



REPUBLIC OF KENYA



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**M'Impwi v Republic (Criminal Appeal 98 of 2018)
[2025] KECA 1561 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1561 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 98 OF 2018
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 3, 2025**

BETWEEN

JOHNSON KOBIA M'IMPWI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (F. Gikonyo J.) delivered on 17th September, 2018 in Criminal Appeal No. 51 of 2017)

JUDGMENT

Background

1. This is a second appeal. Johnson Kobia M'Impwi, (the appellant), was aggrieved by the judgment of the High Court at Meru (F. Gikonyo J.), in Criminal Appeal No. 38 of 2018 which upheld his conviction and sentence of twenty-four (24) months imprisonment. The appellant was charged with the offence of giving false information to a person employed in the Public Service contrary to Section 129 (a) of the Penal Code. The particulars of the charge were that on 1st April 2014 at Criminal Investigations Division (CID) office, Imenti North District within Meru County, the appellant informed C.I Samuel Yagan and No. 62176 CPL Andrew Nyagah, persons employed in the public service as police officers that a member of staff at Mwalimu Sacco (the sacco) withdrew Kshs.2,250,000 from his account (288) 23 without his knowledge and banked it in the account of the Sacco General Manager, Mr. Maitethia, information he knew to be false, intending thereby to cause the arrest and charge of the said member of staff and Maitethia, an act which they ought not to have done if the true state of facts respecting such information was given had been known to them. The prosecution called six (6) witnesses in support of its case against the appellant.
2. Daniel Kinyua Matere (PW1), testified that in 2012 he was working with Solutions Sacco as the Assistant CEO in charge of Finance. That on 25th July, 2015, he was in a board meeting when he was



called by an officer from Banking and Anti-fraud named Josiah Gichohi who informed him that he was instructed to investigate a matter raised by one of their members, the appellant, in relation to a withdrawal of money from his account on 17th January, 2008. That he was in Machakos and thus called his colleague at the Head Office in Meru, one David Thurania Muguika, an accountant and requested him to give the relevant information required by the said officer. That PW1 then learned that the complaint was made by the appellant relating to alleged withdrawal of Kshs.2,250,000.00 from his account. PW1 testified that the appellant had secured a loan of Kshs.3,000,000.00 from the Sacco to purchase a truck. PW1 testified that he was aware that the appellant travelled to Mombasa where he identified a truck and informed the CEO, Mr. Mukira Muteithia who in turn requested the teller on duty to make a withdrawal of Kshs.2,250,000.00 from the appellant's account and deposited it into the vendor's account name Bat-hef H Hussein Said. PW1 testified that he was in possession of a statement indicating that a deposit of Kshs.2,250,000.00 was deposited on 17th January, 2008 for one Bat-hef Hussein. Further, that there was a sale agreement between the appellant and the vendor, Yaseer Abdulla Omar which PW1 testified that he came to know of once the appellant complained to the CID. Further, that the sale agreement was dated 17th January 2008 and was between the vendor, Yaseer Abdulla Omar and Johnson Kobia and was witnessed by Mureithi. That the sale agreement indicated that the purchase price was Kshs.2,200,000.00 That the appellant requested that Kshs.2,250,000.00 be deposited so that he could service the vehicle, fuel and insure it to enable the motor vehicle be driven home from Mombasa. That he was aware that the appellant bought the vehicle as the appellant took possession of motor vehicle KBB 630B Mitsubishi FH. PW1 testified that he had a copy of the log book for the motor vehicle. That the appellant defaulted in paying the loan in the first instance but finally paid in December 2016. PW1 testified that the appellant ceased being a member of the Board of the Sacco which is when he started complaining that his money amounting to Kshs.2,200,000.00 was withdrawn from his account and deposited in other accounts. On cross-examination, PW1 maintained that the money was withdrawn legally and the appellant gave verbal consent and instruction regarding the account in which the money was to be deposited. He produced a loan statement, loan application form, deposit slip, sale agreement, logbook and minutes of the finance sub-committee as exhibits 1-6.

3. Maitethia Mukira, (PW2) the then CEO of Solutions Sacco, testified that he met the appellant in Mombasa on 16th January 2008 to buy a truck, which truck he identified. That the appellant instructed him to call back the office in Meru and authorise withdrawal of Kshs.2,250,000.00 from the appellant's account and bank it in the truck seller's account and that this money was paid by PW1. That the appellant gave instructions directly and personally and that it was PW1 who banked the money in the truck vendor's account.
4. Stephen Mwenda (PW3), the then Branch Manager for Solutions Sacco, testified that his instructions were to withdraw the money as cash and give it to PW1 who was to deposit it in the truck vendor's account. A bank statement in support thereof was produced as Exhibit 7. PW3 testified that he was a bank teller at the material time and clarified that the Sacco was initially known as Mwalimu Sacco but later rebranded to Solutions Sacco.
5. Mureithi Thurania, (PW4), a motor vehicle dealer testified that the appellant called asking for help to source a lorry which he did and requested the appellant to go to Mombasa. That the appellant who was accompanied by PW2 met with PW4 in Mombasa. PW4 testified that the appellant agreed with the seller on the price and was given an account number to deposit the money. That after the seller had confirmed that the money had been deposited, a sale agreement was signed with the appellant which PW4 witnessed. It was PW4's further evidence that the appellant requested him to drive the truck to Nairobi which request he honoured and drove the vehicle to Otiende Estate.



6. David Thurania (PW5), testified that he was at the material time employed as an accountant of the Sacco. That the appellant applied for a loan of Kshs.3,000,000.00. PW5 further testified that the appellant was the Chairman of the Credit Committee and the withdrawal of Kshs.2,250,000.00 was done with his authority. That the appellant gave verbal instructions and also gave the truck seller's account where the money was to be deposited. That the policy of the Sacco was that the supplier be paid directly which explains why the seller was paid directly. In cross-examination, PW5 testified that the appellant failed to repay the loan and the vehicle was seized and later auctioned.
7. No. 3228 Sgt Tosiah Gichobi (PW6), was the Investigating Officer in this case who testified that on 26th June, 2014, the in-charge of Anti Banking Fraud Investigation Unit minuted to him a complaint letter attached to a letter from DCI Nairobi instructing their office to carry out investigations on a complaint by the appellant which was reported to the Head of Civil Service that his loan at Solutions Sacco had been withdrawn without his approval on 17th January, 2008. PW6 testified that he commenced investigations and found that the appellant's complaint was not true; that the appellant had bought a lorry in Mombasa and had given instructions to the Sacco for withdrawal of his loan money of Kshs.2,250,000.00 and the same was banked in the account of a motor vehicle dealer in Mombasa. PW6 testified in cross-examination that the appellant's complaint was that the money had been withdrawn by a stranger but investigations revealed that the appellant had given instructions regarding the withdrawal of the said money. PW5 testified that the appellant was a member and a board member of the Sacco. PW5 testified that the CEO of the Sacco withdrew the money on the authority of the appellant.
8. After close of the prosecution case, the appellant was found to have a case to answer and was put on his defence but elected to remain silent after an adjournment request, based on illness, was denied. Consequently, the case was closed and, in a judgment, dated 20th March, 2018 the trial court found the appellant guilty of the charge and sentenced him to 24 months' imprisonment or a fine of Kshs.500,000.00. Aggrieved, the appellant filed his first appeal before the High Court on grounds that the trial court erred in law and fact by: holding that the charge of giving false information was proved against the appellant; failing to find that the charge of giving false information had not been proved; that conviction was against the weight of the evidence; that the conviction was bad in law as the trial was influenced by a person who had no right to address the court hence prejudicing the appellant; that the trial court was biased against the appellant and therefore did not afford him a fair, just trial.
9. After considering the record and the submissions of the parties, the High Court upheld the appellant's conviction. It was the finding of the High Court that the evidence tendered by the prosecution in support of the charge was overwhelming, strong, firm and consistent. However, on sentence, the High Court noted that the appropriate sentence under Section 129 (a) of the Penal Code against which the appellant was charged is imprisonment for three years but the trial court imposed a fine of Kshs.500,000.00 in default, 24 months' imprisonment. The High Court took into account the appellant's argument that a custodial sentence may be inappropriate since the appellant was 62 years and diabetic requiring continuous medication. As such, the High Court substituted the custodial sentence with an order for the appellant to serve the remainder of his sentence under probation.
10. Dissatisfied by the above finding, the appellant proffered a second appeal before this Court.

Submissions

11. At the hearing of the appeal, the appellant, acting in person had filed his submissions. Ms. Nandwa, the learned Prosecution Counsel appeared for the State and had filed written submissions.



12. The appellant raised three main grounds of appeal: violation of his right to a fair hearing; failure by the prosecution to prove the charge beyond reasonable doubt; and the harshness of the sentence imposed by the trial court and upheld by the High Court as the 1st appellate court.
13. The appellant submitted that his fair trial rights under Article 50(1) of *the Constitution* were breached when his medical documents were disregarded by the trial court forcing him into silence. The appellant further submitted that thereafter, the defence case was marked closed. The appellant relied upon the case of Communications Commission of Kenya & 5 others vs Royal Media Services & 5 others [2014] eKLR and Mbaki & Others vs Macharia and another [2005] EA 206 for the proposition that:

“The right to be heard is a valid right. It would offend all notions of justice of the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”
14. On whether the prosecution proved its case beyond reasonable doubt, the appellant relied on section 129 of the Penal Code and the case of Mbogo Samuel Mungai vs R Nakuru High Court Criminal Appeal No. 57 of 2004 that:

“To constitute an offence of giving false information as defined in section 129 of the Penal Code, the giver of that information must personally be knowing or having reasons to believe that what he is reporting is false. If he is convinced that the information is true, and after investigations it is found that the information is factually incorrect, the charge of giving false information cannot be sustained.”
15. The appellant further submitted that there was no evidence that he gave false information to the Chief of Staff Head of Public Service. That the only witness was Sgt Tosiah Gichobi who stated that he received a complaint letter from the Banking Fraud Investigation Unit. It was the appellant’s submission that the testimony of the said Tosiah was hearsay and inadmissible. That the particulars of the offences were that the appellant on the 1st day of April 2014 at CID office, Imenti North District within Meru County informed C.I Samuel Yagan and No. 62176 CPL Andrew Nyaga, persons employed in the public service as police officers. The appellant submitted that C.I. Samuel Yagan and CPL Andrew Nyaga, were never called to testify and no direct evidence was adduced to prove that he provided them with false information. The appellant submitted that the two public officers were not called as witnesses to testify before the trial court to confirm if the appellant gave them false information. The appellant further submitted that there was no evidence that the said officers were indeed police officers in public service. Further, that the alleged complaint letter was not produced as an exhibit before the trial court. The appellant relied upon the case of Samson Muoki Joel vs Republic [2021] eKLR where the High Court held that:

“More importantly, on the same issue, the allegation was that the Appellant gave false information to No. 118199 PC Euticus Murimi a police officer who was not called as a witness to testify. Thus, the evidence on record about the false information is hearsay evidence and should not have been relied upon by the trial court to convict the appellant.”
16. The appellant also relied on the case of Calisto Odemba vs R [2020] eKLR where the High Court set aside the appellant’s conviction for reason that there was no evidence adduced as to how the appellant gave false information. Lastly, the appellant submitted that the prosecution failed to prove its case beyond reasonable doubt and that the sentence imposed by the two courts below ought to be set aside.



17. Ms. Nandwa for the State opposed the appeal. She submitted that the prosecution had adduced sufficient evidence which established the appellant's guilt on the charge brought against him to the required standard of proof beyond reasonable doubt.
18. Ms. Nandwa further submitted that the appellant's right to fair trial was not violated as the appellant chose to give sworn defence but on the hearing day the trial court noted that the medical document produced in support of the appellant's application for adjournment were not authentic, in that he had complained of malaria but produced a document showing that he was diabetic. That the appellant chose to remain silent when he was asked to proceed with the defence hearing. Counsel cited the case of Savannah Development Co. Ltd vs Mercantile Co. Ltd, CA No. 120 of 1992 that:

The elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application of adjournment; how far if at all, the other party is likely to be prejudiced by the adjournment ...”
19. Counsel submitted that the appellant ought to have filed a constitutional petition if at all his right to fair trial was violated. Counsel submitted that the prosecution proved its case beyond reasonable doubt. That in the case of Daniel Mutugi vs R [2006] eKLR the High Court stated that for a conviction on this count, it must be proved that the appellant gave information to a person employed in the public service which information he knew or believed to be false. Counsel submitted that the prosecution evidence was that the appellant knowing well that he had secured a loan and gave authority to have the same withdrawn in order to pay for a vehicle he intended to purchase, gave false information to PW6.
20. As regards sentence, Ms. Nandwa submitted that the High Court took into account the age of the appellant and the fact that he was diabetic and was ordered to serve a non-custodial sentence despite Section 129 of the Penal Code providing for three (3) years' imprisonment for the subject offence.

Determination

21. This is a second appeal and as such we are limited to consideration of matters of law only. Accordingly, we are generally bound by concurrent findings of fact by the two courts below departing therefrom only in the rarest of cases where they are not based on any evidence or proceed from a misapprehension of the evidence or are plainly untenable. See *Karingo v Republic* [1982] KLR 219 and Section 361 of the Criminal Procedure Code.
22. We have carefully perused the record, considered the impugned judgment, submissions by parties, the authorities cited and the law. We discern the main issues for determination to be whether the prosecution proved its case beyond reasonable doubt that the appellant committed the offence charged with and whether the sentence meted upon the appellant was harsh and excessive.
23. The particulars of the charge were that:

“On the 1st day of April 2014 at CID office, Imenti North District within Meru County informed C.I Samuel Yagan and No. 62176 CPL Andrew Nyaga, persons employed in the public service as police officers that a member of staff at Mwalimu Sacco withdrew Kshs.2,250,000 from his account (288) 23 without his knowledge and banked in the account of Sacco general manager Mr. Maitethia, information he knew to be false, intending thereby to arrest and charge the said member of staff and Maitethia, an act which they ought not to have done if the true state of facts respecting such information was given had been known to them.”



24. On the question whether the prosecution proved its case beyond reasonable doubt, the appellant contended that the evidence adduced was insufficient. In particular, he emphasized that not all the persons expressly named in the particulars of the charge sheet were called to testify and that the alleged complaint letter was never produced in evidence.
25. It is significant that two crucial witnesses, namely C.I. Samuel Yagan and Cpl. Andrew Nyaga, who were expressly named in the particulars of the charge as the recipients of the alleged false information, were not called to testify. Their testimony would have been essential in establishing whether the appellant indeed furnished them with false information. The omission to call them rendered the prosecution case materially deficient.
26. The record further reveals that although the prosecution called several witnesses, their testimonies did not cure this fundamental gap. Without the direct testimony of the two named officers, the prosecution's case rested largely on hearsay and inference, which fell short of the standard of proof required in criminal proceedings.
27. From the totality of the evidence, we are satisfied that the prosecution failed to prove the essential elements of the offence of giving false information to a person employed in the public service contrary to Section 129(a) of the Penal Code. The failure to call the two officers expressly named as recipients of the alleged false information left a fatal gap in the case. Without their evidence, it could not be established that the appellant communicated false information to them, or that they were public officers within the meaning of the Penal Code.
28. Moreover, no independent evidence was led to establish that the said individuals were, at the material time, persons employed in the public service as required by Section 129(a) of the Penal Code. In the absence of proof both of their status and of the alleged communication to them, the particulars of the charge remained unproven. Accordingly, it cannot be said that the offence as charged was proved beyond reasonable doubt.
29. Given the foregoing failure of proof, the question of sentence does not arise. The conviction having been found unsustainable; the sentence imposed by the courts below must equally be set aside.
30. The upshot is that the appeal is meritorious and is hereby allowed. The conviction is quashed and the sentence set aside. The appellant is acquitted of the charge.
31. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

Deputy Registrar

