



REPUBLIC OF KENYA



**Kimeu v Republic (Criminal Appeal E022 of 2022)  
[2023] KEHC 24172 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24172 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E022 OF 2022  
GMA DULU, J  
OCTOBER 16, 2023**

**BETWEEN**

**NICHOLAS MUTUKU KIMEU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in Criminal Case No. E168 of 2021 at Makeni Law Court delivered on 15th February 2022 by Hon. Otieno J. (RM))*

**JUDGMENT**

1. The appellant was charged with five counts of stealing contrary to Section 268(1) as read with Section 275.
2. Under Count I, the particulars of offence were that on diverse dates between 26<sup>th</sup> August 2019 and 18<sup>th</sup> March 2020 while at Mbuvo market, Kathonzweni Sub County within Makueni County fraudulently withdrew Kshs. 127,000/= from KCB Bank account number 110xxxxx registered under the name John Kioko Kavila through KCB Agent Code 62xxx registered under the name Mbuvo Network CBO the property of John Kioko Kavila.
3. The particulars of Count II were that between 13<sup>th</sup> January 2020 and 1<sup>st</sup> April 2020 while at Mbuvo market, Kathonzweni Sub County in Makueni County fraudulently withdrew Kshs. 44,000/= from KCB Bank account number 112xxxxxxx registered under the name Solomon Muasya Mulumbi through KCB agent code 62xxx registered under the name Mbuvo Network CBO the property of Solomon Muasya Muvumbi. There were no particulars for count III.
4. The particulars of Count IV were that on diverse dates between 13<sup>th</sup> January 2020 and 1<sup>st</sup> April 2020 while at Mbuvo market, Kathonzweni Sub County within Makueni County fraudulently withdrew Kshs. 2,000/= from Equity Bank account number 126xxxxxxx registered under the name Domitila



Nzula Munyoki through Equity Agent Code 62xxx registered under the name Mbuvo Network CBO the property of Domitila Nzula Munyoki.

5. The particulars of Count V were that on diverse dates between 13<sup>th</sup> January 2020 and 1<sup>st</sup> April 2020 while at Mbuvo market, Kathonzi Sub-County fraudulently withdrew Kshs. 2,000/= from Equity Bank account number 519xxxxxx registered under the name Philles Mwelu Jackson through Equity Agent Code 62xxx registered under the name Mbuvo Network CBO the property of Philles Mwelu Jackson (should be Jackson).
6. He pleaded not guilty to the charges, and was convicted after trial. I note that in the conviction however Count III is mentioned and Count V is omitted. In particular, the trial court concluded as follows:-

“The sum total of the foregoing is that the accused person is accordingly convicted of stealing contrary to Section 268 as read with Section 275 of the Penal Code on Counts 1, 2, 3 & 4. He is however acquitted in Count 3 pursuant to Section 215 of the Criminal Procedure Code.”
7. Consequently upon the conviction the trial court ordered that of the Kshs. 50,000/= already repaid by the appellant, the complainant receive in Count II, 30,000/= and the complainant in count IV and V receive 5,000/= each and the balance be paid to complainant in count IV. The trial court then went on to sentence the appellant to 3 years imprisonment on Count I and a fine of Kshs. 20,000/= on each of Counts I, IV and V and in default imprisonment of 2 years. (In my view the latter Count I should be Count II.)
8. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-
  1. The learned Magistrate erred in law and fact when he convicted and sentenced him without regard to his basic rights including the disclosure of the prosecution evidence as provided under Article 50(2)(j) of the *Constitution*.
  2. The learned Magistrate erred in law and fact when he failed to indicate the charge he was convicted and sentenced under, amongst the five charges he was facing in this trial, during her judgment as stipulated in Section 169(2) of the *Criminal Procedure Code*.
  3. The learned trial Magistrate erred in fact and in law by failing to observe that he was charged under a duplicate charge and that the prosecution was allowed to amend the charge sheet twice without fully applying the requirements of the law under Section 214 of the *CPC*.
  4. The learned Magistrate erred in fact and in law when he dismissed his sworn defence without giving a cogent reason and by shifting the burden of proof to the appellant, misrepresenting and misdirecting herself on the evidence, and hence arriving at a wrong conclusion.
9. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
10. This being a first appeal, I have to start by reminding myself that as a first appellate court, I have a duty to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences, while bearing in mind that I did not see witnesses testify to determine their demeanour see *Okeno v Republic* (1972) EA 32.
11. The appellant has raised technical as well as substantive grounds of appeal. I will deal with the technical grounds first.



12. The appellant has complained that he was not accorded a fair trial as envisaged under Article 50(2)(j) (h) of the *Constitution*. Under this ground he says that after two witnesses testified, the prosecution amended the charge sheet.
13. Having perused the proceedings, indeed after two witnesses testified, the prosecution applied for and was allowed by the trial court to amend the charges. Thereafter, the appellant pleaded not guilty to all the five (5) charges.
14. I note that the additional charges were in respect of other complainants whose evidence was tendered after the charges were pleaded to. The first two counts related to John Kioko Kavila and Solomon Mwasya Mulumbi.
15. In view of the above position, I find no basis to support the appellant's complaint that he was not provided with evidence before being tried for any offence or charge. I thus dismiss that complaint since under Section 214 of the *Criminal Procedure Code*, the prosecution is allowed to amend the charge or charges at any time before closure of their case.
16. With regard to ground 2 of appeal that the Magistrate failed to indicate the charges for which the appellant was convicted as required under Section 169(2) of the *Criminal Procedure Code* (Cap.75), indeed there was an error in the numbering of the charges on which the appellant was convicted and sentenced.
17. However, it is very clear from a holistic reading of the conviction and sentence, that the appellant was acquitted of Count 3, as the trial court in the judgment found that there was no sufficient evidence to establish that the agency (CBO) lost Kshs. 82,050/=
18. I thus dismiss ground 2 of the appeal.
19. The appellant further raised another technical ground that he was tried on a duplicate charge. On this he has complained that Section 268(1) and 275 of the *Penal Code* should not have been pleaded or referred to together in the same count of stealing.
20. In my view, Section 268(1) of the *Penal Code* only describes the general definition of stealing and Section 275 of the *Penal Code*, describes the specific type of theft allegedly committed and the punishment. The appellant was thus not charged with duplicate offences in the same count, but with the offence wherein the general definition is in another section and the specific type of offence and punishment is in another section. I thus find no duplicity in the charges. I dismiss that ground.
21. The substantive ground of appeal is on shifting the burden of proof to the appellant and not considering the appellant's defence. On this ground, I note that in proving the offences alleged, the prosecution called nine (9) witnesses.
22. On his part, the appellant tendered sworn defence testimony and did not call additional witnesses. He stated that he was assaulted by the investigating officer while in custody and forced to admit the offences. He stated also that he was not supplied with witness statements and that the prosecution witnesses lied against him. He was cross-examined by the prosecutor.
23. It is also of note that in mitigation before sentence, the appellant offered payment of Kshs. 50,000/= as compensation in order to be accorded a lenient sentence.
24. In my view, from the evidence on record from the prosecution, weighed against the sworn defence of the appellant, the offences – Count I, II, IV and V were proved by the prosecution beyond any reasonable doubt. I thus dismiss the appeal on conviction.



25. On sentence, considering the circumstances of this case where the appellant systematically took advantage of vulnerable customers, the sentences imposed cannot be said to be harsh or excessive.
26. I thus dismiss the appeal, but clarify that the conviction and sentence of the trial court was for counts I, II, IV and V. The appeal is dismissed. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF OCTOBER 2023 AT VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Appellant

Mr. Kazungu for State

