



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna v Republic (Criminal Appeal 94 of 2019)  
[2023] KEHC 2137 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2137 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL 94 OF 2019  
JM CHIGITI, J  
MARCH 14, 2023**

**BETWEEN**

**MICHAEL NJUGUNA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being aggrieved and dissatisfied by the judgment delivered on 6th March 2014 at Kiambu Chief Magistrate Court in Criminal Case No. 299 of 2010 Republic vs Michael Njuguna and Titus Ngochi by Honorable C.C. Oluoch)*

**JUDGMENT**

**Brief Background**

1. The Appellant was arraigned in court facing ten counts as set out in the charge sheet dated June 26, 11 in Criminal Case No 299 of 2010. The matter went into trial where the prosecution called witnesses.
2. The Appellant was thereafter put to his defence where he gave an unsworn statement. After hearing the case, the court convicted the Appellant with court II, III, and IV on March 6, 2014.
3. The last paragraph of the judgment read as follows;  

“In the result I convict the 1<sup>st</sup> Accused in count I and the 2<sup>nd</sup> Accused in count II, III, and IV  
I however acquit the 1<sup>st</sup> Accused in count I under Section 215 of the CPC.”
4. The court thereafter proceeded into sentencing as follows:  

“  
Count (2<sup>nd</sup> Accused) – Fined Kshs 50,000 or 6 months in default  
I



Count (1<sup>st</sup> Accused) - Fined Kshs 50,000 or 6 months in default

II  
Count (1<sup>st</sup> Accused) - Fined Kshs 20,000 or 4 months in default

III  
Count (1<sup>st</sup> Accused) - Fined Kshs 50,000 or 4 months in default

IV default, sentences shall run consecutively.”

5. Dissatisfied with the decision and the judgment the Appellant filed a Memorandum of Appeal on 20/3/14.
6. The Appellant raised 8 grounds of Appeal.

### **Analysis and Determination**

7. This being a first appellate court, the court shall proceed to analyze and re-evaluated afresh all the evidence adduced before the lower court and draw its own conclusions bearing in mind that it neither saw nor heard any of the witnesses in line with the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal held as follows:

“ 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 Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA. 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 finding and conclusion; 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] EA 424.”

### **Ground 1**

8. The Appellant raised a concern that he was convicted in a case where there was no complainant.
9. I have had the occasion of appraising myself with the trial court file from where I have satisfied myself that the complainant was Kimani Charagu.
10. The investigating officer confirmed that the complainant was Kimani Charagu - during chief and cross examination.
11. The charge sheet identifies Kimani Charagu as the complainant.
12. This ground of Appeal lacks merit and I proceed to dismiss it.

### **Ground 2**

13. The Appellant faults the trial magistrate for failing to consider the evidence produced by the Appellant at all.
14. From the proceedings it is on record that during the hearing, the Appellant gave an unsworn statement on September 10, 2013.
15. It is my finding that the trial magistrate referred to the Appellant’s unsworn statement during the witness’s analysis at pages 5 and 6 of her judgment.



16. However, unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. They have no probative or evidential value.
17. The law relating to unsworn statements is well expressed by Emukule, J in the case of *Mercy Kajuju & 4 Others v Republic* [2009] eKLR where he stated as follows:

“I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.
18. This ground lacks merit and it is hereby dismissed.

### **Ground 3**

19. The Appellant raises the ground that the trial magistrate erred in law and in fact by relying in evidence of a sole witness to convict him.
20. I have analyzed the evidence as tendered by all the prosecution’s witness, and it is my finding that there is ample evidence that can implicating the Appellant.
21. The complainant testified that he knew the Appellant and that he did not prepare any sale agreement. He confirmed that his secretary was in hospital at the time the offence was committed.
22. The document examiner linked the signatures and the sale agreement to the Appellant.
23. PW2 Suleiman Kiragu Kimani, the Credit Manager testified that the Appellant approached the bank for a loan of Ksh 5.2 million.
24. He testified during cross-examination that the Appellant presented a copy of the sale agreement, the title deed, and the receipt to the bank.
25. The trial magistrate in her judgment made reference to the evidence that the Appellant was mandated to sell the property and collect bids according to PW2. This witness testified that the property was transferred to the Appellant.
26. The magistrate made reference to the complaints evidence touching on the Appellant.
27. Sargent Peter Indech, one of the prosecution witnesses, tendered evidence that implicated the Appellant when he told the court that the Appellant had applied for a loan using the suit property, the agreement, and the receipt being receipt No 5382 that had been plucked from the receipt book of Murutani Company.
28. The agreements were purportedly witnessed by Kimani Charagu the complainant who disowned the fact. He testified that the property was registered in the Appellant’s name.
29. PW7, Keneth Kibe Gitahi the Equity bank ex-official testified and told the court that the Appellant appeared in the bank and used the sale agreement, the receipt for the deposit, and a copy of the title to apply for a loan.
30. It is my finding that the forgoing evidence is sufficient to link the Appellant to the offence.
31. This ground has not been proven and I hereby dismiss it.



## Ground 4 & 5

32. The Appellant is of the view that he was convicted without any evidence linking him to the crime.
33. PW1 testified that the Appellant was appointed as the agent to sell the property.
34. The analysis that this court has done on ground 3 of the Memorandum of Appeal sufficiently links the Appellant to the offence and it is my finding that this ground lacks merit.

## Ground 6

35. The Appellant raises concerns that he was denied the right to representation during the trial.
36. Upon analyzing the proceedings of the trial court, I have noted with a lot of concern that when the matter came up for hearing on 9<sup>th</sup> April 2013, the magistrate refused the Application for an adjournment, by the Appellant who indicated that his advocate was attending a clinic. The matter proceeded into the hearing of PW 3 and 4 without the Appellant's counsel. The Appellant was forced to conduct the cross-examination in person.
37. I have taken note of the fact that the Appellant conducted the cross-examination in person, in a clear breach of his right to fair hearing as guaranteed under Article 50 of *the Constitution* which provides that;
  1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
  2. Every accused person has the right to a fair trial, which includes the right—
    - (a) to be presumed innocent until the contrary is proved
    - (b) to be informed of the charge, with sufficient detail to answer it
    - (c) to have adequate time and facilities to prepare a defence;
    - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
    - (k) to adduce and challenge evidence;
38. The right to a fair hearing under Article 50 of *the Constitution* is non-derogable in nature under Article 25 of *the Constitution*. Article 25 of *the Constitution* provides that; despite any other provision in *the Constitution*, the following rights and fundamental freedoms shall not be limited- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of habeas corpus.
39. The prosecution did not have much to say on this issue in its submissions.
40. Article 165 of *the Constitution* gives this court unlimited powers to this court to protect, promote, and fulfil the rights of the Appellant as - guaranteed under Articles 25 and Articles 50 of *the Constitution*.
41. I have also noted that counsel for the Appellant was again unwell, and absent when the matter proceeded on November 16, 2012. I have looked at the evidence that was tendered on the day when the Appellant was forced to conduct the cross-examination in person. The witness who testified on November 16, 2012 was the complainant who is an advocate of the High Court. The content of his



evidence is heavy. He is the king pin of the entire case. He is a trained law professional. The depth of his evidence cannot be downplayed.

42. He is the nexus to his office secretary who is the prosecution witness who refers to the forged sale agreement that is at the heart of the entire case.
43. His signature is the subject of what the document examiner PW7 analyzed. He testified that he knew the Appellant. He had a lot of evidence that weighed heavily in the mind of the trial court while arriving at a conviction.
44. I have also looked at the nature and the content of the cross-examination as done by the Appellant. The nature and the depth of the questions that are posed by the Appellant to the witness show that the two had a 10-year relationship as office neighbors, and that there was a sale agreement in issue. There was a receipt and a payment in question.
45. Article 50 (k) of *the Constitution* gives the Appellant the right to adduce and challenge evidence. From the going analysis, it is my considered view that the Appellant was not well equipped to challenge evidence this witnesses.
46. There is a possibility that his advocate had prepared a list of questions for cross examination around the sale agreement, the signature, their relationship, the receipt and the secretary inter alia.
47. The Appellant's right to fair hearing as guaranteed under Article 50 was violated in the circumstances. He was disadvantaged and exposed to an unfair prosecution outcome that led to the conviction. This would have been different had the Appellant been allowed to challenge the prosecution evidence through counsel.
48. I make a finding that this ground of Appeal has merit and the same succeeds. The same has the effect of vitiating the entire proceedings, and the conviction and sentence.

#### **Ground 7**

49. This ground was dealt with in the court's reasoning in 2,3, and 4 above.

#### **Ground 8**

50. The sentencing cannot hold in light of my finding that the appellants right to fair hearing under Article 50 of *The Constitution* was threatened, impeached and or violated.

#### **Disposition**

51. This court has arrived at the finding that the Appellant's right to fair hearing as guaranteed under Article 50 of *the Constitution* was violated.

#### **Order:**

1. The Appeal is allowed.
2. The conviction and the sentence are quashed and set aside.
3. The Appellant is set free.

**DATED AND DELIVERED AT KIAMBU THIS 14<sup>TH</sup> DAY OF MARCH 2023.**

**J. CHIGITI (SC)**

**JUDGE**

