

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIBERA**  
**CRIMINAL APPEAL NO. E031 OF 2025**

**HAMMERTON MUHONGO**  
**MUKHWANA.....APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 27<sup>th</sup> February 2025 at Kibera Chief Magistrate's Court Criminal Case No. 564 of 2020 Republic vs Hammerton Muhongo Mukhwana)*

**JUDGEMENT**

1. The appellant was charged and after full trial convicted by the Subordinate Court on five counts of offence as follows: In counts I, stealing by agent contrary to section 268(1) as read with section 283(c) of the penal code. In counts II, obtaining money by false pretences contrary to section 313 of the Penal Code. In counts III, IV, V, and VI, issuing a bad cheque contrary to section 316(A)(1)(a) (4) of the Penal Code. In count I, he was sentenced to serve one (1) year imprisonment, count II, a fine of Kshs. 1,000,000 in default to serve two (2) years imprisonment and in counts III, IV, V, and VI he was sentenced to pay a fine of 50,000 on each count in default to serve 1-year imprisonment on each count. All sentences were to run concurrently.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was

convicted. He urged the court to quash his conviction and set aside the sentence imposed.

3. This is the first appellate court and in **Okeno v. R [1972] EA 32**, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The prosecution's case was that PW1, Emma Wangari Mwangi, a Legal Manager at Mayfair Insurance Company, testified that she knew the appellant, who conducted business through Hajis Insurance Agency. A client, Hela EPZ Limited, had taken out insurance covers through the appellant. Mayfair Insurance issued the policies through Hajis Insurance Agency on the understanding that the agency would remit the premiums received from the client.
5. Upon discovering that the premiums had not been remitted, Mayfair cancelled the policies and wrote to the Kenya Revenue Authority (KRA) to cancel the bonds. When Hela EPZ realised the deactivation, it confirmed in writing that all premiums had been paid to the appellant but not forwarded to Mayfair. The unpaid balance stood at Kshs. 3,778,305, part of a total premium of Kshs. 5,704,936, which the appellant was obligated to remit to Mayfair.
6. The appellant subsequently issued cheques to Mayfair, all of which were dishonoured due to insufficient funds. PW1 clarified that policy activation was conditional upon payment of premiums.

When it became apparent that premiums had not been received, the policies were cancelled.

7. PW2, Philip Ayieko Mateyo, a former Senior Accountant at Hela EPZ Limited, testified that upon expiry of the company's customs bond on 2<sup>nd</sup> September 2016, he informed management, prompting renewal through Agis Insurance Agency, represented by the appellant. A meeting held on 15<sup>th</sup> September 2018 authorised the renewal at a total cost of Kshs. 7,684,465, payable in three instalments.
8. PW2 produced invoices, quotations, and bank records showing that payments were made to Agis Insurance Agency via cheques and EFT transfers. Between 2016 and 2018, Hela made several payments totalling approximately Kshs. 8.9 million.
9. The appellant produced a certificate showing that Agis Insurance Agency was duly registered with KRA and jointly owned by Hammerton Muhongo Mukhwana (the appellant) and Jacob Kieni. Disputes arose after the last premium payment on 28<sup>th</sup> November 2018, when KRA deactivated Hela's bond, citing non-payment to Mayfair.
10. Mr. Dason Batugedra, the agency manager, admitted via email dated 13<sup>th</sup> December 2018 that the premiums had not been remitted. Correspondence from advocates and KRA confirmed the same. The matter was reported to Kilimani Police Station on 2<sup>nd</sup> May 2019, where the complainant recorded a statement.
11. PW3, Gabriel Otieno Juma, Assistant Manager (Underwriting) at Mayfair, confirmed that the appellant, identifying himself as a director of Hajis Insurance, had proposed to insure Hela's policies

worth Kshs. 190 million with total premiums of Kshs. 3,851,283. The policies were issued and signed, but subsequent investigations by the legal department revealed that recoveries were initiated due to non-payment.

12. PW4, Evelyne Ndung'u, Relationship Manager at Standard Chartered Bank, produced bank statements confirming payments made to Hajis Insurance Agency on 9<sup>th</sup> January 2017 and 8<sup>th</sup> March 2017. She noted that some documents were missing and could not verify the authenticity of all entries or the legitimacy of the statements.
13. PW5, Winnie Uirori, Legal Administrator at Stanbic Bank, produced certified statements of Mayfair's account between 10<sup>th</sup> November 2016 and 8<sup>th</sup> December 2018, including dishonoured cheques issued by Hajis Insurance Agency.
14. PW6, Austin Amoth, an advocate at Equity Bank, presented certified statements of Hela EPZ's accounts. PW7, Inspector Kipkorir Torotich, corroborated the evidence, confirming that the appellant, acting as Mayfair's agent, received Kshs. 7,684,465 from Hela EPZ but failed to remit the amount, contrary to Section 156 of the Insurance Act, which requires agents to forward premiums directly to the insurer. He further testified that the appellant issued cheques that later bounced and that the invoices were overquoted by about Kshs. 2 million.
15. In his defence, the appellant (DW1) stated that he regularly issued advance cheques in anticipation of incoming business and would later make payments through RTGS. He claimed to have lost Kshs. 18 million in business and that no audit from Mayfair proved

otherwise. He maintained that he had dealt with Mayfair for three years without issue and that no bank either Stanbic, Equity, or Standard Chartered, had ever raised an objection to his transactions.

16. The appellant explained that custom bonds are instruments used by traders for import and export, guaranteed by insurance and regulated by KRA. He denied any direct dealings with PW2, and maintained that Mayfair had never invoiced him personally.

17. He further stated that, at the time, insurance brokers were lawfully permitted to collect premiums, and no client had ever complained that funds were misappropriated. He insisted he maintained a good relationship with Mayfair and had never issued a dishonoured cheque knowingly.

18. During cross-examination, the appellant acknowledged receiving three cheques from Hela for the bonds and claimed to have remitted Kshs. 1.9 million to Mayfair. He denied knowledge of any amendment to the law prohibiting brokers from collecting premiums and stated that he was unaware of the bond deactivation.

19.

20. The defence, contended that the dispute was commercial in nature, arising from delayed remittance and not criminal intent. It was argued that the dishonoured cheques were not evidence of fraud but of financial hardship. The prosecution, however, maintained that the appellant intentionally withheld the funds, thereby defrauding Mayfair Insurance Company.

21. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.

22. In count I, the appellant was charged with the offence of stealing by agent contrary to section 283 of the Penal Code. It provides as follows:

If the thing stolen is any of the things following, that is to say -

- (a) Property which has been received by the offender with a power of attorney for the disposition thereof;**
- (b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay or deliver for any purpose or to any person the same or any part thereof or any proceeds thereof;**
- (c) property which has been received by the offender either alone or jointly with any other person for or on account of any other person**
- (d) the whole or part of the proceeds of any valuable security which has been received by the offender with a direction that the proceeds thereof should be applied to any purpose or paid to any person specified in the direction**
- (e) the whole or part of the proceeds arising from any disposition of any property which has been received by the offender by virtue of a power of attorney for such disposition, such power of attorney having been received by the offender with a direction that such proceeds should be applied to any purpose or**

**paid to any person specified in the direction, the offender is liable to imprisonment for seven years.**

23. Similarly, in the case of **Ong'are Moguche v Republic [2019] eKLR**, the Court of Appeal laid out the following ingredients to be met for an offense of stealing by agent to be established;

**(i) There must be a property that is stolen within the definition and meaning of stealing as per section 268 of the Penal Code.**

**(ii) There must be an agency relationship between an accused person and the complainant.**

**(iii) The property stolen must have been received by the accused person in any of the circumstances enumerated under paragraphs (a) to (e) of section 283 of the Penal Code.**

24. On the first ingredient, the property alleged to have been stolen consisted of insurance premiums amounting to Kshs. 3,778,305, which clearly constitutes property capable of being stolen within the meaning of Section 268 of the Penal Code. The funds were paid by Hela EPZ Limited to Hajis Insurance Agency, operated by the appellant, for onward remittance to Mayfair Insurance Company.

25. The second ingredient, the existence of an agency relationship, was clearly demonstrated. PW1, the Legal Manager at Mayfair, confirmed that Hajis Insurance Agency was authorised to receive premiums on behalf of Mayfair, with an obligation to remit them promptly. The appellant therefore acted in the capacity of an agent of Mayfair Insurance.

26. Regarding the third ingredient, it was proven that the appellant received the said premiums in circumstances contemplated under Section 283(b) of the Penal Code, as an agent authorised to collect and transmit funds to the insurer. The appellant failed to remit the money, issued cheques that were dishonoured, and could not account for the balance.
27. The defence of a commercial misunderstanding or financial hardship was not supported by evidence. The deliberate failure to remit client premiums and the issuance of worthless cheques demonstrate dishonest intent.
28. Accordingly, this court finds that the prosecution proved beyond reasonable doubt that the appellant, being an agent of Mayfair Insurance Company, dishonestly converted to his own use premiums received from Hela EPZ Limited. The conviction in count I for the offence of stealing by agent under Section 283(b) of the Penal Code is therefore affirmed.
29. In count II, appellant was charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. First, the appellant, acting through Hajis Insurance Agency, represented to Hela EPZ Limited that he was authorised to receive and remit premiums to Mayfair Insurance Company for the renewal of customs bonds. This representation was false, as he later failed to remit the premiums and instead issued cheques that were dishonoured. His continued assurances that payment would be made amounted to a deliberate misrepresentation of existing facts, made with intent to deceive both Hela and Mayfair.

30. Second, the appellant obtained money capable of being stolen. Evidence from PW1, PW2, and PW7 confirmed that Hela EPZ paid approximately Kshs. 7,684,465 to the appellant's agency for premiums due to Mayfair Insurance. The funds were received on the strength of the false representation that they would be forwarded to the insurer.
31. Third, there was clear intent to defraud. The appellant neither remitted the premiums nor refunded the money. His issuance of dishonoured cheques and failure to account for the funds demonstrated a deliberate intention to permanently deprive Mayfair of its due premiums.
32. Accordingly, the prosecution proved the offence of obtaining money by false pretences contrary to section 313 of the penal code beyond reasonable doubt. The conviction in count II, is affirmed.
33. In Counts III, IV, V, and VI, the appellant was charged with issuing bad cheques contrary to Section 316A(1)(a)(4) of the Penal Code. The prosecution was required to prove that the appellant drew cheques; that he knew at the time that his account had insufficient funds; and that the cheques were intended to settle an obligation or obtain a benefit.
34. The evidence established these elements. PW1, the Legal Manager at Mayfair Insurance, and PW5, the Legal Administrator at Stanbic Bank, produced bank statements showing that the appellant issued several cheques to Mayfair in payment of premiums totalling Kshs. 3,778,305. These cheques were all returned unpaid due to insufficient funds. PW5 further confirmed

that the account held by Hajis Insurance Agency did not have enough balance to honour the cheques.

35. The appellant's defence that the cheques were "advance cheques" or that he intended to later make RTGS payments was unconvincing. Once issued, the cheques amounted to a representation that funds were available. The subsequent dishonour evidenced both knowledge of insufficient funds and intent to deceive the payee.
36. Accordingly, the prosecution proved beyond reasonable doubt that the appellant knowingly issued bad cheques within the meaning of Section 316A(1)(a)(4). The appellant's conviction was therefore proper and is affirmed.
37. The appellant was sentenced to serve one (1) year imprisonment in count I, pay a fine of Kshs. 1,000,000 in default to serve two (2) years imprisonment in count II and in counts III, IV, V, and VI he was sentenced to pay a fine of 50,000 on each count in default to serve 1-year imprisonment on each count. All sentences were to run concurrently.
38. During the sentencing proceedings, the trial court considered the appellant's mitigation and that he was a first offender and exercised discretion.
39. Section 28 of the Penal Code which prescribes the sentences to be imposed in default of payment of different amounts of fine makes it clear that unless there is a provision in any law to the contrary, the maximum sentence that any court can impose in default of payment of fines exceeding Kshs. 50,000 is twelve months imprisonment. The default sentence of two (2) years

imprisonment in count II ran afoul of Section 28 of the Penal Code for the reason stated above. The trial court should have followed the law and ought to have imposed a default sentence of 12 months imprisonment in lieu of payment of the fine imposed.

40. Consequently, it is my finding that the appellant's appeal on sentence is partially allowed in the following terms:

- i. The sentence in Count I is maintained.
- ii. The sentence in Count II of payment of a fine of Kshs.1,000,000 in default to serve two years imprisonment is hereby substituted with a sentence of the payment of a fine of Kshs.1,000,000 in default to serve twelve (12) months imprisonment.
- iii. The sentences in Counts III, IV, V, and VI are maintained.

Orders accordingly.

**Judgement dated and delivered virtually this 15<sup>th</sup> day of  
October 2025**

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**D. KAVEDZA  
JUDGE**

**In the presence of:**

In the absence of the parties  
Karimi Court Assistant.