prosecution fell short of the standard required to arrive at a conviction. The standard being beyond reasonable doubt.

Issues for determination

18. The Court proceeds to frame two issues from determination.
 - a. Whether the charges were proved to the required standard of proof?
 - b. What orders should lie in this Appeal?

Analysis

19. This is a first Appeal. The Court reminds itself of the duty to re-evaluate the evidence on record and arrive at an independent conclusion. *Okeno -vs- Republic* [1972] E.A 32 applies to this case.
20. The Court has analysed the evidence afresh as well as considered the two issues framed in seriatim as follows;

a. Whether the charges were proved to the required standard of proof?

21. The Narrative by the Prosecution witnesses was that Mater Hospital had floated a tender for renovation of its St. Mary's Ward. Three companies responded to the tender.
22. Shemay Limited tendered Kshs.16,049,123/-. Kenya Medical Engineering Company quoted Kshs.14,082,550/- while BOC Kenya Limited (BOC) quoted Kshs.8,237,742/-.
23. That the tender was awarded to Kenya medical Engineering Company notwithstanding that they were not the lowest bidders.
24. That the 2nd Accused person as the Chair of the Tender Committee manipulated the process so as to award the tender to Kenya Medical Engineering Company. This was achieved by amending the Policy document in relation to awarding of tenders.



25. The document was amended so as to give power to the Chairman of the tender committee in certain urgent circumstances, to solely award or reject tenders. Thereafter he or she could seek the ratification or rejection of the award of tender by the tender committee at the earliest time possible.
26. The amendment to the Procurement Policy MH – PUR – POLOI (2) thus gave unilateral powers to the Chairman of the Tender Committee to by-pass the Tender Committee and act in his sole discretion.
27. This is the power that was exercised by the 2nd accused when he awarded the tender to Kenya Medical Engineering Company. When he sought to convene the tender committee to ratify the award of tender, there was disagreement. A member even wrote an email denying ratifying the decision.
28. Subsequent internal investigations revealed that the Chair of the Tender Committee was purporting to exercise powers that he did not have. That the policy document had been manipulated by way of amendment so as to give him such powers.

The charge relating to making a document without authority.

29. The case against the Appellant was that she was the Quality Assurance Manager, hence the custodian of the Mater Hospital Policy documents. They were said to have been stored in her laptop which had been issued to her by Mater Hospital.
30. To this Court, there were two Policy documents presented. One gave powers to the Chair of the Tender Committee to award or reject the tender applications.
31. The other document as per clause 1.3 does not contained such powers. As the Management had disowned the amended document, the Court takes the view that the amended document was made without authority. Even the Appellant does not support the amended document.
32. The question that should then vex this Court is who then amended the policy document? There was no eye witness to the amendment. The Prosecution relied upon the evidence of PW7. Joseph Kioko Maundu the Head of Information Tendering at Mater Hospital.
33. It also relied upon the evidence of PW8 Catherine Lomaria a Digital Forensic Examiner for DCI Cyber-Crime Unit. The Court has taken note of her evidence as well as the Forensic Report dated 23/3/3016.
34. From her evidence, the Appellant accessed the Policy document on 9/4/2015 at 3.31 p.m. the changes made was to convert the document from Word to PDF format. No other alterations as to contents were made.
35. The crucial changes to the document were made on 4/2/2016 at 1.46 p.m. they were made using the credentials FKamundiMater-Server3.
36. The Policy document at clause 1.3 originally read as follows

“Tender Process

Sourcing for goods and services will be therefore competitive bidding and in line with the purchasing procedure MH-PUR-POLO1 (4) and the tendering procedure MH-PUR-OP11(o). Specific tender Committee will be responsible for adjudication and awards of various items/projects and services in line with stipulated limits.”

37. The person using the above-mentioned credentials FKamundiMater-Server3 amended the document, firstly by deleting the words “in line with stipulated limits.”



38. The following new words were inserted thereafter.

“However, the Chairperson of the Tender Committee shall have the discretion to determine awarding of or rejection of any tender in situations of urgency of item/project and services and or in the absence of more than half of the members. In this case, the Chairperson will convene the tender Committee for ratification of the award or rejection of the particular tender at the earliest possible time.”

39. The evidence of PW7 Joseph Kioko the IT Manager at Mater Hospital, does not shed light on who changed the Policy document. To him both the Appellant and the 1st Accused had access to the document.

“Both accused had access to the policy document in both word and PDF. None needed any credentials to access the document. It was saved in the hard disk.”

40. His evidence was that each employee had been assigned a user name and a confidential password. This was for purposed of accessing the mater Hospital computer systems. This should be the credentials that should leave a trail every time someone accessed the computers to log into the system.

41. The evidence of PW8 Catherine Lomaria the Digital Forensic Examiner is that the Policy document was changed by FKamundi.Materserver3.

42. None of the witnesses testified as to who had been assigned the credentials FKamundi.Materserver3.

43. There was no evidence placed before the Trial Court to indicate that the Appellant had been assigned the Credential FKamundi.Materserver3. The evidence led was that the Appellant had been assigned the credentials FKamundi.

44. The Appellant submits that the Policy documents were easily accessible. Even PW2 was able to demonstrate that he could access the document using his Smart Phone.

45. The Defence presented by the Appellant is that she did not change the document. She had made a charge on 20/1/2015 by converting the Policy document from word to PDF format. The contents of clause 1.3 remained the same. Her testimony was that Dr. Ndani Victor and Agnes Chege had malice against her.

46. The Ingredients to be proved in a charge of making a document without authority have been the subject of Court decisions. In Dennis Binyenya -vs- Republic [2018] eKLR, Hon. G. W. Ngenye Macharia (as she then was) isolated the ingredients as follows;

- i. “Proof of the making, signing or execution of a document and that the same was done by the accused.
- ii. Proof that the making signing or execution was without lawful authority or excuse and
- iii. Proof that the making, signing and execution was with the intention to defocused or deceive.”

47. In Joseph Mureithi Kanyita -vs- Republic [2017] eKLR the Court of Appeal settled on the ingredients of the offence of making a document without lawful authority as follows;

“The offence is committed by the making, signing or extracting a document, electronic record or writing for or in the name of another person. In addition, the making, signing or



expectedly must be without lawful authority or exercises and with the intent to defraud or deceive.”

48. To this Court, the evidence of who altered the document is very crucial. The burden of proving that they Appellant made the changes/alterations or that she used the credentials FKamundi.Materserver3, at all times lay with the Prosecution. To this Court this burden has not shifted and did not shift.
49. To this Court, the Defence that the Appellant places forward to wit that the charges were fabricated is not unreasonable. Someone else could have created a credential very similar to her name so as to throw her under the bus, so to speak. No evidence was led to show that the Appellant had any rights or access to create credentials other than the one assigned to her. This Court is of the view that the person who created FKamundi.Materserver3 or the person who was accessing the server using the credential aforesaid, changed the policy document. However, no evidence ties the Appellant to the credentials.
50. The Court is persuaded by the Appellant that reasonable doubts do exist as to whether the Appellant attended the Policy document.

The charge relay to conspiracy to defraud.

51. Section 317 of the Penal Code that creates the offence of conspiracy to defraud states as follows;

“any person who conspires with another by deceit or fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to export any property from any person, is guilty of a misdemeanour and is liable to imprisonment for 3 years.”
52. Archibold’s Criminal Pleading, Evidence and Practice 2010 (Sweet & Maxwell) at pages 3025 and 3026 states as follows, as regards the ingredients of the offence.

“The agreement may be proved in the usual way or by proving circumstances from which the Jury may presume it ... Proof of the existence of a conspiracy is generally a matter of inferences deduced from certain criminal acts of the parties accused, done in pursuance of the apparent crucial purpose in common between them.”
53. This Court has relooked at the evidence and analysed it to see the whether there was a common intent or an agreement between the Appellant and the 1st Accused to defraud Mater Hospital. The Court is unable to reach such a conclusion. The Court does not agree with the Trial Court’s conclusion on this issue.
54. The Appellant was not a member of the Tender Committee. It is the 1st Accused who was the Chair. Had she been a member, the Court may have been persuaded that she stood to benefit if Kenya Medical Engineering Company got the tender.
55. In any event the prosecution did not produce any evidence or even allude to any financial benefit that accrued to the Appellant.
56. The Appellant and the 1st accused were Co-Workers. The prosecution did with lead evidence beyond that fact. It would not be safe to presume that Co-workers by the fact of general proximity are co-conspirators. Such a deduction would be wrong and not bound by any facts of the case or common human nature.



57. This Court is of the considered option that Count II was not proved to the required standards, being beyond reasonable doubt.

b. What orders should be in this Appeal

58. The Court is minded to allow this Appeal. There wasn't sufficient evidence placed before the Trial Court, to support the charges as presented.

59. Without proof of Count I the Court is of the view that the conviction on Count II cannot safely stand,

Determination.

60. The Court proceeds to allow this Appeal as it is meritorious. The Appellant's convictions on Count I and Count II are hereby quashed and the sentence passed set aside

61. The Court notes that the Appellant had already paid the fine imposed. This Court directs that the amount paid by the Appellant as fine in this case be refunded forthwith back to her.

62. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD OF OCTOBER, 2024.

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -

Mr. Otieno for the Appellant

Mr. Gachawa for the Respondent

Court Assistant - Luyai

