Marete v Republic (Criminal Appeal E068 of 2024)
[2025] KEHC 11385 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11385 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E068 OF 2024

AK NDUNG'U, J

JULY 31, 2025

BETWEEN

JOSEPH KINOTI MARETE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from Original Conviction and Sentence in Nanyuki CM Criminal Case No E829 OF 2022 – L Nyaga, RM)

JUDGMENT

1. The Appellant, Joseph Kinoti Marete (2nd Accused during trial) was convicted after trial of conspiracy to defraud contrary to Section 317 of the *Penal Code*. He was sentenced to two (2) years imprisonment.

2. Being dissatisfied with the conviction and sentence, he appealed to this court vide an amended petition of appeal on the following grounds;

   i. The learned magistrate erred by failing to consider submissions by the Appellant.

   ii. The learned magistrate erred shifting the burden of proof to the Appellant.

   iii. The learned magistrate failed to consider that the prosecution had not proved their case.

   iv. The learned magistrate erred by disregarding the evidence of the 2nd Accused person.

   v. The learned magistrate erred by failing to note that conspiracy to defraud by the 2nd accused was not proven.

   vi. The learned magistrate failed to consider that the complainant testimony and witness statement were contradictory.

vii. The learned magistrate erred by finding that the trial court had jurisdiction to adjudicate over the proceedings notwithstanding the binding case of Edward Njiru Ndwiga vs Republic [2018] eKLR.

viii. The learned magistrate erred by failing to appreciate that the charge sheet was fatally defective contrary to section 214 and 134 of the *Criminal Procedure Code*.

ix. The learned magistrate denied the Appellant his right to dignity as enshrined in *the Constitution*.

x. The learned magistrate erred in denying the Appellant an opportunity to enjoy the right to fair hearing enshrined in *the Constitution*.

xi. The learned magistrate erred in her application of the relevant laws and its principles to the facts of the case.

xii. The learned magistrate erred by rendering a judgment in favour of the Respondent devoid of any justifiable reason contrary to law and facts.

xiii. The learned magistrate erred by failing to exhaustively analyse all the evidence on record and hence arrived at a wrong finding.

xiv. The learned magistrate failed to appreciate that the evidence by the prosecution witnesses lacked in material credibility which tainted the trial.

xv. The learned magistrate erred in accepting that PW4 conducted proper or any investigations at all to warrant him to charge him

xvi. The learned magistrate erred convicting him on a balance of probabilities instead of the standard of beyond reasonable doubt.

xvii. The learned magistrate erred sentencing him to 2 years imprisonment which was manifestly excessive bearing in mind the circumstances of the case, his old age and physical health condition.

xviii. The learned magistrate failed to consider the pre-sentence probation report and sentenced him to a harsh sentence.

xix. The sentences meted on him was manifestly excessive in the circumstances.

3. The appeal was canvassed by way of written submissions. The Appellant's counsel submitted that the trial court lacked jurisdiction to hear and determine the matter as the dispute between the complainant and the Appellant was purely civil in nature and the complainant wanted a refund of his money as indicated in his witness statement. That it was the intention of the parties that they be bound by the terms and conditions of the sale agreements which were properly executed hence the sale of properties forming the basis of the offence were agreements for the sale of land between the 1st accused and the complainant. Reliance was placed on the case of Joseph Wanyonyi Wafukho v Republic (2014) eKLR and Edward Njiru Ndwiga v Republic (2018) eKLR where in the latter case, the court found that the charges of conspiracy and obtaining by false pretences could not stand after the complainant had carried out due diligence and entered into a valid agreement. That according to PW1's witness statement, he was informed of the true identity of the registered owners by the 1st accused and was given all relevant documents after conducting a search and it was good. That he went to the ground and saw the beacons hence the trial court lacked jurisdiction to determine the dispute.

4. Further, it was PW1 statement that he was informed of the true identity of the registered owners by the 1st Accused and he was given the relevant documents which showed that the Appellant was not the real owner of the suit property hence he was estopped from claiming fraud against the Appellant. Additionally, the charge could not stand without any evidence of the essential ingredient of common intention as the prosecution was required in proving conspiracy to establish that the Appellant together with another agreed by common mode to defraud the complainant which inference must be made both from the actions of the accused and the evidence tendered in court as Halsbury's Laws of England Vol 25 observed that it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose.

5. He submitted that PW1 testimony was full of inconsistencies and contradictions. That his testimony whether he ever met the Appellant was questionable, reasonably doubtful and was uncorroborated by his statement. All the prosecution's witnesses contradicted themselves and from the evidence tendered, it was clear that he was not privy to the alleged transactions. That it was incumbent upon the prosecution to tender evidence to prove that the Appellant knowingly and willingly committed the offence and the witnesses did not establish the charge to the required standard. The case was not investigated as the investigation officer placed full reliance on hearsay evidence and it seems that he may have been influenced by the complainant.

6. The trial magistrate shifted the burden of proof on him and there was no sufficient evidence to support the finding by the trial magistrate as the Appellant proved that there was no agreement or consent between him and his alleged conspirator as per Pexhibit8. That the defence was categorical that the complainant knew that the accused persons were not the registered owners and the Appellant showed the court that he was appointed to sell the parcels from registered owners and he produced evidence to that effect, Dexhibit2. That his defence was not considered but the trial court used the evidence adduced in his defence to convict him. As to sentence, he submitted that it was manifestly excessive for to a terminally ill and elderly offender with chronic illness.

7. In rejoinder, the Respondent's counsel submitted that the court had jurisdiction as even assuming there were civil issues in nature, that was not a bar to any criminal proceedings as per section 193A. That the authority relied by the Appellant could not help him since even in a scenario where issues are in a concurrent jurisdiction, there has to be a demonstration that the criminal charges are meant to aid a party against another or to force an accused to settle and in the instant case, there were no concurrent proceedings. He submitted that the charge sheet was proper in all material aspects and this ground must also fail as the Appellant did not submit on it and it was coming up for the first time in appeal hence the lower court was not given an opportunity to make verdict on the same.

8. As to what entails conspiracy, he submitted that Section 10 of the *Evidence Act* permits that the conduct of one party may be taken to impute the involvement of their counterpart in a conspiracy. Therefore, it is permissible to infer conspiracy from certain acts, events or facts. Further, one need not avail conclusive evidence when the facts themselves permit an inference that there were concerted efforts by certain parties to commit a crime to achieve a common purpose. That conspiracies are committed in a calculated manner and secretly hence it cannot be a prerogative for those involved in conspiracies to demand that their effort must be proved to an absolute degree. That it is not plausible to prove human undertakings to an absolute certainty as was held in Woolmington v DPP 1935 AC 462.

9. He submitted that the evidence before the lower court pointed to a concerted scheme between the Appellant and his co-accused as the evidence revealed that PW1 was not known to the Appellant's co-accused before he introduced them, it was the Appellant who induced PW1 to transact with his co-accused after the Appellant showed PW1 documents in respect of the land in question, the Appellant's

conduct proves that he was aware of the transactions between PW1 and his co-accused as evidenced by Pexhibit6 showing receipt of money from his co-accused and that the land transactions failed because the real owner was dead while the other one had sold the land way back in 2018. That this points towards a concerted scheme between the Appellant and his co-accused. The fact that he met PW1 in the presence of PW2 and PW3 and his co-accused over the said transactions proves the element of conspiracy that there was an agreement between the Appellant and his co-accused to enter into a transaction with PW1.

10. Further, there was an intention to deceive as the owner of Segera/Segera/Block 2/20 was stated to be dead so he knew that he would not be able to procure the owner to transfer the land to PW1. He did not prove that he obtained consent from the owners of the parcels to sell on behalf of them. He therefore knew that he was not in a position to go through with the botched transaction and that was an intention to defraud. That DW1, the Appellant's co-accused corroborated the prosecution's evidence which showed that the Appellant was the mastermind of the entire scheme.

11. He submitted that there were no material discrepancies in the evidence and the Appellant did not mention what those contradictions were or whether they went to the root of the charges. As to whether his defence was considered and whether it cast a reasonable doubt, it is submitted that it was a fanciful account made as an afterthought since he did not deny receiving money from DW1 and his allegation that DW1 was repaying a loan was fanciful and an afterthought since when his advocate was examining DW1, there was no mention of the alleged indebtness between him and DW1. That he said he had authority to sell, but never called the owners to prove the same and his allegation that he left the documents in DW1's car was an aforethought as he did not cross examine him on the same. Hence, the defence failed to rebut the ingredients of the offence and was properly dismissed.

12. As to sentence, he submitted that sentencing is an exercise of discretion and a court sitting on appeal ought not to interfere with such discretion. That Section 317 does not mention an option of a fine hence there was no basis for a non -custodial sentence. As to whether the sentence was manifestly harsh, he submitted that the Appellant did not mitigate, he did not allude to frail health or old age hence the court had no material to consider him for leniency.

13. This being the first appellate court, my 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 an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

14. The court's jurisdiction on first appeal emanates from the provisions of Section 347 of the *Criminal Procedure Code* (CPC) which enacts that appeals from the subordinate court are to be determined by the High Court and may be on a matter of fact as well as matter of law.

15. The role of the court is to reevaluate, analyze and assess the evidence on record and come up with its conclusion on whether the trial court arrived at the correct judgment. In doing so, the court must give allowance for the fact that, unlike the trial court, it had no advantage of seeing and hearing the witnesses testify and give due allowance for that fact. (See Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570) and Okeno vs Republic)

16. The evidence before the trial court was as follows. PW1, the complainant testified that he was introduced to the Appellant by PW2 and when they met, the Appellant informed him that he had bought land known Segera/Segera/Block 2/10 (Mbugiongai) which he wanted to dispose. He had four original title deeds but he told him that he would only afford to purchase parcel no. 20. That he gave him a title deed in the name of Ruth Mberenya M'Kirera and he also saw the copy of the ID and KRA PIN. He noticed that the passport photo for Ruth was not clear and the Appellant informed him that he was going to Meru where he would meet Ruth and they would take a clear photo and they agreed

not to proceed further until a clear photo was availed. He was called after two days by the Appellant who informed him that he travelled back to Mombasa and referred him to his co-accused whom he claimed that they had bought the land together. He met the 1st accused at PW2's office and 1st accused informed him that they had bought the land with the Appellant.

17. He testified that they had agreed on the purchase price with the Appellant so they just recorded an agreement in absence of the Appellant who kept instructing them through the phone. He gave the money to the 1st accused. On 11/03/2022, he entered into another agreement with the 1st accused for the purchase of Segera No. 70 though he was in communication with the Appellant who said he was still in Mombasa. He gave the money to the 1st accused who was to forward to the Appellant. He went to process the titles but he was informed that the title deed was fake for parcel no. 20 and the owner had reported loss of the tile and had been issued with a new title and that the owner was deceased. He conducted a search on parcel no. 70 and noticed that the owner had sold the land and a title deed was issued. He informed the Appellant and his co-accused who promised to refund the money. He conducted a search for parcels no. 1275 and 557 and noticed that the title deeds were also fake.

18. On cross examination by the Appellant, he testified that he met him 3 or 4 days before 02/03/2022 and had not heard of him prior to the said date. On the first day, he was in possession of documents for parcel no. 20 and the 1st accused handed over the documents to him after the agreement. That he entered into the agreement with the 1st accused as he had instructed them to do. That he believed him as he was introduced to him by PW2. That he had called him to PW2's office to refund the money and he requested for original documents which he declined to give him.

19. PW2 testified that in February 2022, she met with the Appellant, his co-accused and PW1 at Emess hotel as the Appellant had some parcels at Segera that he was selling. They discussed about the land and they parted and after 3 to 4 days, 1st accused went with the title for parcel no. 20 which he was selling and she contacted PW1 who was interested in buying and an agreement was entered which she signed as a witness. After sometime, 1st accused went with a clearance certificate for parcel no. 70 and she contacted PW1 who was interested and an agreement was drawn. The 1st accused was paid the purchase price. After a month, PW1 contacted her and informed her that the properties were not genuine and she paid back the commission she had been given. PW1 sought for a refund but the same was not refunded. She testified that she knew the Appellant and his co-accused.

20. On cross examination by the Appellant, she testified that he was not present when the agreement was entered and that they first met with him and his co-accused and he told them that some Merians had instructed him to sell their lands. That there was a handwritten transfer form transferring the land from Ruth to him. There were transfer documents that were stamped by an advocate. That he introduced the 1st accused as his agent and the 1st accused stated that he had authority from him to sell the land. That he was not mentioned during the agreement.

21. PW3 testified that he met with PW1 but PW2 found them and told PW1 that he wanted to introduce him to his fellow Meru men. They went and they met the Meru man who informed PW1 that he wanted to sell to him a parcel of land. They met at Emess hotel and he sat at a separate table. There were two men and they had title deeds and their conversation was about purchase of land. He identified the Appellant and his co-accused as the men they had met.

22. On cross examination by Appellant's counsel, he testified that he was not involved in the meeting but could see the title deeds from where he was seated. That he did not know the accused's names but came to know their name when PW1 informed him that he was conned.

23. PW4, the investigating officer corroborated PW1's testimony. He testified that he was convinced that the complainant was defrauded and he summoned the 1st accused who informed him that he was Appellant's agent and he produced an Mpesa statement showing that on 02/03/2022, when the first agreement was drawn, he transferred Kshs.90,000/- to the Appellant and that on 11/03/2022, a day after the 2nd agreement, he transferred Kshs.90,000/- to the Appellant. That they summoned the Appellant who gave him a resolution by Mbugiongai members dated 15/05/2010 in which the Appellant was entrusted to transacts over the parcels of land on their behalf including parcel nos. 20 and 70. That the members trusted the Appellant to transact on their behalf but according to his investigations, the members were defrauded out of their trust. He also obtained a copy of agency agreement between the Appellant and the 1st accused in which the Appellant had given the 1st accused authority to transact business on his behalf.

24. He produced the title deed for parcel no. 20 as Pehxhibit1, search for the said parcel as pexhibit2, agreement for sale for the said land as Pexhibit3, agreement for sale for parcel no. 70 as pexhibit4, a copy of clearance certificate for parcel no. 70 as pexhibit5, Mpesa statement for the 1st accused as pexhibit6, agency agreement as Pexhibit7, resolution from Mbugiongai members as Pexhibit8 and the lists of parcels of land capturing parcel no. 20 and 70 as Pexhibit9.

25. On cross examination by Appellant's counsel, he testified that the relationship between the 1st accused and the Appellant was that they had entered into an agency agreement. That Pexhibit7 paragraph *2*, part d showed that the 1st accused was to hand over/submit all offers to the 2nd accused, the principal. That PW1 dealt with the 1st accused and expected all the transfers to be effected by 1st accused and not the Appellant. That he disapproved that the Appellant was not aware of the 1st accused transaction considering the money that was sent to him by the 1st accused. That transfer documents were not availed. That the complainant did a search and that is when he realised that the land was registered under Ruth Mberenya. PW1 was aware the land did not belong to the 1st accused and the agreement was that the 1st accused would reach out to Ruth and have the transfer forms signed. That he managed to reach out to Julia Karegi and Ruth Mberenya on phone and Ruth was not aware of the sale and was applying for a duplicate title deed. That they refused to record statement as they did not want to be involved in any matter over the Appellant. PW1 was not aware of the agency agreement between the 1st accused and the Appellant.

26. On re-examination, he testified that PW1 knew that the first parcel of land was registered under another proprietor but the agreement was that the 1st accused would reach out to the registered proprietor to do the transfer. That the 1st accused was not directly connected to the owners of land as he was only involved through his agency agreement with the Appellant. PW1 dealt with the 1st accused throughout the transaction and he acquired all the documents from the 1st accused. PW1 in his statement was not aware of the Appellant unless he knew him from previous engagement.

27. The 1st accused at trial (DW1) testified that he had known the Appellant through the Appellant's son, one Mashon Kinoti. There was an agency agreement for sale of land between the Appellant, Mashon. He denied any intention to defraud. Emilio Ndiritu and DW1 in which the Appellant was the principal and the others were agents. One Florence introduced DW1 to the complainant and they sold 2 parcels of land to him and the proceeds were sent to the Appellant via Mpesa. He denied any intention to defraud.

28. Emillio Mwai nderitu (DW2) testified that there was an agency agreement between the Appellant in which he (DW2) was an agent together with Mashon Kinoti and DW1. The Appellant was the principal.

29. The Appellant testified as DW3. He testified that he was in the land conveyancing business and the 1st accused was his agent. That he undertook to help the less fortunate in the land they had bought back in the 1990s and he was entrusted with over 2000 parcels of land and he had taken charge of the same since 2010. They had a resolution with owners of Segera Segera Block 2 (Mbugiongai) and he was given authority as per Pehxibit8. The owners transferred the properties to him and each had his promissory note and an agreed price he would pay after the sale and he produced various promissory notes as D exhibit 2a to 2d. He testified that he entered into an agency agreement with 1st accused as per Dexhbit1 and they were to sell parcels of land listed in the schedule. That parcel no. 20 and 70 were not listed in the schedule so they were not to be sold on his behalf. That the agents were to be paid after introducing a purchaser and he would negotiate the final price. He met the 1st accused who said that he had purchasers in Nanyuki and he left the documents in the 1st accused car which he got back on 04/04/2022.

30. On 09/04/2022, he went to PW2's office and she introduced him to PW1 who accused him of refusing to pay back his money. PW1 informed him that he gave money to his agents and he was given fake documents. That this was the first time he was meeting with PW1. PW1 showed him the documents in his possession. He produced a copy of the transfer document for parcel no. 20 as Dexhibit3 and testified that Julia Karegi had transferred the land to him. He wrote to the DCIO through a letter on 23/06/2022 whereby he reported the 1st accused for refusing to return his documents and selling the parcels without his permission and he produced the letter as Dexhibit4. That he terminated the agency agreement through a letter dated 23/06/2022 which he produced as Dexhibit5. That the 1st accused sent him money but he thought that he had started repaying what he owed him. He did not indicate the purpose of the money. He did not enter into a sale agreement with PW1 and only met at PW2's office.

31. On cross examination, he testified that that he had spoken to PW1 late February and he mentioned that he was selling some parcels of land and he referred him to 1st accused to assist in the sale. That the documents he left in the 1st accused's car were titles and transfers for Segera Block 2 to himself. That he did not hold any title for the parcels of land. That he was not aware that the subject parcels were sold as he did not sell them and he learnt of their sale through this case. That the titles for the subject land were in the names of the original owners which he had left in the 1st accused's car. He had not given the 1st accused persons the documents to transfer on his behalf. He maintained that the 1st accused was not his agent for parcel no. 20 and 70.

32. On cross examination by the 1st accused's advocate, he testified that PW1 lied when he stated that he directed him to pay money to his agent.

33. He testified in re-examination that when the 1st accused sent him money, they were not in talking terms. That he had not met the complainant prior to when he met him at PW2's office. That he did not abandon his claim as he was advised at DCI headquarters that this case will be heard first.

34. From the grounds of appeal, a recap of the evidence at the trial court and the rival submissions made, the issues for determination (and I note the parties generally agree on this) are;

    1. Whether the trial court had jurisdiction to adjudicate over the dispute.

    2. Whether the prosecution proved its case beyond reasonable doubt with the auxiliary questions whether the prosecution's evidence was sufficient and whether the Appellant's defence was considered.

    3. Whether the sentence was legal and appropriate in the circumstances.

Whether the trial court had jurisdiction to adjudicate over the dispute.

35. It is contended for the appellant that the dispute herein was of a purely civil nature and therefore the court was bereft of the jurisdiction to adjudicate over it in the criminal jurisdiction. The counter argument by the respondent is that by dint of Section 193A of the *Criminal Procedure Code*, the existence of a civil dispute is not a bar to a criminal prosecution.

36. For a party to succeed in raising the question of jurisdiction based on existence of a civil case based on the same fact, one must demonstrate that the criminal prosecution is based on bad faith not founded on reasonable suspicion and actuated by bad faith specifically geared to force an accused to settle an otherwise purely civil case.

37. It would be a misapprehension of the law to maintain that so long as a dispute has some civil nature and available civil remedies, a criminal prosecution cannot lie on the same facts. The reality is that most criminal charges will harbor an element of a civil claim and this includes elementary charges like assault and stealing which would at the same time attract tortious liability against an accused person.

38. It is the duty of the court to determine where the criminal jurisdiction is under abuse and in the majority of times, this will only be achieved upon receipt of evidence. The court can however readily determine abuse of the criminal jurisdiction in obvious cases, for example, if the dispute is based purely on payable interest on a loan facility, each case depending on it facts and circumstances.

39. At all material time the court must defer to the prosecutorial powers bestowed on the office of the Director of Public Prosecutions and investigating officers.

40. In *Republic v Principal Magistrate Maralal & another; Eregai & another (Exparte Applicants); Lengupae (Interested Party) (Miscellaneous Civil Application17 of 2023*) [2024] KEHC 3985 (KLR) this court cited with approval the decision in Kuria & 3 Others Vs Attorney General [2002] 2 KLR where the court held:-

> "...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings
>
> commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society& which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial. (Emphasis added).In the circumstances of this case, it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that

the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names"

41. In the instant appeal, the charges laid out clear and discernable criminal elements which fell for adjudication by the Magistrate's court exercising its criminal jurisdiction. The court had the requisite jurisdiction.

Whether the prosecution proved its case beyond reasonable doubt with the auxiliary questions whether the prosecution's evidence was sufficient and whether the Appellant's defence was considered.

42. As to whether the ingredients of the offence of conspiracy were proved, Section 317 of the *Penal Code* provides for the offence of conspiracy to defraud in the following terms:

> " 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".

43. I have considered the evidence adduced at the trial.

44. The Black Law Dictionary 10th Edition at page 375 defines the word conspiracy as follows:-

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

45. Further still, Archibold; writing on criminal pleadings, evidence and practice, states:-

> " 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 an 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."

46. On the re-evaluation of the evidence, there is ample evidence that the then 1st Accused and the Appellant engaged in transactions with the complainant purporting to sell land which they had no capacity to transfer as it belonged to other persons.

47. In countering this evidence, the appellant in defence testified under cross examination, inter alia, that he received money on 02/03/2022 from the 1st accused which was the date of the first agreement. He also received money on 11/03/2022 but he did not know of the sale of 10/03/2022 and he did not know why the money was being sent to him. That the 1st accused had sold off some parcels without him and he used the police for recovery. That the agency agreement was exclusive and restricted the agents to the attached schedule. That after receiving the money, he did not call the 1st accused to ask him why he was sending the money.

48. Section 10 of the *evidence Act* provides as follows;

10. Statements and actions referring to common intention. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against

each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

49. It follows from the foregoing that 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.

50. A wholistic consideration of the evidence adduced at trial leads me to only one conclusion; that the relationship between the appellant and the then 1st accused, the exchange of monies between them coincidentally at the time the sale agreements were signed and the participation by the Appellant, though remotely, by giving instructions from a different location in the preparation of the agreements, have all the hallmarks of a conspiracy between the 2 and establish without room for doubt a common intention to defraud and any protestations and denials by the appellant are punctured and fall flat and are unworthy of belief.

51. The prosecution having discharged its burden of prove and demonstrating that the appellant received proceeds of the fraudulent transactions, the Appellant assumed the evidential burden to show what the monies received by him were for if at all not in perpetuation of the fraud.

52. Strangely, the Appellant admits receiving the monies from the then 1st Accused and in a mind-boggling explanation in his evidence and cross examination states that he did not know what the money was for and he did not ask the sender, the then 1st Accused!! The coincidence in the timings of the receipt of the monies cannot be ignored.

53. Am satisfied that the evidence on record was sufficient to prove the charge herein and it establishes clearly Appellant and the then 1st accused were in a conspiracy to defraud the complainant.

Whether the sentence was legal and appropriate in the circumstances.

54. As regards sentence, I note the Accused did not mitigate at trial only stating that he wished to appeal against the decision of the trial court. He never raised the mitigating factors of frail health and old age now raised in this appeal thus denying the trial court a basis in its exercise of discretion in sentencing.

55. It readily emerges that the sentence meted out by the trial court was lower than the prescribed one in law. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

56. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte

blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

57. The Court of Appeal of East Africa in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

58. Where the sentence is manifestly excessive, an appellate court assumes the jurisdiction to interfere with the sentence of a trial court. (See R - v- Shershowsky (1912) CCA 28TLR 263).

59. Locally the law has been settled by the Court of Appeal in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 where the court stated;

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)"

60. Further exposition of the applicable principles is found in Bernard Kimani Gacheru vs. Republic [2002] eKLR where the court of Appeal rendered itself thus;

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

61. Section 317 of the *Penal Code* provides as follows;

317. Conspiracy to defraud

> " 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".

62. The appellant was sentenced to 2 years imprisonment. I note the pre-sentence inquiry reports from the Director of probation services had recommended non-custodial sentences. I have read and considered the trial Magistrate's ruling on sentencing. I find the same considered all relevant factors including the advanced age of the Appellant as seen from the pre-sentence inquiry report. The court did not take into account irrelevant matter. The court passed a sentence that was within the law and indeed did not mete out the maximum sentence. The court considered the subsisting the aggravating factors. I find no basis at all upon which to interfere with the sentence passed.

63. With the result that the appeal herein lacks merit on all fronts and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025.

A.K. NDUNG'U

JUDGE