



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT ELDAMA RAVINE (SUB-
REGISTRY)**

CRIMINAL APPEAL NO. E001 OF 2025

BETTCY CHEBICHII TANGUT alias TOWETT.....

APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....

RESPONDENT

**(Being an appeal from the judgment, conviction and
sentence of Hon. R. Koech, Senior Principal Magistrate,
Eldama Ravine, delivered on 27th January 2025 in Eldama
Ravine Criminal Case No. E832 of 2021)**

JUDGMENT

1. The appellant was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars were that between 11th and 18th March 2021 at Mogotio Township and Kelelwa Centre, jointly with others not before court, and with intent to defraud, she obtained various sums ranging from Kshs.

- 1,000/= to Kshs. 11,000/= from the complainants in eleven counts.
2. She denied all the counts. The prosecution called seven witnesses. At the close of the prosecution case, the court placed her on defence in counts I, IV, V, VI, VII, VIII and IX. She was convicted in counts I, IV, VI, VII, VIII and IX and sentenced to pay a fine of Kshs. 100,000/= for each count, in default to serve twelve months' imprisonment per count.
 3. Being dissatisfied, the appellant lodged an appeal raising fourteen grounds.

APPELLANT'S SUBMISSIONS

4. The appellant submitted that the issues for determination were condensed into three categories:
 1. Whether the trial court applied the correct principles of law, particularly—
 - i. Whether the prosecution proved its case beyond reasonable doubt;
 - ii. Whether the trial court properly interrogated the charges against the evidence adduced;
 - iii. Whether failure to establish the true ownership of the paybill number led to a mistrial; and

iv. Whether the charge sheet was defective.

2. Whether the trial magistrate erred in law and fact by:-

- i. relying on uncorroborated circumstantial evidence; and
- ii. admitting inconsistent and irregular prosecution evidence.

3. Whether the trial magistrate:-

- (i) imposed an excessive and unlawful sentence;
- (ii) considered extraneous matters;
- (iii) imposed cumulative instead of concurrent sentences; and
- (iv) failed to consider mitigation.

5. Counsel submitted that an appellate court may only interfere with findings of fact where they are based on misdirection or misapprehension of evidence, citing *Selle v. Associated Motor Boat Co. Ltd* [1986] EA 123.

6. It was argued that prosecution witnesses, including PW4 (Anastine Chepkorir Kemboi), testified that the money was sent to paybill number 4050835 in the name *Income Plus Credit Limited*. None of the witnesses showed that the

appellant received the money personally or was a beneficiary of the said company.

7. The prosecution failed to prove that *Income Plus Credit Limited* was owned, managed or controlled by the appellant. Although the prosecution indicated it would obtain reports from Safaricom Ltd and the Registrar of Companies, none was produced in court. The omission left a critical evidentiary gap regarding the alleged benefit to the appellant.
8. The trial magistrate, however, concluded that “the accused was a direct beneficiary of the monies defrauded from the complainants.” This finding, based solely on oral evidence, lacked documentary support linking the appellant to *Income Plus Credit Limited*.
9. Reliance solely on oral testimony without corroborating expert or documentary evidence such as Mpesa records or company ownership details amounted to a misdirection. The exhibits marked for identification were never produced, and the investigating officer failed to testify. Consequently, the appellant was convicted on unproven assumptions.
10. Counsel further submitted that the charge sheet was defective. They alleged that the appellant personally obtained money from the complainants, yet the evidence

suggested she merely mobilized potential clients as a hired singer. The prosecution ought to have investigated and charged the real beneficiaries named in the defence namely Samuel Tarus, Sifuna, Mary Mumbi, and Silo rather than the appellant.

11. On the second issue, counsel argued that the trial court erred in relying on circumstantial evidence without corroboration. The magistrate's finding that the appellant "was either an agent or one of the proprietors of Income Plus Credit Limited" was speculative and unsupported by evidence.
12. The mere fact that the appellant was hired to promote the company did not establish a nexus between her and the alleged fraudulent transactions. The prosecution failed to trace the money trail or prove any direct link between the appellant and the complainants' deposits.
13. The evidence of the complainants was inconsistent. For instance, PW1 stated that upon sending money, the name *Mumbi* appeared, yet others testified that payments reflected *Income Plus Credit Limited*. This inconsistency should have raised reasonable doubt about the reliability of the evidence.

14. Counsel submitted that the sentence was manifestly excessive and that the trial court considered extraneous matters, disregarded mitigation, and dismissed the defence without proper evaluation. The appellant was a first offender and, by her account, also a victim of deception. A concurrent sentence of six months per count would have been sufficient. Section 313 of the Penal Code prescribes a maximum of three years for the offence, emphasizing that proof of intent to defraud is essential an element not established in this case.
15. The trial magistrate's remarks that the appellant was "the principal fraudster" and "executed the scheme with military efficiency" were not supported by evidence. The court itself noted that the investigating officer did not testify and that key Mpesa records were never produced. The conviction therefore contravened Articles 49, 50 and 51 of the Constitution, which guarantee fair trial rights.
16. Counsel maintained that the appellant's defence was wrongly rejected. She consistently explained that she was a hired singer, identified those behind the company, and even reported the matter to police. Her evidence showed that she was not the proprietor or beneficiary of the company.

17. The defence demonstrated that:-
 - a) The police failed to pursue the true culprits;
 - b) The appellant was used as a scapegoat; and
 - c) The real perpetrators were never charged.
18. It was urged that this court should accord the appellant the benefit of doubt, noting the prosecution's failure to prove the case beyond reasonable doubt. Under Sections 107 and 109 of the Evidence Act, the burden of proof lies on the prosecution, and it was not discharged.
19. The prosecution's failure to trace the true owners of the paybill number or tender the Safaricom and Registrar of Companies reports left the court to base its findings on speculation. The trial court thus relied on assumptions rather than evidence.
20. Counsel cited *Republic v. Khalumi & Another* [2024] eKLR, where the court held that even after a prima facie case is established, the burden of proof remains with the prosecution throughout. The accused's duty is merely to raise reasonable doubt.
21. In respect to circumstantial evidence, counsel submitted that for such evidence to sustain a conviction, it must be inconsistent with innocence and irresistibly point to guilt. The prosecution failed to establish any link between

the appellant and the funds, and therefore the doctrine of recent possession was inapplicable.

22. In *Mwangi v. Republic* (Criminal Appeal No. E054 of 2023), the Court of Appeal held that for circumstantial evidence to be valid, there must be a causal link between the accused and the crime. Here, the evidence merely showed that the appellant was a victim of a wider fraud, not a perpetrator.

23. On sentence, counsel relied on *Ngotho v. Republic*, where it was held that consecutive sentences are appropriate only for offences arising from unrelated facts or incidents. Since the charges herein arose from the same transaction and involved similar intent within a short time span, concurrent sentences were warranted.

24. In *William Kimani Ndichu v. Republic* [2015] KECA 695, the Court of Appeal, citing *Rex v. Saidi Nsabuaga s/o Juma* (1941) 8 EACA 81 and *Nathani v. R* [1965] EA 777, and held that offences form the same transaction if connected by proximity of time, criminal intent, and continuity of action. The offences herein, occurring between 11th and 18th March 2021, fit that description.

25. Counsel therefore urged this Court to set aside the conviction and sentence, and either acquit the appellant or

substitute the sentences with concurrent terms proportionate to the circumstances.

RESPONDENT'S SUBMISSIONS

26. Prosecution counsel submitted that the case was proved beyond reasonable doubt through the evidence of seven witnesses, who consistently testified that they deposited money through a paybill number provided by the appellant, believing they would receive loans within two days.
27. It was submitted that the appellant approached the victims and introduced them to *Income Plus Credit Limited*, a company purportedly offering loans, and gave them the paybill and account numbers for registration and deposit of funds.
28. When the victims failed to get the promised loans, they contacted the appellant, who initially asked them to be patient but later stopped responding.
29. The respondent argued that failure to produce documents marked for identification was not fatal to the prosecution case, as the oral and circumstantial evidence sufficed. Further, the appellant admitted that the victims deposited money into the account she provided.

30. On sentence, it was argued that Section 313 of the Penal Code prescribes up to three years' imprisonment. The trial court imposed a one-year sentence per count, which was lenient, and rightly ordered the sentences to run consecutively because the offences were committed on different dates and against multiple victims. Reliance was placed on *Benson Mwamela Mwanyengela v. Republic* (Criminal Appeal No. E005 of 2023), where the Court of Appeal held that sentences for offences arising from multiple transactions should run consecutively.
31. The prosecution further submitted that the trial court considered the appellant's mitigation and a probation officer's report dated 13th January 2025 before passing sentence. The appellant made no attempt to reconcile with the victims.
32. Counsel urged the court to find that the conviction was safe, the sentence lawful, and the appeal devoid of merit, and to dismiss it in its entirety.

ANALYSIS AND DETERMINATION

33. This being a first appeal, this court is duty bound to re-evaluate, re-analyze and reconsider the evidence adduced before the trial court and arrive at its own independent

conclusion while bearing in mind that it did not have the advantage of seeing the witnesses testify and observing their demeanor. (See *Okeno v Republic* [1972] EA 32).

(a)Whether the prosecution proved the offence of obtaining by false pretenses beyond reasonable doubt

34. The appellant was convicted on six counts of obtaining money by false pretenses contrary to section 313 of the Penal Code. The key ingredients of the offence are that:-
- (i) there must be a false pretense;
 - (ii) there must be an obtaining of something capable of being stolen; and
 - (iii) the obtaining must have been with intent to defraud.
- (See *Abdalla Mohammed v Republic* [2018] eKLR).
35. The prosecution evidence shows that the complainants (PW1-PW7) each testified that the appellant approached them with information that a company known as *Income Plus Credit Limited* was advancing loans on condition that one first registers with Kshs. 1,000 and deposits additional savings. She gave them a paybill number 4050835 to which they sent various sums ranging from Kshs. 1,000 to 11,000. They trusted her because she was known to them, but when the promised loans were not forthcoming, they reported to the police.

36. The appellant in her sworn defence admitted that she was involved in mobilization but explained that she was a singer who had been hired by one **Samuel Tarus** to promote the said company through songs at various centers in Mogotio and Kelelwa. She denied receiving any money from the complainants and maintained that the monies were sent to the paybill number belonging to *Income Plus Credit Limited*, a company she was not associated with. She stated that she too was duped and that the real culprits were never charged.
37. The appellant's principal contention is that the prosecution failed to link her to the paybill account and to demonstrate that she was the owner, signatory, or beneficiary of the monies deposited. She faulted the trial court for relying solely on oral testimony without production of the alleged M-Pesa statements or reports from Safaricom and the Registrar of Companies to prove ownership of the paybill or the company.
38. Upon re-evaluating the record, it is evident that no documentary evidence was produced to establish that the appellant personally received or benefited from the money deposited to the said paybill. The investigating officer did not testify and the exhibits (M-Pesa statements) marked for identification were never formally produced. The trial

magistrate in her judgment expressly noted that those documents were not tendered.

39. In the absence of such evidence, the finding that the appellant was “a direct beneficiary of the monies defrauded from the complainants” was based purely on inference drawn from oral testimony. However, the offence of obtaining by false pretenses requires proof of a **false representation made by the accused herself** with intent to defraud. The prosecution had the burden to show that the appellant was party to the fraudulent scheme or that she had control over the funds. That link was not established.
40. While the evidence shows that the appellant indeed introduced the complainants to the scheme and gave them the paybill number, her explanation that she was hired to mobilize people for a company whose officials were never investigated was not disproved by the prosecution. Her conduct was imprudent but, standing alone, it does not meet the threshold for criminal liability under section 313 of the Penal Code.
41. The failure by the prosecution to produce the Safaricom or Registrar of Companies’ report, or to call the investigating officer to clarify ownership of the paybill, left a critical evidentiary gap. That omission created reasonable doubt as

to whether the appellant acted with intent to defraud or was herself misled by the company she promoted.

42. The trial court therefore fell into error by relying on uncorroborated oral testimony without documentary proof of the money trail. In *Sawe v Republic* [2003] KLR 364, the Court of Appeal held that suspicion, however strong, cannot form the basis of a conviction in a criminal case. The conviction in this case was largely based on suspicion arising from the appellant's role as a mobilizer.

(b) Whether the circumstantial evidence was sufficient

43. The trial court's finding was based on circumstantial evidence; that the appellant gave out the paybill number and was therefore either an agent or proprietor of *Income Plus Credit Limited*. For circumstantial evidence to sustain a conviction, it must satisfy the conditions set out in *Abanga alias Onyango v Republic* Cr. A. No. 32 of 1990 (UR):-

1. the circumstances must be firmly established;
2. they must unerringly point to the guilt of the accused;
and
3. they must form a complete chain ruling out any other reasonable hypothesis except the guilt of the accused.

44. In this case, although the evidence places the appellant at the center of mobilization, there is no proof that she benefitted from the scheme or had control over the proceeds. The missing reports from Safaricom and Registrar of Companies broke the chain of circumstantial evidence and left open the possibility that she was merely a paid mobilizer or even a victim of the same scam. From the foregoing, the circumstantial evidence does not meet the legal threshold to sustain a conviction.

(c) Whether the charge sheet was defective

45. The charge sheet described the appellant as the person who “obtained” money from the complainants. Given that the prosecution’s own evidence indicated that the money was remitted to a corporate paybill and not to her personal number or account, the particulars should have clarified her role, if any, as an agent or accomplice. The failure to properly frame the charge contributed to the uncertainty as to her criminal liability.

(d) Whether the sentence was excessive

46. The appellant was sentenced to pay a fine of Kshs.100,000 for each count, in default twelve months imprisonment, the sentences to run consecutively. The offence of obtaining by false pretenses attracts a maximum of three years’ imprisonment. In imposing cumulative default

sentences for six counts, the trial court treated the counts as unrelated.

47. The record shows that the offences were committed within a span of one week (11th to 18th March 2021) in the same locality, involving the same paybill number and similar representations. The transactions were therefore part of a single scheme. In *Ng'ang'a v Republic* [1981] KLR 530 and *Ngotho v Republic* [2022] KEHC, courts have held that where offences arise from a single transaction or common intent, concurrent sentences are appropriate.
48. Further, the trial court failed to sufficiently consider the appellant's mitigation that she was a first offender and a mother and imposed maximum sentence and further ordered that they run consecutively. In my view, though the sentences are within the law, they were manifestly excessive in the circumstances.
49. Having re-evaluated the entire evidence and submissions, I find that the prosecution did not prove beyond reasonable doubt that the appellant obtained money from the complainants by false pretenses or that she intended to defraud them. The conviction was unsafe, having been based on suspicion and incomplete investigation.

50. From the foregoing, I find merit in the appeal. The conviction on all counts is quashed and the sentences set aside.

51. **FINAL ORDERS:** -

- a) This appeal is hereby allowed.
- b) Conviction and sentence in I, IV, VI, VII, VIII and IX are hereby set aside.
- c) Any fines paid, if any, shall be refunded to the appellant.

Judgment delivered, dated and signed Virtually at Kabarnet this **13th** of **November** 2025.



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RACHEL NGETICH
JUDGE

In the presence of:

- CA Karanja.
- Ms. Omari for state.
- Mr. Sirma for Appellant.
- Appellant.