Njuguna v Republic (Criminal Appeal E038 of 2022)
[2025] KEHC 16934 (KLR) (19 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E038 OF 2022

DKN MAGARE, J

NOVEMBER 19, 2025

BETWEEN

DORCAS WAITHIRA NJUGUNA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. F. Muguomgo, Senior Resident Magistrate in Nyeri CMCRC No. 1513 of 2019.
2. The Appellant was charged with Conspiracy to defraud contrary to Section 317 of the Penal Code.
3. The particulars of the offence were that on diverse dates between 21.10.2015 and 23.5,2016 at Nyeri Town within Nyeri County, jointly with others not before court conspired and defrauded Charles Wambugu Gitonga Ksh. 9,253,300 by falsely pretending that she was operating genuine business of importing gravel machine crushers.
4. The Appellant was arraigned and he denied the charges. A plea of not guilty was consequently recorded.
5. The Trial Court considered the case and rendered the Judgement on 5.9.2022. The Court found the Appellant guilty and convicted her of the offence of conspiracy to defraud. The Appellant was also sentenced to 2 years imprisonment in default of Ksh. 2 Million fine.
6. The Appellant, aggrieved, lodged this Appeal. The Petition of Appeal dated 20.9. 2022 raised the following Grounds:
    a. The learned trial magistrate erred in convicting the Appellant on sale uncorroborated evidence of the complainant.

b. The learned trial magistrate erred in law and fact in convicting the Appellant on circumstantial evidence without proper identification of the assailant.

c. The learned trial magistrate erred in law and fact in failing to find that the case of the prosecution was marred with discrepancies, inconsistencies and contradictions.

d. The learned trial magistrate erred in law and fact in disregarding the defence by the Appellant.

Evidence

7. At trial, PW1, the complainant, Charles Wambugu Gitonga. It was his case that he met the Appellant at the Namanga Border. They struck a business deal and the Appellant gave him the bank account details to deposit the money.

8. There was a Nicholas and John who were also in attendance. According to him, they were affiliated to Dorcas but as mere helpers. Nicholas ran the Appellant's errands like going to Tanzania to check equipment.

9. The money was sent to the Appellant's bank account by RTGS. There were deposits on 10.5.2016 for Ksh. 500,000/= and Ksh. 450,000/= on 11.5.2016. total money send was Ksh. 9,253,300 and the Appellant stopped receiving his calls. John and Nicholas also stopped receiving his calls. This was after they knew he had made the deposit. He reported them to the police and they were arrested and charged.

10. PW2 was No. 78909 Jesse Macharia on DCI Nyeri. He produced bank transactions. He was the author of the investigation's diary. He charged after he obtained a court order and did investigations. The total amount transferred was Ksh. 9,253,000. Before he obtained the bank statements, he had Ksh. 3,620,000 as the deposited amount. according to him, investigations linked the Appellant and that is why she was arrested and charged.

11. The Appellant also testified on oath as DW1. She testified that she did not know the Complainant. She first saw her at the Nyeri Police Station. She used to do business with one Isaiha Njuki Njue but not the complainant. His clients would send money to her bank account. She did not know the complainant could be one of the persons that send money to her account.

12. On cross examination, she admitted seeing the name Charles Wambugu sending her money.

13. DW2 was Peter Mwangi Njoroge. He testified that he knew the Appellant to be person of good standing who could not commit the alleged crimes. He could talk to Isaiah and Isaiah could instruct him to send money to the Appellant's account. That was whenever he was buying stock in Tanzania. The Appellant was as such his customer he did not know the other customers who deposited the money.

Submissions

14. The Appellant filed submissions. They are dated 24.4.2025. She submitted that the Prosecution failed to establish the case against the Appellant on the charge

of conspiracy to defraud contrary to Section 317 of the Penal Code to the required standard of proof beyond any reasonable doubt. Reliance was placed on Court of Appeal case in Njoroge v Republic [1987] KLR 19, where it was held that:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from

the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".

15. It was submitted that individuals who allegedly introduced or connected the Complainant to the Appellant namely Mathai, Wachira, Nicholas, and John Mwaura were never called to testify, and no justification was provided by the Prosecution for their absence.

16. Further reliance was placed on the case of Ronald Kiptoo Yator v Republic [2019] KEHC 5762 (KLR) where it was submitted that the Court held that for the offence of conspiracy to defraud to be complete evidence must be adduced to show that there existed an agreement, consent or combination of the two or more persons as was established in the case of Christopher Wafula Makhoha –vs- Republic [2014] eKLR where the court agreed with the holding in that case where the court (Mabeya J) held that the charge of conspiracy to defraud must involve two or more persons and not a single accused person.

17. It was also submitted that the testimony of the Complainant was not corroborated by any independent or supporting evidence. Reliance was placed on Section 143 of the *Evidence Act*, Cap 80, Laws of Kenya.

18. She also cited inter alia the case of Bernard Kebiba vs. Republic [2000] eKLR where it was submitted that the Court stated that,

> "……the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant……Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."

19. The Respondent filed submissions dated 11.4.2023. It was submitted that the offence was proved against the Appellant beyond reasonable doubt. Reliance was placed on section 317 of the Penal Code.

20. It was submitted that the Prosecution proved the ingredients of the offence of conspiracy to defraud which were the existence of an agreement and the intention to defraud the public. They cited Rebecca Mwikali Nabutola & 2 Others v Republic (2016) eKLR to support prove of the ingredients of the offence.

21. On the intention to defraud, it was submitted that it was proved that the Appellant, having obtained the money, never delivered the stone cutting machine but instead cut off communication from the complainant.

22. On corroboration, the Respondent submitted that the evidence of the complainant was well corroborated by the documentary evidence detailing the bank transfer

Analysis

23. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not

disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

24. Therefore, this Court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

25. The Appellant was charged before the trial court with Conspiracy to defraud contrary to Section 317 of the Penal Code. A trial ensued at which the prosecution called a total of 2 witnesses and the Appellant when put on his defence elected to give sworn evidence and call one witness.

26. The summary of the prosecution's case was that the Appellant agreed with the Complainant who was interested in doing the business of crushing stones. The Appellant and one Nicholas and John met the complainant and they promised that they would be agents to ensure the complainant gets stone crushing equipment imported from Tanzania. This was to be at the complainant's cost. The complainant paid moneys to the agreed account to be applied towards acquiring the stone crusher machines. The account was the Appellant's account as agreed. Upon deposit of the amount, the Appellant stopped associating with the complainant and or even picking his phone calls.

27. The synopsis of the case of the Appellant was that indeed she saw money deposited by the complainant. It was a transaction in the names of the complainant. He had deposited money. The Appellant knew this to be one of the customers referred by one Isaiah Njuki Njue. The said Isaiah Njuki Njue had instructed a number of clients to send money to the Appellant's account. The Appellant did not personally know the Complainant.

28. The complainant produced bank details for the RTGS transfers. The court has np doubt that moneys left the Complainant's account to the Appellant's account. The question may be how much but does this go the root of proving the charge? No. the amount was clearly not more than what the charge sheet stipulated as to raise doubt. In his evidence, the Appellant denied ever dealing with the complainant but admitted seeing a transaction in the name of the complainant.

29. Having reviewed the evidence, I have no doubt that the evidence of PW1 and PW2 proved that the Appellant had obtained the money from PW1. If there was any other basis for receiving the money other than the fraud, as per the complainant's case and if indeed the money was not meant to acquire stone crushing equipment; as purported the Appellant, then it was her duty to support this allegation in evidence. This could not shift the burden of proof that was at all times on the prosecution. the prosecution proved that money was send to the account in the name of the Appellant. The Appellant herself gave the account n umber to PW1 and must have known the reason she instructed PW1 to pay via such account n umber.

30. The Judgment was faulted by the Appellant on the four (4) grounds of appeal. A reading of those grounds sums up that the charge was not proved to the requisite stands. Being a first appeal, as above observed, the court is duly bound to re-appraise and re-examine the entire record of evidence afresh and to come to own conclusions.

31. In undertaking that obligation, the court finds that the trial court did not only consider and affirm the evidence by documents how the money got transferred to the Appellant but also analyzed into great depth the ingredients of the offences charged while relying on sound and binding decided cases.

32. After my own analysis, it is determined the trial court cannot be faulted for believing the evidence of PW2, the Investigating Officer. An appellate court would only reverse the factual findings by a trial court where there is evidence of failure to consider the law and principles applicable or where the analysis of evidence is perfunctory and conclusions not supported by evidence on record or pervert such evidence. Accordingly, the finding that the Appellant conspired with others to defraud PW1 was proved beyond reasonable doubt.

33. Upon analysis, I find that the trial court cannot be faulted for accepting the evidence of PW2, the Investigating Officer. An appellate court may only overturn factual findings where there is a failure to consider the law, where the evidence is superficially analyzed, or where conclusions are unsupported or pervert the evidence on record. Accordingly, the finding that the Appellant conspired with others to defraud PW1 was proved beyond reasonable doubt.

34. The Court finds no error in the evaluation of the evidence or the application of the law and therefore concludes that the appeal lacks merit. It is dismissed

12. The court exercised discretion in accordance with the law. In the case of Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> "Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
>
> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

35. The Appellant did not attack the sentence as granted by the trial court, and I do not find any basis for interfering with it, for indeed it was a lawful sentence.

Determination

36. I make the following final Orders:

    i. This Appeal is devoid of merit and is dismissed in limine.

    ii. Right of appeal, 14 days.

DELIVERED, DATED AND SIGNED AT NYERI, VIRTUALLY ON THIS 19TH DAY OF NOVEMBER 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kimani for the Respondent

Mr. Kimeu for the Appellant

Appellant present

Court Assistant - Michael

M.D. KIZITO, J.