

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. E039 OF 2025

MESHACK MWAU MULEVU.....

APPELLANT

=VERSUS=

REPUBLIC.....

RESPONDENT

**(Being an appeal from the Conviction and Sentence of Hon. A.
M. Obura (CM) in Voi CMCCR Case No. E373 of 2022 delivered
on 2nd July 2025)**

JUDGMENT

1. The Appellant was charged in Voi CMCR Case No. E373 of 2022 alongside two others with the following charges:-

Count I: Conspiracy to Defraud c/s 317 of the Penal Code,

in that:

On the 20th January 2022 at LMD Ranch in Maungu within Voi Sub-County in Taita Taveta County, the appellant jointly and severally by deceit conspired to defraud ABDI MOHAMED NUNOW 60 Heads of cattle worth Kshs. 2,815,200/=

Count II: Conspiracy to Defraud c/s 317 of the Penal code,

in that:

On the 20th January 2022 at LMD Ranch in Maungu within Voi Sub-County in Taita Taveta County, the appellant jointly and severally by deceit conspired to defraud ABDI MOHAMED NUNOW 29 Heads of cattle worth Kshs. 2,232,800/=

Count III: Conspiracy to Defraud c/s 317 of the Penal code,

in that:

On the 25th January 2022 at LMD Ranch in Maungu within Voi Sub-County in Taita Taveta County, the appellant jointly and severally by deceit conspired to defraud ABDI MOHAMED NUNOW 28 Heads of cattle worth Kshs. 2,239,600/=

Count IV: Conspiracy to Defraud c/s 317 of the Penal code,

in that:

On the 29th January 2022 at LMD Ranch in Maungu within Voi Sub-County in Taita Taveta County, the appellant jointly and severally by deceit conspired to defraud ABDI MOHAMED NUNOW 29 Heads of cattle worth Kshs. 2,653,600/=

Count V: Conspiracy to Defraud c/s 317 of the Penal code,

in that:

On the 1st February 2022 at LMD Ranch in Maungu within Voi Sub-County in Taita Taveta County, the appellant jointly and severally by deceit conspired to defraud ABDI MOHAMED NUNOW 29 Heads of cattle worth Kshs. 1,947,800/=

Count VI: Conspiracy to Defraud c/s 317 of the Penal code, in that:

On the 6th February 2022 at LMD Ranch in Maungu within Voi Sub-County in Taita Taveta County, the appellant jointly and severally by deceit conspired to defraud ABDI MOHAMED NUNOW 60 Heads of cattle worth Kshs. 1,980,750/=

Count VII: Conspiracy to Defraud c/s 317 of the Penal code, in that:

On the 20th January 2022 at LMD Ranch in Maungu within Voi Sub-County in Taita Taveta County, the appellant jointly and severally by deceit conspired to defraud ABDI MOHAMED NUNOW 29 Heads of cattle worth Kshs. 2,109,380/=

Count VIII: Fraudulent Trading c/s 1002(i) as read with Section 1002(3) of the Companies Act No. 17 of 2015, in that:

On diverse dates between January 2022 and February 2022 at LMD Ranch in Maungu within Voi Sub-County in Taita Taveta County, the appellant being a Director of EASTMEAT SUPPLIES LIMITED knowingly defrauded ABDI MOHAMED NUNOW of Kshs. 16,737,560/= through EASTMEAT SUPPLIES LIMITED.

2. The Appellant pleaded not guilty to the charges. The prosecution called a total of 4 witnesses.
3. The prosecution evidence in summary was that the complainant who is a livestock dealer started a business with the Appellant and two others namely **CLEOPHAS MWANZIA MULEVU** and **EASTMEAT SUPPLIES LTD** (a limited company).
4. The Appellant and his co-accused bought heads of cattle from the complainant and paid promptly.
5. In January 2022, the Appellant and his co-accused bought 60 heads of cattle from the complainant worth Kshs. 2,8115,200/= and presented to him post dated cheques as follows:-

	<u>Amount</u>
(i) KCB cheque dated 31st March 2022	Kshs.
703,800/=	
(ii) KCB cheque dated 17th April 2022	Kshs.
703,800/=	

**(iii) KCB cheque dated 17th march 2022 Kshs.
703,800/=**

**(iv) KCB cheque dated 3rd March 2022 Kshs.
703,800/=**

6. When the complainant banked the cheques, they were all dishonoured.

7. The complainant said he was issued with other cheques as follows:-

**(i) KCB cheque dated 18th February 2022 Kshs.
2,239,600/=**

**(ii) KCB cheque dated 22nd February 2022 Kshs.
2,653,600/=**

**(iii) KCB cheque dated 18th February 2022 Kshs.
1,947,800/=**

**(iv) KCB cheque dated 2nd March 2022 Kshs.
2,109,308/=**

**(v) KCB cheque dated 18th February 2022 Kshs.
55,400/=**

**(vi) KCB cheque for Kshs.
104,250/=**

**(vii) KCB cheque dated 7th February 2022 for Kshs.
598,740/=**

8. Further the Appellant also used to ask the complainant to send money to fuel vehicles.

9. The total amount owed was Kshs. 16,737,560/=. PW3 MARSHALL ONYANGO said he was aware the outstanding amount was Kshs. 17,000,000. He was working with the Appellant in logistics but he did not handle the cheques.
10. The Appellant said they paid for all livestock supplied through the 3rd Accused, EASTMEAT SUPPLIES LTD account number 1291543636.
11. Further that there was a drought in 2021 to 2022 and there was no way the complainant would have agreed to deliver the goods on credit.
12. The trial court found that the prosecution did not prove Count I to VII since it was only the Appellant who was dealing with the complainant and he is the one who issued the cheques.
13. The trial court found the Appellant guilty on Count VIII and fined him Kshs. 5,000,000/= or in default to serve 5 years imprisonment.
14. The Appellant has appealed against sentence and conviction on the following grounds:-

(i) Misapprehension of Law and Facts.

- (a) THAT the learned trial Magistrate erred in law and fact by convicting the appellant under Section 1002(1) and 1002(3) of the Companies Act 2015 with regard to COUNT VIII without proving fraudulent intent beyond reasonable doubt at the time of contracting.**

(b) THAT the Learned Magistrate erred in law and fact by holding that the prosecution proved its case beyond reasonable doubt with regard to COUNT VIII while holding that the prosecution failed to meet the required threshold on COUNT I - VII relating to conspiracy to defraud.

(ii) Failure to provide reasoned Judgment.

THAT the learned trial Magistrate erred in law and fact by failing to give adequate reasons for rejecting the appellant's defence and disregarded crucial aspects of the defence evidence, including the existence of a commercial dispute and disputed accounts reconciliations.

(iii) Improper and injudicious evaluation of evidence.

THAT the court improperly assessed the evidence by relying on perceived inconsistencies in the appellant's testimony while ignoring or discounting corroborative defence and documentary evidence.

(iv) Unlawful use of criminal process for Civil Recovery.

THAT the learned trial Magistrate erred in law and fact by issuing a compensation order of Kshs. 16,737,560 based on a commercial dispute (which was ordered for fresh trial in Voi High Court Civil

Appeal E025/2023), contrary to established legal principles.

(v) Conflict of interest and apprehension of bias.

THAT the learned trial Magistrate erred in failing to recuse herself from the criminal matter as she had handled a civil matter at the Magistrate court, Voi MCCC E141 of 2022 arising from the same facts, which judgement was set aside by the High Court at Voi in Civil Appeal E025/2023, thus creating a perception of bias and violating the appellant's right to an impartial trial under Article 50(1) and Article 47(1) of the Constitution.

(vi) Excessive and disproportionate sentence.

THAT the Learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant to a fine of Kshs. 5,000,000 and in default serve five years' imprisonment, together with an order for compensation of Kshs. 16,737,560 which sentence is excessive, harsh, unsafe and failed to consider the appellant's financial inability and status as a first-time offender.

(vii) Improper reliance on probation report.

THAT the court relied on a disputed probation report containing assertions not admitted or proven, including alleged remorse and acknowledgment of debt, contrary to principles of fairness.

15. The parties filed written submissions as follows:- The appellant in his submissions challenges his conviction and sentence, arguing that the trial court's judgment was against the weight of evidence and resulted from a flawed process.
16. The main issue the appeal is the assertion that the complainant's evidence was uncorroborated and unreliable, particularly the alleged "sales record book," which the defence contends is not a genuine business record. The appellant points to significant inconsistencies within this book: its author was unknown, it contained alterations, and crucially, it lacked any mention of the appellant or the third accused, as well as essential details like signatures, delivery notes, invoice numbers, or truck registrations.
17. A detailed comparison of the cheque exhibits with this sales book reveals further discrepancies, where the dates, quantities, and customer names in the book do not match the testimony of prosecution witnesses regarding the alleged transactions.
18. The appellant emphasizes the established commercial practice that the sale of goods is evidenced by delivery notes and invoices, neither of which were produced.

19. Furthermore, the trial court's refusal to order bank statements that would have demonstrated an existing business relationship and significant prior payments by the appellant, which would negate any fraudulent intent, is highlighted as a key misdirection.
20. This failure to critically analyze the defence evidence and weigh it against the prosecution's case, as required by precedent, rendered the conviction unsafe.
21. The appeal further submits that the entire dispute is fundamentally civil in nature, arising from a commercial relationship built on trust involving credit, reconciliation of accounts, and quality disputes, which was improperly criminalized.
22. This is underscored by the existence of a parallel civil case between the same parties on the same facts.
23. Consequently, the compensation order for the exact civil claim amount was unlawful, as criminal courts are not equipped to adjudicate such complex commercial claims, especially after the related civil judgment was set aside.
24. The appellant also raises a concern of bias, noting that the trial magistrate had previously presided over the related civil matter, creating a reasonable apprehension of prejudgment.
25. The sentence itself is attacked as manifestly excessive and disproportionate for a first-time offender acting in a commercial context.

26. Finally, the appellant contends that the sentencing process was procedurally unfair because the trial court relied on a disputed probation report that contained contested assertions of remorse and acknowledgment of debt, effectively basing the sentence on unproven, hearsay material rather than facts established in court.
27. The respondent submitted that the appellant was properly convicted on the seventh count of fraudulent trading contrary to section 1002 of the Companies Act after the prosecution proved its case beyond reasonable doubt through four witnesses.
28. The prosecution demonstrated through PW1, Abdi Mohammed Nunow, that the appellant issued numerous cheques totaling Ksh 16,737,560 for livestock supplies, all of which were dishonored upon presentation.
29. PW2 corroborated the business relationship between the parties, while PW3, a former employee of the appellant, confirmed that he procured livestock for the appellant from Voi and that the cheques issued were returned unpaid.
30. PW4, the investigating officer, produced certified copies of the dishonored cheques obtained from Kenya Commercial Bank Voi and the registration details of Eastmeat Supplies Ltd from the Registrar of Companies, thereby establishing the corporate involvement in the fraudulent scheme.

31. Regarding the appellant's first ground that the conviction was not proved beyond reasonable doubt, the respondent contends that the testimonies of prosecution witnesses, together with the certified copies of bounced cheques and the complainant's contemporaneous records, sufficiently established the fraudulent intent at the time of contracting.
32. The certified copies of cheques obtained from KCB Voi provided independent corroboration of the transactions, meeting the evidentiary threshold required in criminal proceedings as affirmed in *Republic v Okumu*.
33. The appellant's participation in carrying on business with intent to defraud was therefore conclusively established.
34. On the claim that the trial magistrate failed to provide a reasoned judgment, the respondent submits that the trial court adequately considered and rejected the appellant's defense of an existing commercial dispute involving unreconciled accounts.
35. The court properly characterized this defense as an afterthought, given that the issuance of multiple cheques that were subsequently dishonored pointed to a clear fraudulent intent rather than a genuine commercial disagreement.
36. The trial court was entitled to assess the credibility of this defense and find it wanting in light of the overwhelming prosecution evidence.

37. Concerning the alleged improper evaluation of evidence, the respondent acknowledges that there were minor discrepancies in the computation of the total amount lost, with the charge sheet indicating Ksh 16,737,560 while the exhibits showed Ksh 16,737,520, and the investigating officer's calculations suggesting Ksh 14,081,380.
38. The respondent submits that these variances are negligible and do not vitiate the conviction, as the fundamental fact of fraudulent trading through dishonored cheques remained unchallenged.
39. Regarding the admission of cheque number 159 which was not among those certified by the bank, the respondent argues that this singular error does not undermine the entire prosecution case, and the High Court has the power to rectify such minor irregularities as established in *Ngonde v Republic*.
40. On the ground that criminal process was unlawfully used for civil recovery, the respondent submits that the trial court properly exercised its discretion under section 178 of the Criminal Procedure Code by ordering restitution to the complainant.
41. The court explicitly provided that the amount of Ksh 16,737,560 should be paid within six months, failing which it would be recoverable through civil proceedings.
42. This order was within the court's statutory mandate and did not convert the criminal matter into a civil dispute.

43. The fact that a related civil matter was ordered for retrial does not preclude the criminal court from issuing appropriate restitution orders in a concluded criminal case where guilt has been established.
44. Regarding the allegation of bias arising from the trial magistrate having previously handled a related civil matter, the respondent submits that the appellant never raised this objection during the trial proceedings.
45. The mere fact that a judicial officer has presided over a related civil matter does not automatically disqualify them from hearing a criminal case arising from similar facts, especially where no actual bias has been demonstrated.
46. The appellant had the opportunity to raise this issue before the trial court but failed to do so, and cannot now raise it as a ground of appeal without having given the trial court an opportunity to address the concern.
47. Finally, on the improper reliance on the probation report, the respondent submits that such reports are standard tools used by courts to determine appropriate sentences.
48. The appellant had the opportunity to challenge the contents of the probation report before sentence was passed, and there is no indication that he was denied this opportunity.

49. The probation report would have assisted the court in understanding the appellant's circumstances and the impact of the offence, thereby enabling the court to impose the sentence of five years imprisonment in default of paying the Ksh 500,000 fine, together with the restitution order.
50. The respondent therefore urges this court to uphold the conviction and sentence as they were soundly based on the evidence presented and the applicable law.
51. The issues for the court's determination in this appeal are as follows;
- (i) Whether the prosecution proved the offence of fraudulent trading contrary to Section 1002 of the Companies Act beyond reasonable doubt, particularly regarding the element of fraudulent intent at the time of contracting.
 - (ii) Whether the trial court properly evaluated the evidence, including the appellant's defence that this was a commercial dispute rather than a criminal matter.
 - (iii) Whether the trial magistrate's prior handling of a related civil matter created an appearance of bias warranting recusal.
 - (iv) Whether the restitution order of Kshs. 16,737,560 was lawfully made under Section 178 of the Criminal Procedure Code.
 - (v) Whether the sentence of Kshs. 5,000,000 fine or five years imprisonment was manifestly excessive.

(vi) Whether the trial court properly relied on the probation report during sentencing.

52. This court has carefully considered the record of appeal, the submissions by both parties, and the applicable law.

53. As the first appellate court, it is duty-bound to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not have the advantage of observing the witnesses testify.

54. The Court of Appeal in *Okeno v Republic* [1972] EA 32 established this principle, and this court shall adhere to it.

55. The appellant was convicted on Count VIII for fraudulent trading contrary to Section 1002(1) of the Companies Act, which provides that if a business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, each person who knowingly participates in carrying on the business in that manner commits an offence .

56. The particulars of the charge alleged that the appellant, as a director of Eastmeat Supplies Limited, knowingly defrauded the complainant of Kshs. 16,737,560 through the company.

57. The evidence adduced by the prosecution established that the appellant, through his company, engaged in a series of transactions with the complainant involving the purchase of cattle.

58. The complainant testified that the appellant issued multiple post-dated cheques for the cattle supplied, all of which were dishonoured upon presentation.
59. The prosecution produced certified copies of these dishonoured cheques obtained from Kenya Commercial Bank Voi, which independently corroborated the complainant's testimony.
60. PW3, a former employee of the appellant, confirmed that he procured livestock for the appellant from Voi and that the cheques issued were returned unpaid.
61. PW4 produced the registration details of Eastmeat Supplies Ltd from the Registrar of Companies, establishing the corporate structure through which the appellant operated.
62. The appellant's primary contention is that the prosecution failed to prove fraudulent intent at the time of contracting.
63. He argues that the transactions were legitimate commercial dealings and that the dishonoured cheques resulted from a genuine commercial dispute over the quality and quantity of cattle supplied, not from any fraudulent purpose.
64. He further contends that the trial court erred by rejecting his defence without adequate reasons and by failing to order production of bank statements that would have demonstrated an existing business relationship and prior payments.

65. This court finds that the trial court properly evaluated the evidence and correctly rejected the appellant's defence.
66. The issuance of multiple cheques across several transactions, all of which were dishonoured, coupled with the absence of any credible explanation for the dishonour, points irresistibly to fraudulent intent.
67. The appellant did not dispute issuing the cheques, nor did he demonstrate that he had taken any steps to ensure they would be honoured or to rectify the situation upon their dishonour.
68. The failure to order bank statements, while perhaps unfortunate, does not vitiate the conviction, as the certified copies of the dishonoured cheques provided sufficient independent evidence of the transactions.
69. The appellant relies on the principle that a mere breach of contract does not constitute fraud, and that criminal liability requires proof of dishonest intent at the inception of the transaction.
70. While this principle is sound, the facts of this case go beyond a simple breach of contract. The pattern of issuing cheques that were subsequently dishonoured, the total absence of payment despite receiving the cattle, and the appellant's failure to provide any credible explanation for the dishonour collectively establish the requisite fraudulent intent.
71. Regarding the alleged conflict of interest and apprehension of bias, the appellant contends that the trial magistrate should have

recused herself because she had previously handled a related civil matter, Voi MCCC E141 of 2022, which was subsequently set aside by the High Court in Civil Appeal E025 of 2023.

72. This ground fails for two reasons. First, the appellant did not raise this objection during the trial proceedings, thereby denying the trial magistrate an opportunity to address the concern.
73. Second, the mere fact that a judicial officer has presided over a related civil matter does not automatically disqualify them from hearing a criminal case arising from similar facts.
74. The test for recusal is objective that is whether a reasonable person, knowing all the circumstances, would conclude that the judge's impartiality might reasonably be questioned .
75. The appellant has not demonstrated any actual bias or any specific conduct by the magistrate that would lead a reasonable observer to doubt her impartiality.
76. Moreover, judicial officers have a duty to sit unless compelling reasons exist to recuse themselves, as recognized by the doctrine of necessity and the duty to sit .
77. The appellant cannot remain silent during trial and then raise bias for the first time on appeal.
78. The appellant further argues that the trial court improperly used the criminal process for civil recovery by ordering restitution of Kshs. 16,737,560.

79. This court finds that the restitution order was lawfully made under Section 178 of the Criminal Procedure Code.
80. That section provides that where a person is convicted of an offence involving stealing, obtaining, or converting property, the property shall be restored to the owner .
81. The proviso to Section 178(2)(i) states that where goods have been obtained by fraud or other wrongful means not amounting to stealing, the property in the goods shall not revert in the owner by reason only of the conviction.
82. However, this proviso does not preclude the court from ordering restitution of the value of the goods.
83. The trial court explicitly provided that the amount should be paid within six months, failing which it would be recoverable through civil proceedings.
84. This order was within the court's statutory mandate and did not convert the criminal matter into a civil dispute.
85. The fact that a related civil judgment was set aside does not affect the validity of this restitution order, which was made in a concluded criminal proceeding where guilt had been established.
86. Regarding the sentence, the appellant contends that the fine of Kshs. 5,000,000 or five years imprisonment is manifestly excessive and fails to consider his status as a first-time offender.

87. Sentencing is a matter of judicial discretion, and an appellate court will not interfere unless the sentence is illegal, or the trial court acted on a wrong principle or overlooked material factors. Section 1002(3) of the Companies Act provides for a fine not exceeding five million shillings or imprisonment for a term not exceeding five years, or both .
88. The trial court imposed the maximum fine and the maximum default sentence. While this sentence is within the statutory limits, this court must consider whether it is proportionate to the offence and the circumstances of the offender.
89. The appellant was a first-time offender, and the offence, though serious, arose from a commercial relationship that had initially been conducted on a cash-on-delivery basis before credit was extended.
90. The total amount involved was substantial, and the impact on the complainant was significant.
91. However, the trial court does not appear to have given sufficient weight to the appellant's mitigation or the fact that he was a first offender.
92. This court finds that while a custodial sentence or substantial fine was warranted, the maximum fine coupled with the maximum default sentence, in addition to the substantial restitution order, is excessive in the circumstances.

93. The appellant's complaint about reliance on the probation report is without merit.
94. Probation reports are standard tools used by courts to determine appropriate sentences.
95. The report would have assisted the court in understanding the appellant's circumstances and the impact of the offence.
96. There is no indication that the appellant was denied an opportunity to challenge the contents of the report before sentence was passed.
97. Having re-evaluated the entire evidence, this court finds that the conviction on Count VIII was safe and is hereby upheld.
98. The prosecution proved beyond reasonable doubt that the appellant, as a director of Eastmeat Supplies Limited, knowingly participated in carrying on the business with intent to defraud the complainant.
99. The evidence of the dishonoured cheques, the certified copies from the bank, and the testimony of the prosecution witnesses collectively established the offence.
100. The trial court's rejection of the appellant's defence was proper, as the defence did not raise any reasonable doubt about the prosecution's case.
101. However, this court finds merit in the appeal against sentence.
102. While the offence is serious and warrants a substantial penalty, the imposition of the maximum fine and maximum default sentence,

coupled with the restitution order, is excessive for a first-time offender.

103. The trial court appears to have overemphasized the aggravating factors without giving due consideration to the mitigating circumstances.

104. This court will therefore interfere with the sentence by setting it aside.

105. The restitution order of Kshs. 16,737,560 is upheld as it was lawfully made under Section 178 of the Criminal Procedure Code.

106. The amount represents the value of the cattle obtained through the fraudulent scheme, and the complainant is entitled to restitution.

107. The trial court properly provided that this amount be paid within six months, failing which it would be recoverable through civil proceedings. This order does not convert the criminal matter into a civil dispute but rather gives effect to the statutory mandate of restitution.

108. In the circumstances, this court makes the following orders:

- (i) The appellant's conviction on Count VIII for fraudulent trading contrary to Section 1002(1) of the Companies Act is hereby upheld.**

(ii) The sentence is set aside. The probation officer is directed to file another Presentence Report within 14 days of this date.

(iii) The restitution order of Kshs. 16,737,560 to be paid to the complainant within six months is upheld.

109. The appellant's conviction on Counts I to VII, having been acquitted by the trial court, remains undisturbed.

110. Orders to issue accordingly.

Dated, signed and delivered this 18th day of March 2026 in open court at Voi High Court.

**ASENATH ONGERI
JUDGE**

In the presence of:-

Court Assistant: Millicent/Mabishi

State Counsel:.....

For the Appellant:

Appellant: