



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 133 & 134 OF 2018**

**PETER MWANIKI MBUGUA.....1<sup>ST</sup> APPELLANT**

**SARAH WANJIRU GATITU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal arising out of the conviction and sentence of Hon. C. M. Njagi RM delivered on 27<sup>th</sup> July 2018 in Nairobi CM CR. Case No. 3611 of 2013)**

**JUDGMENT**

The Appellants, Peter Mwaniki Mbugua and Sarah Wanjiru Gatitu, were jointly charged in count one with the offence of forgery contrary to Section 349 of the Penal Code. The particulars of the offence were that on 24<sup>th</sup> June 2010 at unknown place within the Republic of Kenya, with intent to defraud, the Appellants, jointly with others not before court, forged a certain document namely a National Bank of Kenya Personal Loan Application form in the name of Joseph Korir Kosgei for Ksh.800,000/- purporting it to be a genuine and valid National Bank of Kenya Personal Loan Application form in respect of the said Joseph Korir Kosgei.

The 1<sup>st</sup> Appellant was charged in count two with the offence of uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence were that on 11<sup>th</sup> June 2010 at National Bank of Kenya Hospital Branch in Nairobi, with intent to defraud, the 1<sup>st</sup> Appellant knowingly and fraudulently uttered a false National Bank Personal Loan Application form in the name of Joseph Korir Kosgei to Kithinji Murithi Kirema, a Direct Sales Representative at the said Bank purporting it to be a genuine and valid National Bank of Kenya Personal Loan Application form in respect of the said Joseph Korir Kosgei.

The Appellants were jointly charged in count three with the offence of forgery contrary to Section 349 of the Penal Code. The particulars of the offence were that on or before 16<sup>th</sup> June 2010 at unknown place in the Republic of Kenya, with intent to defraud, the Appellants forged a letter of offer Ref. No. NBK/JKN/ck/ADV.43/1038 in the name of Joseph Korir Kosgei purporting it to be a genuine and valid letter of offer signed by Joseph Korir Kosgei.

The 1<sup>st</sup> Appellant was charged in count four with the offence of uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence were that on 17<sup>th</sup> June 2010 at National Bank of Kenya Hospital Branch in Nairobi County, with intent to defraud, the 1<sup>st</sup> Appellant knowingly and fraudulently uttered a certain false document namely a National Bank of Kenya Letter of Offer Ref. No. NBK/JKN/ck/ADV.43/1038 in the names of Joseph Korir Kosgei to Sharon Koech, a Clerk at the said Bank purporting it to be a genuine and valid letter of offer in respect of the said Joseph Korir Kosgei.

The Appellants were jointly charged in count five with the offence of forgery contrary to Section 349 of the Penal Code. The particulars of the offence were that on or before 17<sup>th</sup> June 2010 at unknown place in the Republic of Kenya with intent to defraud, the Appellants jointly with others not before court forged a certain document namely a National Bank of Kenya Cash Withdrawal Voucher for Ksh.775,760/- in the names of Joseph Korir Kosgei purporting it to be a genuine and valid payment voucher issued by Joseph Korir Kosgei.

The 2<sup>nd</sup> Appellant was charged in count six with the offence of uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence were that on 17<sup>th</sup> June 2010 at National Bank of Kenya Hospital Branch in Nairobi, with intent to defraud, the 2<sup>nd</sup> Appellant knowingly and fraudulently uttered a certain false document namely a National Bank of Kenya Withdrawal Voucher for Ksh.775,760/- in the names of Joseph Korir Kosgei to Immaculate Mbithe, a Clerk at the said Bank purporting it to be a genuine and valid

payment voucher for the said amount issued by Joseph Korir Kosgei.

The Appellants were jointly charged in count seven with the offence of forgery contrary to Section 349 of the Penal Code. The particulars of the offence were that on or before 17<sup>th</sup> July 2010 at unknown place within the Republic of Kenya with intent to defraud, the Appellants jointly with others not before court forged a certain document namely a National Bank of Kenya Real Time Gross Settlement form (RTGS) for Ksh.775,760/- in the names of Collins Bosire purporting it to be a genuine and valid funds transfer instructions issued by the account holder Joseph Korir Kosgei.

The 2<sup>nd</sup> Appellant was charged in count eight with the offence of uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence were that on 17<sup>th</sup> June 2010 at National Bank of Kenya Hospital Branch in Nairobi, with intent to defraud, the 2<sup>nd</sup> Appellant knowingly and fraudulently uttered a certain false document namely a National Bank of Kenya Real Time Gross Settlement form (RTGS) for Ksh.775,760/- in the names of Collins Bosire to Immaculate Mbithe, a Clerk at the said Bank purporting it to be a genuine funds transfer instruction issued by the account holder Joseph Korir Kosgei.

The Appellants were jointly charged in count nine with the offence of forgery contrary to Section 349 of the Penal Code. The particulars of the offence were that on or before 25<sup>th</sup> February 2010 at unknown place within the Republic of Kenya with intent to defraud, the Appellants forged a document namely Kenyatta National Hospital payslips for the months of March, April and May 2010 in the names of Joseph Korir Kosgei purporting them to be genuine and valid payslips issued by Kenyatta National Hospital.

The Appellants were jointly charged in count ten with the offence of forgery contrary to Section 349 of the Penal Code. The particulars of the offence were that on or before 11<sup>th</sup> June 2010 at unknown place within the Republic of Kenya, with intent to defraud, the Appellants jointly with others not before court forged a certain document namely Equity Bank Ltd Statement of Account for Account No. 0120125896500 in the names of Joseph Korir Kosgei purporting it to be a genuine and valid statement of account issued by Equity Bank of Kenya Ltd, KNUT House Branch.

The Appellants were jointly charged in count eleven with the offence of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the offence were that on 17<sup>th</sup> June 2010 at National Bank of Kenya Hospital Branch in Nairobi, the Appellants jointly with others not before court, being employees of the said bank as clerks, stole Ksh.775,760/- the property of National Bank of Kenya which came into their possession by virtue of their employment.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellants were convicted as charged in Count I, II, III, IV, VI, VII, VIII, IX, X and XI. With respect to Count I, III, VII, IX and X, the Appellants were sentenced to serve one (1) year imprisonment in each count. The Appellants were sentenced to serve two (2) years imprisonment in Count XI. The 1<sup>st</sup> Appellant was sentenced to serve one (1) year imprisonment for each count with regard to Counts II and IV. The 2<sup>nd</sup> Appellant was sentenced to serve a custodial sentence of one (1) year in each count with respect to Counts VI and VIII. The sentences were ordered to run consecutively. The Appellants were aggrieved by their convictions and sentences and have each filed a separate appeal to this court.

In their respective petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their convictions and sentences. They were aggrieved that the trial court failed to consider their mitigation in sentencing them. They took issue with the sentences meted out by the trial court stating that the trial magistrate ought to have given them an option of paying a fine. They faulted the trial court for convicting them based on evidence of prosecution which was inconsistent and full of contradictions. They asserted that the evidence by the prosecution was not sufficient to sustain a conviction. In the premises, the Appellants urged this court to allow their respective appeals, quash their convictions and set aside the sentences that were imposed on them. For the purpose of the hearing of the appeals, they have been consolidated and shall be heard together as one.

During the hearing of the appeals, this court heard oral submissions from Mr. Were for the Appellants and Ms. Aluda for the State. Mr. Were submitted that the charges as drafted in Count I and II were defective. The dates indicated in the said counts were contradictory. The Appellants were alleged to have uttered a document that was non-existent. He averred that the funds that were allegedly stolen by the Appellants were transferred to Collins Bosire. The prosecution failed to adduce any evidence linking the Appellants to the said Collins Bosire. He asserted that the Appellants came into contact with the documents alleged to be forged and uttered as they performed duties assigned to them by their employer. The Appellants' superiors approved the said documents. He was of the view that elements of the offence of forgery were not established by the prosecution. He submitted that the prosecution failed to prove that the Appellants' intended to defraud the bank. The beneficiary of the alleged stolen funds was known. The said beneficiary was not investigated. He further submitted that the Appellants' sentences were harsh and excessive in the circumstances. The trial court ought to have given the Appellants an option to pay a fine. In the premises, he urged this court to allow the Appellants' respective appeals.

Ms. Aluda for the State did not oppose the appeals. She averred that the elements of the offence of forgery were not established by the prosecution. The prosecution failed to show a connection between the Appellants and the beneficiary of the funds (Collins Bosire). She submitted that the loan application forms were approved by PW3, PW4, PW5 and PW7. These witnesses testified that the documents were valid. She was of the view that prosecution failed to establish the Appellants' guilt to the required standard of proof beyond any reasonable doubt. With regard to the sentence, Learned State Counsel submitted that the sentences ought to run concurrently since the offences were committed during the same transaction. She stated that the option of paying a fine should also have been availed to the Appellants. She therefore urged this court to allow the Appellants' respective appeals.

The facts of the case according to the prosecution are as follows: PW1, Joseph Korir Kosgei, stated that sometime in the year 2007 he applied for a loan of Ksh.180,000/- from National Bank of Kenya. He cleared the said loan. Sometime in October 2010, he decided to apply for another loan of Ksh.1,450,000/- but the bank declined to process the same. The bank informed him that he had outstanding loan of Ksh.800,000/-. He wrote a letter to the said bank informing them that he had not applied for the loan of Ksh.800,000/-. On 23<sup>rd</sup> November 2011, he went to the bank and met with the bank manager and officials from the Banking Fraud Investigations Unit. The bank officials showed him a loan application form purportedly filled and signed by him. The loan application form was dated 11<sup>th</sup> June 2010. The loan

amount applied for was Ksh.800,000/-. He denied applying for the said loan. He stated that the particulars in the loan application form were not his. He was also shown an RTGS application form dated 17<sup>th</sup> June 2010 purportedly signed by him. The application form sought to transfer Ksh.775,760/- from his account to another account in the name of Collins Bosire. The money was for purchase of a car. PW1 denied filling the RTGS application form. He stated that he had not purchased any car. PW1 was asked to identify a withdrawal slip, a letter of offer from the bank, an insurance form from Pan Africa Life Insurance all purportedly to have been signed by him. He denied executing the said documents. He was further asked to identify three payslips for the month of May, June and July 2010 which were in his name. He stated that the said payslips were not his. He stated that he did not know the Appellants.

PW2, Immaculate Mbithe, was a clerk at the National Bank of Kenya at all material times. She was working under the supervision of the 2<sup>nd</sup> Appellant. On 17<sup>th</sup> June 2010, she received a Real Time Gross Settlement (RTGS) form from the 2<sup>nd</sup> Appellant. The same had been duly filled. The transfer of funds was from PW1's account to another account at Equity Bank Ltd in the name of Collins Bosire. It was accompanied by a cash withdrawal voucher. PW2 stated that her role was to ensure that the Applicant's signature on the RTGS form was the same signature as the one captured in the bank systems. She confirmed that the signature on the RTGS form was valid. She stated that RTGS forms were required to be filled by the Applicant.

PW3, Sharon Jemutai, stated that she was a clerk at the National Bank of Kenya, Hospital Branch. She was attached at the Credit Section. On the material day of 17<sup>th</sup> June 2010, she was a trainee under the supervision of the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Appellant gave her a letter of offer by the Bank for a loan. The letter was dated 16<sup>th</sup> June 2010. It was addressed to PW1. The 1<sup>st</sup> Appellant asked her to sign the letter as a witness. PW3 stated that the letter had been signed by various bank officials. The said loan was disbursed to PW1. PW1 later applied for another loan. She notified him that the loan could not be processed since he had another outstanding loan. PW1 denied having any outstanding loan at the bank. She referred the case to her superior.

PW4, Kithinji Kirema, was a direct sales representative at the National Bank of Kenya, Hospital Branch. His duties included *inter alia* selling loan products. On 11<sup>th</sup> June 2010, he received a loan application form from the 1<sup>st</sup> Appellant. The loan applicant was PW1. The application was accompanied by three payslips for the month of March, April and May 2010, a copy of PW1's national identity card and an insurance form. He verified that all the required documents were in order. He countersigned the application form as a bank official. He afterwards forwarded the application documents to the 1<sup>st</sup> Appellant for further action.

PW5, Nebert Walumolo, was a credit advance officer at National Bank of Kenya. In 2010, he worked at the Hospital Branch at Kenyatta National Hospital. On 10<sup>th</sup> June 2010, he received loan application forms from PW4. PW1 was the applicant. The loan amount applied for was Ksh.800,000/-. The application was accompanied by three payslips for the month of March, April and May 2010, a copy of the applicant's identity card and a bank account statement from Equity Bank Kenya Ltd. PW5 stated that the loan application form was duly filled and had been approved by PW1's employer. He confirmed that PW1 had in 2007 applied for a loan of Ksh.180,000/-. However, the same had since been cleared. He filled a loan appraisal form. He recommended the applicant for the loan. He forwarded the application to his supervisor, Pauline Wairimu. The application followed due process. It was later referred back to the credit section for processing. The loan application had been approved by the manager. PW5 stated that the Appellants were his colleagues. The 1<sup>st</sup> Appellant worked with him at the Credit Section.

PW7, John Karumbi, was at all material times the Branch Manager at National Bank of Kenya, Hospital Branch. On 5<sup>th</sup> November 2010, PW1 reported that he had been informed that he had an outstanding loan of Ksh.800,000/- which he had no knowledge of. PW7 investigated the complaint. He requested for the loan application documents for the said loan. He afterwards summoned the officer who countersigned the loan application form. The said officer was PW4. PW4 denied ever meeting PW1. PW4 informed him that the 1<sup>st</sup> Appellant forwarded the loan application form to him. However, the 1<sup>st</sup> Appellant denied forwarding the loan application documents to PW4. PW7 discovered that the loan was processed on 17<sup>th</sup> June 2010 and the funds were credited to PW1's account. A RTGS was debited from the same account on the same day. The 2<sup>nd</sup> Appellant effected the RTGS transaction. PW7 notified the Security Department of the complaint. PW7 informed the court that a loan application cannot be processed in the absence of the customer. He stated that the customer is also required to be present for a RTGS application to be effected. He stated that the 2<sup>nd</sup> Appellant effected the RTGS in the absence of the customer (PW1). He testified that the 1<sup>st</sup> Appellant did not process the said loan. His duty was to recommend a loan application for processing to the Accounts Advances Section. He stated that an employee by the name of Pauline Wairimu released the funds.

PW8, Rowland Mueshi, was the Human Resource Officer at Kenyatta National Hospital, where PW1 was employed. She stated that she received a loan application form from a clerical officer for approval. The loan applicant was PW1. The same was approved.

CIP Iranda Masiko (PW9) was a Forensic Document examiner adducing evidence on behalf of his colleague John Muinde. On 27<sup>th</sup> July 2011, John Muinde received documents from the investigating officer (PW10) for examination. He examined the loan application documents *vis-a-vis* specimen handwritings from PW1 and the Appellants. He produced a report of the findings in evidence. The report indicated that PW1 did not fill the loan application documents. The 2<sup>nd</sup> Appellant's signature that appeared on some documents matched her specimen signature. PW1's payslips from Kenyatta National Hospital that had been attached to the loan application documents were found to have been printed by a different machine compared to the specimen payslips. However the stamp from Kenyatta National Hospital matched the specimen stamp. The bank account statements from Equity Bank Ltd did not match the specimen account statements provided.

This case was investigated by Sgt. Charles Mabonga (PW10). The same was assigned to him on 15<sup>th</sup> November 2010 while he was attached at the Banking Fraud Investigations Unit (BFIU). The loan application documents were forwarded to him. He interrogated PW1 who denied applying for the loan. He obtained specimen handwritings and signatures from PW1 as well as the Appellants and forwarded them together with the loan application documents for forensic examination. He thereafter charged the Appellants with the present offences.

When the 1<sup>st</sup> Appellant was put on his defence, he testified that at all material times he was employed by National Bank of Kenya. He was attached at the Loans Department. His duties included attending to customers who sought to apply for loans and appraising the loan application documents. He only attended to clients who came to the bank. He stated that he was not a direct sales representative. He told the

court that the branch manager (PW7) summoned him to his office. He interrogated him about the loan subject matter in the present case. PW7 informed him that the loan had been processed by a direct sales representative (PW4). PW4 had however told PW7 that he received the loan application documents from him. He denied giving the said documents to PW4. He stated that the movement register did not indicate that the loan application documents originated from him. The documents were prepared by a direct sales representative (PW4). PW4 was paid a commission for selling that loan product. He stated that the loan application was approved by the relevant authorities at the bank. He stated that a customer's employer is required to approve a loan application before the bank can approve the same. He did not forward the loan application documents to Kenyatta National Hospital for approval. Afterwards, the documents are forwarded to the Accounts Advances Department. The employee in-charge of the Advances Department is required to call the customer's employer and confirm that they have approved the loan application. The bank officer in-charge of the Advances Department was Pauline Wamuyu. She was required to call Kenyatta National Hospital to confirm that they approved PW1's loan application. The loan was approved and processed. He told the court that he was not involved in crediting the loan funds to the customer's account. He denied forging or uttering any documents. He stated that he did not know the beneficiary of the funds (Collins Bosire). He denied the charges against him.

The 2<sup>nd</sup> Appellant was put on her defence. At all material times, she worked as a clerk attached to the Forex Department at National Bank of Kenya. She handled the RTGS application in the present case. She stated that she never dealt directly with the customers. If a customer wanted an RTGS application processed, they were required to fill the forms at the Front Office. The forms were then forwarded to her. Her role was to check and ensure that the form was filled correctly and confirm that customer's signature on the form matched the signature captured in the system. If everything was in order, she was required to countersign the RTGS form and forward the same to her superior for verification. She stated that she followed due process. She was not involved in the release of funds. She denied any involvement in the present offences.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic (1982 – 88) 1 KAR 1134** stated this on the duty of the first Appellate court:

**“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”**

**In the present appeal, the issue for determination by this court is whether the prosecution established the Appellants' guilt on the charges brought against them to the required standard of proof beyond any reasonable doubt.** This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. The Appellants are alleged to have forged six (6) documents namely: National Bank of Kenya Personal Loan application form in the name of PW1 for Ksh.800,000/-, a letter of offer purported to be signed by PW1; a National Bank Cash Withdrawal Voucher for Ksh.775,760/- in the names of PW1; a National Bank of Kenya Real Time Gross Settlement Form (hereinafter referred to as RTGS) for Ksh.775, 760/- in the names of Collins Bosire and instructions purported to be given by PW1; Kenyatta National Hospital payslips for the months of March, April and May 2010 in the names of PW1; and lastly Equity Bank Ltd Statements of Account for an account purported to belong to PW1.

Forgery is defined under **Section 345** of the **Penal Code** as **“making a false document with intent to defraud or to deceive”**. The onus is on the prosecution to prove that a document is forged, that the accused person forged the said document and that the accused person forged the document with intent to defraud or deceive. In the present appeal, the prosecution was able to prove that the above listed documents were not genuine. PW1 denied signing the loan application documents. The Forensic Document Examiner (PW9) established that the loan application documents were not authored or signed by PW1. He also compared the Kenyatta National Hospital payslips that were attached to the loan application document with specimen payslips from the said hospital and discovered that the attached payslips were not genuine. PW9 also stated that the statements of account from Equity Bank Ltd were not genuine. The prosecution therefore established that the said documents were forged.

*Were the documents forged by the Appellants with intent to defraud?* PW4 told the court that loan application documents originated from the 1<sup>st</sup> Appellant. He stated that when the 1<sup>st</sup> Appellant gave him the said documents, all the details had been filled. However, no evidence was adduced to corroborate the fact that the documents originated from the 1<sup>st</sup> Appellant. The documents were witnessed by PW4 as the bank official. PW4 was a direct sales representative. He admitted that he did receive a commission for selling that loan product. The 1<sup>st</sup> Appellant's signature did not appear anywhere on the loan application form. The document examiner (PW9) stated that the 1<sup>st</sup> Appellant's specimen handwriting and signature did not match writings on the loan application forms. PW4 told the court that after he countersigned the loan application form, he returned the same to the 1<sup>st</sup> Appellant. However, his evidence was inconsistent with that of PW5. PW5 testified that he received the loan application documents from PW4. He verified the same and prepared a loan appraisal form recommending the applicant for the loan. He afterwards forwarded the documents to his superior, Pauline Wairimu for further action. PW5 stated that he and the Appellant held a similar position in the same department at the bank. He stated that the 1<sup>st</sup> Appellant could not have processed the said documents after he had already dealt with them. The documents were forwarded to their superior. The 1<sup>st</sup> Appellant did not approve the loan application neither did he prepare the loan appraisal form recommending the applicant for the loan. This court is therefore of the opinion that the prosecution failed to prove that the 1<sup>st</sup> Appellant forged any of the loan application documents with an intent to defraud the bank.

According to the evidence by the prosecution, the 2<sup>nd</sup> Appellant dealt with the RTGS application. The RTGS application form purported to have instructions from PW1 to transfer Ksh.775,760/- from PW1's account to an account at Equity bank Ltd under the name of Collins Bosire. The RTGS form was accompanied by a cash withdrawal voucher of the said amount. Both documents contained PW1's alleged signature. PW1 denied filling or signing the RTGS application form. He also denied signing the cash withdrawal voucher. The document examiner confirmed that the two documents were not genuine. They had been forged. The 2<sup>nd</sup> Appellant did not deny that she countersigned the RTGS application. She stated that her role was to ensure the RTGS form was correctly filled and confirm that the customer's signature on the form matched the signature captured in bank systems. She is then required to countersign the RTGS form and forward the same to her superior for verification. She denied forging the RTGS form as well as the cash withdrawal voucher. She stated that she received the RTGS documents in the course of her duties and forwarded the same to the manager for verification.

PW2, who was working under the 2<sup>nd</sup> Appellant, testified that the 2<sup>nd</sup> Appellant must have dealt with the customer who filled the RTGS application forms. The then Branch Manager (PW7) told the court that a customer was required to be present at the bank for the 2<sup>nd</sup> Appellant to verify and approve the RTGS application. He stated that the 2<sup>nd</sup> Appellant countersigned the RTGS application documents in the absence of the alleged customer (PW1). The 2<sup>nd</sup> Appellant in her defence stated that she did not deal directly with the customer. She told the court that the customer filled the RTGS forms at the Front Office. The forms were then forwarded to her for further action. This court is not convinced that the 2<sup>nd</sup> Appellant forged the said RTGS applications forms with intent to defraud since she was not the beneficiary of the funds. Evidence adduced by the prosecution witnesses indicated that the funds were transferred to an account at Equity Bank Ltd belonging to one Collins Bosire. This court notes that the prosecution failed to call as a witness or prosecute the said Collins Bosire. Investigations were not properly done to establish any nexus between the Appellants and the beneficiary of the stolen funds. This would have rebutted the 2<sup>nd</sup> Appellant's defence that she was acting in the ordinary course of her duties. The 2<sup>nd</sup> Appellant forwarded the RTGS application forms to her superior for verification. They were afterwards forwarded to another bank official who authorized the release of the funds. The 2<sup>nd</sup> Appellant's duties did not include authorizing or release of the funds to the account belonging to Collins Bosire. From the foregoing, this court holds that the prosecution failed to prove the Appellants' guilt with regard to the offence of **forgery** in Counts I, III, V, VII, IX and X to the required standard of proof beyond any reasonable doubt. Their subsequent convictions are hereby quashed.

The Appellants were further charged with several counts of **uttering a false document** contrary to **Section 353** of the **Penal Code**. The said section provides as follows:

**“Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.”**

The prosecution must prove that the document was false, in the sense that it was forged; the accused knew it was forged and the utterer intended to defraud. In the present appeal, the documents in question were the loan application documents together with the attachments thereto. As was held earlier in this judgment, the said documents were indeed forged. However the prosecution did not adduce evidence to prove that the Appellants knew that the documents were forged. The prosecution failed to prove the element of intention to defraud since it failed to establish that the Appellants were the beneficiaries of the stolen funds. The prosecution failed to show any connection or nexus between the Appellants and Collins Bosire whose account the funds were deposited in. The said Collins Bosire was not availed in court to adduce evidence. In the premises therefore, the Appellants' convictions in Counts II, IV, VI and VIII are hereby quashed.

The Appellants were jointly charged in Count XI with the offence of **stealing by servant** contrary to **Section 281** of the **Penal Code**. It is not disputed that the Appellants at all material times were employees of National Bank of Kenya, Hospital Branch. Evidence adduced by the prosecution established that Ksh.775,760/- was transferred from PW1's account to an account at Equity Bank Ltd in the name of Collins Bosire. As was held earlier in this judgment, the prosecution did not call as a witness or prosecute the said Collins Bosire. It failed to establish the nexus between the Appellants and the beneficiary of the stolen funds. The Appellants were not the beneficiaries of the stolen funds. The Appellants did not have authority to release the said funds from PW1's account to Collins Bosire's account. The prosecution failed to prove that the Appellants had the intention to deprive the said bank of the funds.

In the premises therefore, this court finds merit with the appeals lodged by the Appellants. The Appellants' respective appeals are hereby allowed. Their convictions are quashed. The Appellants are acquitted of all the charges. The Appellants are set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2019**

**L. KIMARU**

**JUDGE**