

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL APPEAL NO. E052 OF 2024

EVANS NYANUMBA ASUGAH APPELLANT
- VERSUS -
REPUBLIC RESPONDENT

(Being an appeal from the judgment & conviction of **Hon. G. Barasah SRM** delivered on the 11/6/2024 and sentence passed on the 20/6/2024 in **Ksm CMCC in Criminal Case No. E248 of 2021, R. vs Evans Nyanumba Asugah & 3 Others**)

J U D G M E N T

1. The appellant and 3 others not before court were charged with the offence of conspiracy to defraud contrary to ***section 317 of the Penal Code.***
2. The particulars of the charge were that, on diverse dates between the month of **April 2019** and **September 2019** at National Museum of Kenya Kisumu branch, in Kisumu Central sub county within Kisumu County they jointly conspired to defraud the National Museum of Kenya Kisumu branch of **Kshs. 2,385,850/-** by means of manipulation of monthly statistics report by plucking off miscellaneous receipts.
3. The appellant pleaded not guilty and the matter proceeded to trial. The prosecution called six (6) witnesses while the appellant gave sworn testimony.
4. In its judgment dated **11/6/2024**, the trial court found that the prosecution had proved its case against the appellant beyond reasonable doubt for the charge while it had failed to prove the same against the appellant's co-

accused. It ordered that the appellant pay a fine of **Kshs. 150,000/-** or in default 1 year serve imprisonment.

5. Dissatisfied with that decision, the appellant filed his petition of appeal dated **3/7/2024** raising six (6) grounds that can be summarized as follows: -
 - a) **That trial magistrate erred in law and fact in convicting the appellant when the ingredient of crime of conspiracy was not proved.**
 - b) **That the trial court erred in law and in fact in convicting the appellant person on contradictory and inconsistent evidence and on a defective charge.**
 - c) **That trial court erred in law and in fact in convicting the accused person without re-evaluating the appellant's defence.**
6. The appeal was disposed of by way of submissions. The appellant submitted that the appellant could not be guilty of conspiracy without there being any other co-conspirator. That the auditor and curator confirmed that no monies were lost and further that the appellant's immediate supervisor never produced the lists.
7. On its part, the State submitted that there was an agreement between the appellant and other co-conspirators.
8. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach its own independent conclusion and findings but at all times bearing in mind that it did not see the witnesses testify. (See ***Okeno v Republic [1972] EA 32.***)

9. Before the trial court, **Pw1 Phoebe Awita**, a Senior Curator and Officer in Charge at Kisumu Museum testified that she oversees other officers at the Museum and also took care of its collections. She set out the procedure undertaken by both individuals and organized groups when visiting the Museum.
10. That at the beginning of every month of October, they do quarterly returns but that in **October of 2019** she was informed by the education assistants undertaking preparation of the report that they had some gaps in compilation of the reports. That she informed them to seek further information from the accountants but the assistants informed her that their statistics differed from those of the accountant.
11. That she subsequently informed the Director General of the National Museums of Kenya and from the **21/10/2019** to **24/10/2019**, the station was audited by one **Elizabeth Mutua**, the institution's chief internal auditor. That as chief auditor took them through the books, they realized that there were gaps though she did not complete her audit.
12. That after the audit report came out, she received suspension letters for the appellant and his co-accused before the trial court. That the appellant and his cohort subsequently received notice to show cause letters and also appeared before disciplinary hearing after which they were dismissed. That the appellant was the station accountant and she had never had an issue with him or his co-accused before.
13. In cross-examination, she told the court that her problem with the appellant was that the number of visitors reported by the appellant differed from those reported by the education section as by the time the account section was

reporting the visitors, the said visitors would have been counted at the education section.

14. **Pw2 Nesbith Adongo** testified that she worked in the education section of the National Museum of Kenya, Kisumu Branch. That in **October 2019**, she was instructed to do a quarterly report for the 1st quarter running from **July to September, 2019**. That on undertaking the report, it was realized that the number of students and teachers who visited as recorded from their section did not tally with the record of the same from the accounts section.
15. That they reported the same to **Pw1** and on review of the same, it was found that there was a variance of **1,441** visitors for the month of **April, 1,553** for the month of **May, 4,444** for the month of **June, 25,552** for the month of **July, 11,916** for the month of **August** and **1,708** for the month of **September**.
16. In cross-examination, she stated that when the visitors arrive at the museum, she records the number of students then refers them to the ticketing section. That payment is done at the accounting section where the accounts write the correct number and in case the visitors are less, the accounts do not receive the money. That no teacher complained that the accounts had refused to take their money and that the issued receipts are verified at the education desk and can vary when all the students are not paid for.
17. **Pw3 Elizabeth Mutua** the auditor of the National Museum of Kenya testified that on the **16/10/2019**, she was handed an assignment where **Pw1** had informed the Director General that documents at her station were not tallying.
18. That on carrying out her audit, she realized that there were various variances for the audit period of 3 months from receipts sold. That the variance was in

the numbers sold in the receipt books against the number recorded on the register which had 100 while the register had 200 students. That she prepared the audit report on the **16/12/2019**.

19. In cross-examination, she testified that she was relying on the group visit register, receipt books and monthly return files though she did not produce the same before court nor refer to them in her report. That she could not confirm who plucked the receipts from the receipt book.
20. **Pw4 Jared Otieno**, a security warden at the National Museum of Kenya Kisumu branch testified that he and his colleague Adongo did the calculations and realized that the statistics from the education section did not match those from the accounts section. He corroborated **Pw2's** particulars on the variance noted and further testified that in October,2019, an audit was carried out at the branch after which the appellant and his co-accused were arrested and later charged.
21. In cross-examination, he stated that though he had served as a security officer for 17 years, he was redeployed to the education section from 2016 together with **Pw2**. That he would not know whether the officers made a mistake. That the receipts were okay with total numbers and further that there was no anomaly recorded on a daily basis.
22. **Pw5 Stantes Ongata Opijai** the DAHRS at the National Museum of Kenya from the Director General to act on a matter where there was embezzlement of **Kshs. 2,385,850** at the Kisumu branch wherein the appellant and his co-accused were mentioned. That there were about 68 miscellaneous receipts that could not be accounted for. That he issued show cause letters to the appellant and his co-accused on the **19/12/2019** with the appellant responding on the **17/1/2020** refuting the allegations.

23. That on **6/3/2020**, he wrote letters to the appellant and co-accused to appear before the disciplinary committee though the committee could not confirm how much they embezzled and had to await the internal report. **Pw5** did not name the appellant amongst the individuals who embezzled the funds as per the report and instead cited **Caroline Abondi – 916,550, Joel Omari – 447,000** and **Matthews Obinge – 23,400**.
24. **Pw6, No. 3365 Sergeant Benedict Mwanza** from the DCI Kisumu Central testified that he was one of the investigators who undertook the investigation of the matter where there was an allegation of embezzlement of **Kshs. 2,385,850/-** at the National Museum of Kenya Kisumu branch. That on investigation, he established that the appellant though not a ticketing clerk, was colluding with the said clerks leading to the arrest and subsequent charging of the accused persons.
25. In cross-examination, he told the court that though the appellant was not involved directly in receiving revenue from the people, there were missing receipts. That he could not confirm the existence of the said receipts.
26. When placed on his defence, the appellant elected to give sworn testimony. He testified that he used to work as an accountant with the National Museum of Kenya Kisumu branch. That his duties did not connect him with his co-accused.
27. That **Pw3** did not pick anything from him when she was doing her audit. That the tickets used to come from Nairobi through the curator who is the accounting officer of the station and that he only interacted with them after they have been used and consequently he would have encountered any defect in them.

28. That he never directed the ticketing clerks on what to do who were answerable to the curator. That he only kept petty cash as the money collected during the day was taken to the bank.
29. In cross-examination, the appellant reiterated that he did not embezzle any funds from the institution. That he was the accountant but the accounts assistant was the one issuing receipts. That the ticket clerks were to report to the curator and the duty of the accounts was to find out if the money was tallying. That he did not notice any plucking of the receipt book by the ticketing clerks. That the key recommendation of the audit report was to go and verify from schools and that in the instant case the investigating officer stated that he went to the schools and was unable to get the information.
30. In re-examination the appellant testified that the account assistant and curator were verifying the records but raised no complaints.
31. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him.
32. I have considered the record. Kenyan statutes do not define what constitutes ‘conspiracy.’ However, the courts make reference to authoritative legal texts and publications. The **Black Law Dictionary 9th Edition** defines conspiracy as follows: -

“An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement’s motive and (in most states) action or conduct that furthers’ the agreement; a combination for an unlawful purpose.”

33. In Abdi & another v Republic (Criminal Appeal E033 of 2020) [2024] KEHC 8021 (KLR) (Crim), the court made reference to scholarly works to define the elements of conspiracy. It held: -

“Be that as it may, the elements of the offence of conspiracy to commit an offence are articulated in Archibold: Writing on Criminal Pleadings, Evidence and Practice, pages 2589 and 2590, where the authors state as follows: -

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable; there must be agreement ... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.” (Emphasis added)”

34. In Gichanga v Republic [1993] KLR 143, the Court of Appeal held that: -

“With respect to the offences of conspiracy, the crucial issue is whether the appellant and his fellow conspirators acted in concert with the intention that the Board be induced to part with its money.”

35. In Ann Wangechi Mugo & 6 others v Republic [2022] Eklr, the court observed as follows: -

“To prove a conspiracy, the prosecution had to establish that the respondents together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court (see Republic v Anne Atieno Abdul & Others [2017] eKLR). Further Halsbury’s Laws of England Vol. 25 observes that;

It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose.”

36. Further, in Abdi & another v Republic (Criminal Appeal E033 of 2020) (supra) the court observed that: -

“167. Having evaluated the evidence adduced, I find that the trial was well guided in its finding on conspiracy. The intention of the conspirators cannot be supported by direct evidence “for not even the devil knoweth the mind of man”. Conspiracy by its nature is an opaque offence heavily guarded and clouded.

168. It is not easy to find direct evidence and indeed part of commission the offence is to conceal the evidence. Thus if the court were to insist on direct evidence per se, no one will be convicted of the offence. The knowledge and involvement in the offence can be inferred from the conduct of the parties with a common desire to commit a criminal offence.”

37. Applying the above principles to the facts and circumstances of this case, this Court is required to determine whether the prosecution proved that there was a meeting of minds to constitute the offence of conspiracy. The issue is whether the evidence before the lower court demonstrated that the appellant was acting with the common intention of defrauding the complainant, the National Museum of Kenya Kisumu branch.

38. Did the prosecution prove beyond reasonable doubt that indeed there was conspiracy to defraud, on the part of the appellant and his co-accused. This is an interesting case whereby the appellant’s co-accused whom he was

charged together with the offence of conspiracy to defraud were all acquitted of the charge.

39. I have relooked at the evidence placed before the lower Court, witness testimonies and documentary evidence. **Pw1** testified that the number of visitors reported by the appellant differed from those reported by the education section. **Pw2** on her part testified that payment is done at the accounting section where the accounts write the correct number and in case the visitors are less, the accounts don't receive the money. That in the instant case, no teacher complained that the accounts had refused to take their money and that the issued receipts were verified at the education desk and would vary when all the students are not paid for.
40. On her part, **Pw3's** testimony also did not implicate the appellant. Though she testified that there was variance in the numbers sold in the receipt books against the number recorded on the register, she could not confirm who plucked the receipts from the receipt book. **Pw5** similarly testified that the receipts were okay with total numbers and further that there was no anomaly recorded on a daily basis.
41. From the available evidence, the prosecution did not prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding between the appellant and his co-accused. In addition, the prosecution did prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objective(s), or agreed to all the details, or agreed to what the means were by which the objective(s) would be accomplished. That being the case, the issue now turns to whether the alleged conspiracy can be inferred from the conduct of the appellant.

42. None of the prosecution witnesses led evidence to demonstrate that the conduct of the appellant or his co-accused pointed to a conspiracy. In fact, the evidence all point towards the fact that the interactions between the appellant and the ticketing officers were limited to handing over of the ticketing books.
43. In addition to this, the appellant's testimony on the collection of the ticketing book by **Pw1** and further that the ticketing officers reported to **Pw1** remained undisputed.
44. In my view, the totality of this evidence leads this court to the conclusion that there was no evidence presented to prove that the appellant and his co-accused were working together with a common intention to defraud the Complainant. In any event, having acquitted the co-accused of conspiracy, the appellant could not conspire with himself. With whom did he conspire with if the co-accused were innocent of conspiracy? Clearly, the trial court erred in convicting the appellant.
45. Accordingly, I find that the appellant's conviction was not safe. The conviction is quashed and the sentence set aside. The fine be refunded to him, if paid.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **19th** day of **December, 2025**.

A. MABEYA, FCI Arb
JUDGE