



REPUBLIC OF KENYA



**Republic v Shava & 5 others (Criminal Appeal E019 of 2024)
[2025] KEHC 18283 (KLR) (9 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E019 OF 2024
DR KAVEDZA, J
DECEMBER 9, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

MICHAEL SHAVA 1ST RESPONDENT

ELIZABETH AKINYI SHAVA 2ND RESPONDENT

LUCY NDUATA WAKUBWA 3RD RESPONDENT

ISAAC BIWOTT KIPSANG 4TH RESPONDENT

JOSEPH NJOROGE MUNGAI 5TH RESPONDENT

MUHANJI BENSON GWAYUMBA 6TH RESPONDENT

(Being an appeal against the acquittal of the trial court delivered on 29th January 2023 by Hon. W. Lopokoyit (S.R.M) at Kibera Chief Magistrate's Court Criminal Case No. 270 of 2014 Republic vs Michael Shava & 5 Others)

JUDGMENT

1. Before the trial court, the six respondents were jointly charged with two counts of offences. Count I, the offence of conspiracy to defraud contrary to section 317 of the Penal Code and Count II, obtaining money by false pretences contrary to section 313 of the Penal Code. After a full trial, they were acquitted on all counts charged.
2. Dissatisfied, the prosecution filed an appeal challenging the acquittal. In the petition of appeal, the prosecution raised seven (7) grounds which have been coalized as follows: The appellant contended that the trial court failed to properly analyse the prosecution evidence in totality. The trial court erred



in acquitting all the accused persons under Section 215 of the Criminal Procedure Code. The appellant prayed that the appeal be allowed and the acquittal be substituted with a conviction.

3. This being the first appellate court, we are guided by the ruling in *Okeno v. R.* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. The prosecution called five witnesses and produced nineteen exhibits in support of its case. The complainant, Seth Shisabilu Shava (PW1), testified that on 8th March 2013, he secured a tender with the Rural Electrification Authority for the supply of 5,800 eucalyptus electricity poles valued at Kshs. 85,000,000. Prior to securing the tender, PW1 had discovered that his younger brother, the 1st respondent, Michael Shava, had, without his consent, cut down approximately 480 eucalyptus trees planted on his four-acre land in Kakamega County and had restrained him from selling them.
5. PW1 testified that in April 2013, upon being cleared to commence supply, he instructed the 1st respondent to source the required poles. The 1st respondent informed him that the poles were stored at a government facility in Gilgil, but later claimed that they had been transferred to a treatment plant in Kitale. PW1 was informed that upon grading, only 260 poles met the requisite specification. The 1st respondent then introduced him to the 3rd respondent, Lucy Nduta Wakubwa, as a broker capable of sourcing the additional poles.
6. On 12th April 2013, PW1 met the 1st and 3rd respondents and a budget of Kshs. 984,000 was prepared for the purchase of 225 poles. He paid an advance of Kshs. 40,000 to the 3rd respondent through mobile money. He was thereafter taken to the Kitale treatment plant by the respondents and shown poles which were represented as those already sourced for his contract. Acting on these representations, PW1 remitted a total sum of Kshs. 915,000 through the 2nd respondent, Margaret Wambui Ngugi Shava, who is the wife of the 1st respondent, via bank and mobile money transfers.
7. PW1 further testified that one truckload of poles was successfully delivered to the Rural Electrification Authority depot in Awasi. Thereafter, he was informed that further deliveries had been halted because one Isaac Biwott Kipsang, the 4th respondent, demanded Kshs. 648,000 as payment for cutting and transporting the poles. After negotiations, PW1 paid the 4th respondent Kshs. 380,000 through bank and mobile money transfers.
8. PW1 stated that he was thereafter induced to believe that several truckloads of poles were en route to Awasi through electronic mail communications bearing forged delivery notes. He was further demanded to pay Kshs. 404,000 for transport. Upon demanding proper documentation for invoicing, the respondents became evasive and ceased communication.
9. Upon personally visiting the Kitale treatment plant, PW1 established that only 44 poles had been delivered for treatment. His initial 480 poles, valued at Kshs. 1,680,000 were unaccounted for. He reported the matter to the Criminal Investigations Department on 28th August 2013. The respondents were subsequently arrested and charged.
10. Margaret Wambui Ngugi Shava (PW2) corroborated PW1's testimony concerning the transfer of funds and the role played by the 2nd respondent in receiving and transmitting the monies.
11. Oscar Ndilumba Muiywoiki (PW3) testified on the business dealings and confirmed the existence of the tender awarded to PW1.



12. CPL Chrispinus Mbalwa (PW4) and PC Douglas Ombati Kanyega (PW5) testified on the investigations, production of documentary exhibits, tracing of financial transactions, and the eventual arrest of the respondents.
13. The 1st respondent, Michael Shava, gave an unsworn statement and denied defrauding the complainant. He asserted that the trees were planted on his father's land and that PW1 wanted to cut and sell them through his company, but he declined. He stated that PW1 independently engaged the 3rd respondent and sent Kshs. 1,600,000 for the purchase of other trees. He denied any dealings with the Kitale treatment plant and produced several documents in support of his defence.
14. The 2nd respondent, Elizabeth Akinyi Shava, gave an unsworn statement stating that she merely received money in her account and forwarded it to the 1st respondent. She maintained that she believed the money was meant for the purchase of trees.
15. The 3rd respondent, Lucy Nduta Wakubwa, gave an unsworn statement admitting that she introduced PW1 to farmers said to be selling trees, but denied receiving any money towards the business. She maintained that the Kshs. 40,000 she received was repayment of a personal loan previously advanced to the 1st respondent.
16. The 4th respondent, Isaac Biwott Kipsang, in an unsworn statement, stated that he received Kshs. 250,000 from PW1 to buy trees, and he bought 160 trees on his own. He denied any fraudulent intent.
17. Benson Muhanzi (DW5) and Joseph Njoroge Muigai (DW6), employees of the Kitale treatment plant, testified on oath that their company only carries out the treatment of electricity poles and does not sell poles. They confirmed that they received only 77 poles for treatment under an agreement allegedly executed by the 1st respondent and that only 44 poles were ultimately treated. They further testified that partial refunds were made after disputes arose and denied any conspiracy with the respondents.
18. The appeal was canvassed by way of written submissions, which have been duly considered, and there is no need to rehash them.
19. In count I, the respondents were charged with the offence of conspiracy to defraud. Section 317 of the Penal Code provides as follows:

“Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.”
20. To sustain a conviction for conspiracy to defraud under section 317 of the Penal Code, the prosecution was required to prove, beyond reasonable doubt, the existence of an agreement between two or more persons to defraud, a shared intention to commit the unlawful purpose, and participation by each accused in furtherance of that common intent. The offence is complete upon proof of the agreement itself, even if the fraud is not ultimately executed.
21. In the present case, the prosecution alleged that the respondents acted jointly to defraud PW1 of approximately Kshs. 4.1 million through a scheme involving the sourcing, treatment, and delivery of electricity poles. The alleged conspiracy was primarily anchored on purported financial transactions from PW1 to the respondents.
22. To prove the alleged transfer of funds, the prosecution produced bank and M-Pesa statements attributed to PW1. These electronic records were required to be accompanied by a certificate under



- section 106B of the *Evidence Act*, but none was produced. No officer from any bank or mobile money service provider testified to verify the alleged transactions. Even to the naked eye, the statements lacked the requisite security features, such as institutional stamps or authentication marks. The documents were therefore inadmissible and of no probative value.
23. In the absence of properly admitted financial evidence, the prosecution failed to establish that any money moved from PW1 to the respondents or that there was any coordinated financial participation indicative of a conspiracy.
 24. PW3 testified on the existence of the Rural Electrification Authority tender awarded to PW1, while PW4, the investigating officer, outlined steps taken during the investigation and produced exhibits, but his evidence did not cure the fundamental gap occasioned by the absence of certified electronic evidence and expert authentication of the financial records. Neither witness established a financial conspiracy.
 25. Regarding the respondent's culpability, 3rd respondent, the prosecution alleged she introduced PW1 to persons selling trees. No admissible evidence proved she received any portion of the alleged Kshs. 4.1 million or participated in any financial transaction linked to PW1. The alleged receipt of Kshs. 40,000 was neither authenticated nor shown to be connected to a fraudulent design. Her role did not demonstrate participation in an agreement to defraud.
 26. As for the 4th respondent, the prosecution alleged he was paid to cut and transport poles. No admissible bank or mobile money evidence proved he received any funds from PW1, and no delivery records or independent evidence linked him to any fictitious movement of poles. Mere mention in the narrative, without evidential support, was insufficient to sustain the charge.
 27. PW2, Margaret Wambui Ngugi Shava, was shown only to have assisted in receiving funds on behalf of her husband, the 1st respondent, Michael Shava, because she held a bank account. There was no evidence she had prior knowledge of any fraudulent agreement or shared criminal intent. The 5th and 6th respondents, officials of Kitale Treatment Works, consistently testified that their role was limited to the treatment of poles. No evidence showed they received any portion of the alleged Kshs. 4.1 million or dishonestly failed to perform contractual obligations. Their conduct was not linked to any fraudulent agreement with the other respondents.
 28. In general, the circumstantial evidence did not form a complete and unbroken chain pointing irresistibly to the respondents as perpetrators of a joint fraudulent scheme. Further, the prosecution failed to explain how it arrived at the figure of Kshs. 4,165,000. The sum was not itemised, reconciled, or proved through admissible evidence. These cumulative gaps introduced substantial doubt as to the existence of any agreement or common intention to defraud. The charge under section 317 of the Penal Code was therefore not proved to the requisite standard. The acquittal of the trial court on Count I was proper and is upheld.
 29. In Count II, the respondents were charged with obtaining money by false pretences contrary to section 313 of the Penal Code. For a conviction, the prosecution was required to prove that the respondents made a false representation of an existing fact, knew it to be false, intended to defraud, and actually obtained money as a result.
 30. The prosecution asserted that the respondents falsely represented they had sourced and were delivering poles, inducing PW1 to part with approximately Kshs.4.1 million. However, the evidence failed to prove the most critical element: that the money was actually obtained by the respondents.
 31. As stated, the alleged electronic financial records were produced without compliance with section 106B and were therefore inadmissible. Without properly admitted bank or mobile money evidence,



the prosecution could not prove that any money left PW1's hands and was received by the respondents. This was a substantive failure of proof, not a mere technicality.

32. Further, the prosecution did not establish that any false representation was knowingly made at the time the money was allegedly obtained. At best, the evidence disclosed a failed commercial arrangement, which, without more, does not constitute the offence of obtaining by false pretences.
33. The failure to prove actual receipt of the alleged sum, coupled with the uncertainty surrounding the computation of Kshs. 4,165,000, left the charge resting on speculation rather than proof. Consequently, the offence under section 313 of the Penal Code was not established beyond reasonable doubt. The acquittal of the trial court on Count II was proper and is likewise upheld.
34. In the premises, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF DECEMBER 2025

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the Appellant

Ms. Ihadi for the 1st, 2nd and 4th Respondents

Ms. Kamau for Mr. Kimamo Kuria for the 5th Respondent

Karimi Court Assistant.

