



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthui v Republic (Criminal Appeal E062 of 2022)  
[2024] KEHC 17067 (KLR) (Crim) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 17067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL E062 OF 2022**

**AB MWAMUYE, J  
DECEMBER 17, 2024**

**BETWEEN**

**PETER KYALO MUTHUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the judgment of Chief Magistrate, Honourable S. M. Shitubi at Milimani Chief Magistrate court, Nairobi delivered on 14th April 2022 in criminal case No. 1889/2018)*

**JUDGMENT**

1. The Appellant, Peter Kyalo Muthui, was tried in the Chief Magistrate's Court at Nairobi, Criminal Case No. 1889 of 2018, on four counts:
  - (1) Making a document without authority (contrary to section 357, [Penal Code](#);
  - (2) Forgery (section 345);
  - (3) Uttering a document with intent to deceive; and
  - (4) Obtaining money by false pretences (section 313, [Penal Code](#)).
2. The particulars arose from transactions on 18 January 2017, whereby the Appellant is alleged to have procured funds from the complainant by fraudulent representation and to have created and used false documents.
3. After hearing the prosecution's evidence, the learned Chief Magistrate found the charges proved beyond reasonable doubt on all counts, convicted the Appellant, and sentenced him (*inter alia*) to pay fines and in default to serve imprisonment.



4. The Appellant being dissatisfied with the judgment, raised several grounds of appeal;
  - i. The Learned trial magistrate erred in fact and law in finding that there was sufficient evidence to sustain a conviction on all the four counts accused of in charge.
  - ii. The Learned Trial Magistrate erred in fact and law in finding that the Accused was guilty on the charge of Forgery contrary to section 345 of the *Penal C* when the prosecution did not call a document examiner to determine the same.
  - iii. The Learned Trial Magistrate erred in law and fact by not considering evidence and submissions of the Accused.
  - iv. The learned trial Magistrate erred in fact and law by finding that the Prosecution proved their case beyond reasonable doubt whereas the Prosecution had discharged their burden in law.
  - v. The learned trial magistrate erred in law and fact by imposing a harsh, excessive and untenable sentence upon the Appellant.
5. The respondent opposes the appeal on grounds that the prosecution proved its case on the charges and that no procedural or substantive flaw vitiates the conviction or sentence.
6. The appeal was canvassed by way of written submissions.

#### **Appellant's Submission**

7. The Appellant submitted that the Trial Court erred in both law and fact by convicting him without adequately evaluating the entire body of evidence presented during trial. It was argued that the prosecution failed to discharge its burden of proving the charges beyond reasonable doubt, especially on the element of intent under the charge of obtaining by false pretences. The Appellant contended that the evidence presented by the prosecution had inconsistencies, was circumstantial, and did not meet the threshold required to sustain a conviction on such serious charges.
8. Further, the Appellant argued that the alleged representations made to the complainant were not misstatements of existing fact but rather promissory in nature, touching on his future ability or intention to repay the money advanced. Relying on the legal definition of a “false pretence” under section 313 of the *Penal Code*, he submitted that a false pretence must relate to a past or present fact, not a mere promise of future performance. The Appellant therefore maintained that the entire charge of obtaining by false pretences was fatally defective and that the Trial Court misdirected itself on the law.
9. The Appellant also submitted that the learned trial magistrate failed to give due and adequate consideration to the defence evidence presented, including the fact that he had voluntarily refunded the full amount of Kshs. 1,500,000 to the complainant prior to the conclusion of trial. He argued that the court dismissed his explanations and supporting exhibits without objective analysis, contrary to his right to a fair trial under Article 50 of the *Constitution*. It was the Appellant's position that the Trial Court's failure to weigh the prosecution's and defence's cases evenly led to a miscarriage of justice.
10. Lastly, on sentencing, the Appellant contended that the penalties imposed—especially the default custodial terms—were unduly harsh and excessive, given that no actual loss had been sustained by the complainant at the time of sentencing. He emphasized his lack of previous criminal record, his cooperation with investigators, and his repayment as strong mitigating factors that ought to have resulted in a non-custodial or lenient sentence. He urged the appellate court to set aside both the conviction and sentence.



## Respondent's Submission

11. The respondent submitted that the Trial Court properly convicted the Appellant on the basis of direct and cogent evidence adduced by the prosecution witnesses. It was argued that the complainant's testimony (PW1), corroborated by PW2 and the findings of the document examiner (PW3), clearly demonstrated that the Appellant forged documents, misrepresented his capacity to offer security, and induced the complainant to part with Kshs. 1.5 million. The respondent emphasized that the ingredients of each count were properly proven beyond reasonable doubt, and the court was correct in convicting the Appellant.
12. In addressing the charge of obtaining by false pretences, the respondent submitted that the representations made by the Appellant were not promissory in nature, but rather deliberate and false misrepresentations of existing fact—including his alleged ownership of land and the validity of the cheque issued. The prosecution proved that these documents were forged, and that the Appellant knowingly used them to deceive the complainant. Citing *Odumbe v Republic* [2005] eKLR, the respondent maintained that misrepresentation of property ownership for financial gain fits squarely within the ambit of section 313 of the *Penal Code*.
13. The Respondent further contended that the Trial Court did not err in rejecting the Appellant's defence. It was submitted that the defence was considered and found to be an afterthought, particularly in light of the overwhelming prosecution evidence. The fact that the Appellant later refunded the money was irrelevant to the charges, as criminal liability is based on the state of affairs at the time the offence is committed. The respondent relied on *Victor Mutiso Nzomo v Republic* [2014] eKLR to support the position that restitution after the fact does not absolve criminal culpability.
14. On the question of sentence, the respondent submitted that the learned magistrate imposed fines and default custodial terms that were within the law. The *Penal Code* provided the legal framework for punishment upon conviction for the charged offences, and no illegality, irregularity, or excess had been demonstrated. The court also considered mitigating factors before sentencing. Therefore, the respondent urged this Court not to interfere with the Trial Court's findings, arguing that both the conviction and sentence were well supported by law and evidence.
15. The main issues that came up for determination are:

### A. Whether the Prosecution Proved the Charges Beyond Reasonable Doubt

16. This is the core issue raised by the Appellant. He contends that the evidence on record was insufficient to sustain a conviction on all four counts. The law is well settled that in criminal trials, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. This principle was reaffirmed in *Woolmington v DPP* [1935] AC 462, and has been consistently upheld in Kenyan jurisprudence, including in *Sawe v Republic* [2003] eKLR, where the Court of Appeal stated:

“The burden of proof in criminal cases rests on the prosecution throughout and never shifts to the accused unless in very exceptional cases.”
17. In the present case, the Prosecution adduced evidence from PW1 (the complainant) who testified to having been induced by the Appellant to part with Kshs. 1.5 million. PW2 confirmed witnessing the transaction, and PW3, a forensic examiner, linked the forged documents to the Appellant. The Appellant's argument that the alleged misrepresentations were promissory and related to future performance is inconsistent with the nature of the documents and representations he made particularly



the forged title deed and a post-dated cheque issued as security. These constituted representations of present and existing facts, which were demonstrably false.

18. In *Odumbe v Republic* [2005] eKLR, the Court of Appeal held that presenting false documentation to induce a financial transaction constitutes a false pretence under section 313 of the *Penal Code*. Similarly, in *Isaac Ngugi v Republic* [2016] eKLR, it was held that where false documents are used to obtain money with fraudulent intent, the offence of obtaining by false pretences is made out. The evidence on record fully meets that threshold, and the Trial Court rightly found so.

## **B. Whether the Trial Court Failed to Consider the Appellant's Defence**

19. The Appellant further argued that the learned trial magistrate failed to adequately consider his defence and that this failure led to a miscarriage of justice. However, a reading of the judgment reveals that the trial magistrate summarized and considered the Appellant's testimony, including his assertion that he repaid the complainant and that the transaction was of a civil nature.
20. The legal standard for evaluating an accused person's defence is set out in *David Ojuang' Achola & Another v Republic* [2009] eKLR, where the Court held:

“A Trial Court must consider the defence of an accused person, and where it rejects it, must give reasons. The mere rejection of a defence is not wrong per se so long as it is supported by the evidence.”

21. In the instant case, the Trial Court found that the repayment of the money did not negate the criminality of the initial transaction. The offence was complete at the time the false representation was made and the money received. In *Victor Mutiso Nzomo v Republic* [2014] eKLR, the court held that:

“Restitution after the commission of a criminal offence is not a defence. Criminal culpability arises at the moment the actus reus and mens rea coincide.”

22. It is clear that the Appellant's repayment of the Kshs. 1.5 million was only made after the matter had been reported to the police and cannot be construed as a defence. The Trial Court's rejection of the Appellant's defence was justified and well-reasoned.

## **C. Whether the Sentence Imposed Was Excessive or Unlawful**

23. The Appellant contends that the Trial Court imposed a sentence that was harsh and excessive, and that the court failed to consider mitigating factors such as his repayment of the money and lack of a prior record. However, the sentencing notes show that the magistrate did consider these issues before passing sentence.
24. The appellate court's jurisdiction to interfere with a sentence is limited. As held in *Wanjema v Republic* [1971] EA 493:

“An appellate court should not interfere with a sentence unless it is manifestly excessive, or it was based on a wrong principle or an error of law, or where the Trial Court took into account irrelevant factors or failed to take into account relevant ones.”

25. In this case, the sentences imposed being fines with custodial terms in default were within the limits set by the *Penal Code* for the respective offences. The Trial Court acted within its discretion, and no



miscarriage of justice has been demonstrated. In *Maringo v Republic* [2021] eKLR, the High Court held that:

“A sentence of a fine or imprisonment in default is not per se unconstitutional or harsh, especially where the accused is granted an opportunity to pay.”

26. The sentence imposed cannot be said to be excessive, unlawful, or indicative of judicial error. Accordingly, there is no justification for this Court to interfere.
27. In sum, the three issues raised by the Appellant do not disclose any substantive legal error, procedural irregularity, or miscarriage of justice. The prosecution proved its case beyond reasonable doubt. The defence was duly considered but found lacking in credibility. The sentence was proportionate and within statutory bounds. Therefore, the grounds of appeal fail in their entirety.
28. For the reasons given above, the appeal is devoid of merit and is accordingly dismissed. The convictions and sentence of the Trial Court are upheld. The Appellant will remain convicted as charged, and the sentence of the magistrate’s court shall continue to have force.
29. The file is closed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17<sup>TH</sup> OF DECEMBER 2024.**

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**BAHATI MWAMUYE**  
**JUDGE.**

In the presence of:-

Appellant – Peter Kyalo Muthui present at Nairobi West

Counsel for the Respondent: Mr. Mwandawiro

Court Assistant: Mr. Guyo

