



**Macharia & another v Republic (Criminal Appeal 167 of 2023)  
[2024] KEHC 12257 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12257 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 167 OF 2023  
DR KAVEDZA, J  
OCTOBER 14, 2024**

**BETWEEN**

**RACHEL WANJIRU MACHARIA ..... 1<sup>ST</sup> APPELLANT**

**PAUL MAINA MACHARIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 6th October 2023 by Hon. M. Mararo (SPM) at Kibera Chief Magistrate's Court Criminal Case no. 972 of 2019)*

**JUDGMENT**

1. The Appellants were charged and after full trial convicted by the Subordinate Court on several counts of offences, namely; obtaining money by false pretences contrary to section 313 of the [Penal Code](#); conspiracy to defraud contrary to section 317 of the [Penal Code](#); Stealing by servant contrary to section 281 of the [Penal Code](#); fraudulent appropriation contrary to section 328(b)(i) of the [Penal Code](#); Uttering a document with intent to defraud contrary to section 357(b) of the [Penal Code](#) and stealing contrary to section 275 of the [Penal Code](#). They were each sentenced to pay a fine of Kshs. 51,000 on each count in default to serve 12 months imprisonment on each count charged.
2. Being dissatisfied, they filed an appeal and amended grounds of appeal challenging their conviction and sentence.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.



4. The first witness, PW1, Mercy Kamau, gave a sworn statement detailing events that transpired during her time as a finance manager at Cellulant in March 2019. While reviewing records, she noticed delays in payments meant for artists, which raised suspicions. Concerned, she followed up with PW2, who investigated the matter further. PW2 later informed her that the payment records of an artist, Rev. Wanjiru, had been altered, and the artist's name had been replaced with "St. Francis of Assisi." Alarmed by this inconsistency, PW1 decided to examine the bank accounts listed in the file and found that the accounts were registered under the name of the first appellant.
5. Digging deeper, PW1 reviewed records from 2017 to 2019. In the process, she uncovered a second discrepancy involving another artist, Wanduta, who had been receiving unusually small payments. Upon further inspection, she realized that this was because the bank accounts associated with Wanduta's payments were registered under the second appellant's name. Following these discoveries, she escalated the matter to her superior in Nigeria, who advised her to consult the company's legal counsel. PW1 then reported the issue to the police.
6. PW2, Jennifer Wanjera, testified that she worked alongside the first appellant at Cellulant, both managing payments to artists under a program called "Skiza." PW2 explained that the first appellant was responsible for disbursing payments to the artists. In March 2019, while covering for the first appellant who was on leave following the loss of two relatives. PW2 reviewed some of the 2<sup>nd</sup> appellant's files. During this review, she noticed two files with the same artist's name but different payment amounts. She promptly informed PW1 of the discrepancy, who advised her to halt the payments and contact their clients.
7. PW2 proceeded to verify the bank accounts tied to the artists' files. She discovered that the accounts were opened under two separate names, one of which belonged to the first appellant. Her findings on the Wanduta file aligned with PW1's account, confirming that the payments were channelled into the second appellant's account.
8. PW3, Sgt. Samuel Meshangi testified that the case was reported at Kileleshwa Police Station. He reviewed certified bank statements submitted as evidence and confirmed that Cellulant had deposited funds into accounts belonging to both appellants, even though neither had a valid artist contract with the company.
9. After reviewing the prosecution's evidence, the trial court determined that the appellants had a case to answer.
10. DW1, the first appellant, testified that before her arrest, she had been working at Cellulant Kenya, where her duties involved preparing payment logs for clients. However, she could not explain the funds deposited into her personal bank account or why she had added her brother, the second appellant, to the list of artists eligible for payment.
11. DW2, the second appellant, stated that he never questioned his sister about the source of the money deposited into his account. He testified that when he inquired, she merely told him that she was conducting business.
12. In general, the appellants did not dispute that indeed money was lost, and the monies were paid to their accounts or accounts associated with them. In addition, the 1<sup>st</sup> appellant was responsible for disbursing the said monies to artists, and the 2<sup>nd</sup> appellant who is her sister received the said monies and yet he was not an artist.
13. In their appeal, the appellants maintained that their defence was not a confession to the charges against them. I have looked afresh at the evidence adduced before the trial magistrate and in view of the



evidence of the recovery of monies in companies associated to the appellants. As it was held in the Court of Appeal case in Nyeri, *Isaac Nganga Kabiga Vs Republic* C.A Cr. Appeal No. 272 of 2005 (Nyeri) (Unreported) at page 7

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses.”

14. In the present case, the funds were found in the possession of the appellants. In addition, the appellants could not prove how they came to have the said monies yet they were not artists eligible to receive the said funds. The 1<sup>st</sup> appellant could not offer a satisfactory explanation of how the money was disbursed to her brother and herself. I find that in the circumstances of this case, the doctrine of recent possession applies to prove the charges against the appellant.
15. This evidence was fortified by the appellants’ evidence during their respective defences. The Court of Appeal held in *Tuwamoi –Vs- Uganda* [1967] E.A 84 on page 91 para. FG:

“A trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court.....”

16. In the circumstances of this case, I find that although the appellants have attempted to retract their evidence on appeal, the evidence contained in their defence evidence was corroborated by the evidence of the recovery of the stolen funds which was in their possession. In any event, considering the totality of the evidence adduced by the prosecution it is clear that what the appellants admitted in their evidence was in fact true.
17. I hold that the prosecution proved its case to the required standard of proof on the charges against the appellants beyond reasonable doubt. The conviction by the trial court is therefore affirmed.
18. On sentence, the appellants were each sentenced to pay a fine of Kshs. 51,000 on each count charged and in default to serve 12 months imprisonment. It is my finding that the sentence imposed was legal and there is no reason to interfere.
19. Consequently, the appeal against conviction and sentence is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF OCTOBER 2024**

**D. KAVEDZA**



**JUDGE**

