



**Ndung'u & 3 others v Republic (Criminal Appeal E055, E056 & E057 of 2024  
(Consolidated)) [2025] KEHC 14985 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14985 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E055, E056 & E057 OF 2024 (CONSOLIDATED)**

**JM OMIDO, J**

**OCTOBER 16, 2025**

**BETWEEN**

**GRACE MUMBI NDUNG'U ..... 1<sup>ST</sup> APPELLANT  
BENARD OCHIENG' OUMA ..... 2<sup>ND</sup> APPELLANT  
POLYCARP OTIENO OLELA ..... 3<sup>RD</sup> APPELLANT  
KENNEDY OTIENO OCHIENG' ..... 4<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgement and Conviction of Hon. Douglas Ogoti, Chief Magistrate, delivered on 23rd July, 2024 and subsequent sentences imposed on even date in Kisumu MCCR No. 872 of 2018 Republic v Benard Ochieng' Ouma & 3 others)*

**JUDGMENT**

1. This appeal emanates from the judgement, conviction and sentence of Hon. Douglas Ogoti, Chief Magistrate delivered and imposed on 23<sup>rd</sup> July, 2024 in Kisumu MCCR No. 872 of 2018 Republic v Benard Ochieng' Ouma & 3 others.
2. The Appellants herein, Grace Mumbi Ndung'u, Polycarp Otieno Olela, Benard Ochieng' Ouma and Kennedy Otieno Ochieng' were the 3<sup>rd</sup>, 2<sup>nd</sup>, 1<sup>st</sup> and 4<sup>th</sup> accused persons respectively, before the trial court.
3. The four Appellants were charged in the trial court as follows:  
Count I:  
Charge: Conspiracy to defraud contrary to Section 317 of the Penal Code, Cap 63 Laws of Kenya.



Particulars of the offence: On diverse dates between 26<sup>th</sup> day of April, 2018 and 25<sup>th</sup> day of June, 2018 at an unknown place within the Republic of Kenya, the four Appellants, jointly with others not before the trial court, with intent to defraud, conspired to defraud Barclays Bank of Kenya Limited Ksh.8,143,000/=, the property of Barclays Bank of Kenya Limited.

Count II:

Charge: Stealing by servant contrary to Section 281 of the Penal Code, Cap 63 Laws of Kenya.

Particulars of the offence: On 12<sup>th</sup> of May, 2018 at an unknown place within the Republic of Kenya, Bernard Ochieng' Ouma, the 2<sup>nd</sup> Appellant, stole Ksh.10,000/= by fraudulently receiving the amount to his M-pesa account No. 070XXXXXX7 from M-pesa account No. 070XXXXXX2.

Alternative count to Count II:

Charge: Handling stolen goods contrary to Section 322(1) of the Penal Code, Cap 63 Laws of Kenya.

Particulars of the offence: On 12<sup>th</sup> of May, 2018 at an unknown place within the Republic of Kenya, Bernard Ochieng' Ouma, the 2<sup>nd</sup> Appellant, otherwise than in the course of stealing, dishonestly received or retained Ksh.10,000/= in the M-pesa account No. 0706XXXXXX27, the property of Barclays Bank of Kenya, knowing or having reason to believe it to be stolen.

Count III:

Charge: Stealing by servant contrary to Section 281 of the Penal Code, Cap 63 Laws of Kenya.

Particulars of the offence: On diverse dates between 9<sup>th</sup> of May, 2018 (sic) at an unknown place within the Republic of Kenya, Polycarp Otieno Olela the 3<sup>rd</sup> Appellant stole Ksh.148,000/- the property of Barclays Bank of Kenya by fraudulently receiving the amount into his M-pesa account 072XXXX44 from M-pesa numbers 0748XXXX64 and 074XXXX59.

Alternative count to Count III:

Charge: Handling stolen goods contrary to Section 322(1)(2) of the Penal Code, Cap 63 Laws of Kenya.

Particulars of the offence: On diverse dates between 9<sup>th</sup> of May, 2018 and 14<sup>th</sup> of May, 2018 at an unknown place within the Republic of Kenya, Polycarp Otieno Olela, the 3<sup>rd</sup> Appellant, otherwise that in the course of stealing, dishonestly received or retained Ksh.148,000/= in his M-pesa account No. 0724XXXX44, the property of Barclays Bank of Kenya, knowing or having reason to believe it to be stolen goods.

Count IV:

Charge: Stealing by servant contrary to Section 281 of the Penal Code, Cap 63 Laws of Kenya.

Particulars of the offence: On diverse dates between 9<sup>th</sup> of May, 2018 and 24<sup>th</sup> of June, 2018 at an unknown place within the Republic of Kenya, Kennedy Otieno Ochieng' the 4<sup>th</sup> Appellant stole Ksh.290,000/- the property of Barclays Bank of Kenya by fraudulently receiving the amount in his M-pesa account 070XXXX2 from M-pesa numbers 074XXXX64 and 0748XXXX59.

Alternative count to Count IV:

Charge: Handling stolen goods contrary to Section 322(1)(2) of the Penal Code, Cap 63 Laws of Kenya.

Particulars of the offence: On diverse dates between 9<sup>th</sup> of May, 2018 and 24<sup>th</sup> June, 2018 at an unknown place within the Republic of Kenya, Kennedy Otieno Ochieng', the 4<sup>th</sup> Appellant, otherwise that



- in the course of stealing, dishonestly received or retained Ksh.290,000/= in his M-pesa account No. 0708XXXXXXXX32, the property of Barclays Bank of Kenya, knowing or having reason to believe it to be stolen.
4. All the four Appellants pleaded not guilty to all the respective counts/charges and a full trial was conducted.
  5. The prosecution case was founded on the evidence of 13 witnesses while all the four Appellants defence evidence comprised their respective sworn testimonies.
  6. At the close of the trial, the trial court reached the finding that the prosecution had proved all the respective offences that the four Appellants were charged with and they were all convicted on the same. The learned trial Magistrate then went on to sentence the four Appellants.
  7. The grounds of appeal presented by the Appellants vide their respective Petitions of Appeal upon which they seek to upset their convictions and sentences, may be collated and summarized as follows:
    - a. The Appellants' right to a fair trial under Article 50(2) was violated.
    - b. The learned trial Magistrate erred in law and in fact by convicting the Appellants without properly analyzing the evidence of the prosecution witnesses.
    - c. The learned trial Magistrate erred in law and in fact by failing to consider the exculpatory evidence that was tendered in favour of the Appellants by some of the prosecution witnesses.
    - d. The learned trial Magistrate erred in law and in fact by reaching the finding that the prosecution had proved the charges on which the Appellants were convicted beyond reasonable doubt.
    - e. The learned trial Magistrate erred in law and in fact by failing to properly consider the respective defences mounted by the Appellants.
    - f. The learned trial Magistrate erred in law by failing to appreciate that the critical elements of the offences that the Appellants were charged with were not proved to the required standard.
    - g. The learned trial Magistrate erred in law by failing to appreciate that there were material contradictions and inconsistencies in the prosecution witnesses' evidence that vitiated the respective cases against the Appellants.
    - h. The respective sentences that were imposed by the learned trial Magistrate were manifestly excessive.
  8. The Appellants propose that their respective appeals be allowed, the convictions be quashed and the sentences of imprisonment imposed by the trial court be set aside.
  9. This court directed that the appeal be canvassed by way of written submissions. Both the Appellants and the Respondent filed their respective submissions.
  10. This being a first appeal, this court has a legal duty to re-analyze, re-evaluate and re-assess the evidence adduced in the lower court so as to come up with its own conclusions while bearing in mind that it did not have the benefit of seeing or hearing the witnesses when they testified (see *Okeno v Republic* [1972] E.A.



11. In *Pandya v Republic* [1957] EA 336, the court, while addressing the duty of the first appellate court in a criminal appeal, stated as follows:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury, the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

12. In *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal, while addressing itself to the same duty, held that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

13. Similarly, in *Victor Owich Mbogo v Republic*, [2020] eKLR, the Court of Appeal observed as follows:

“It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify.”

14. Now to the evidence before the trial court, the first prosecution witness was Godwin Nyakenyanya (PW1), an employee of Barclays Bank of Kenya (hereinafter “Barclays” or “the bank”). The witness explained to the trial court the process that his employer’s customers followed in applying for and securing loans from the bank.

15. In his testimony, PW1 told the court that the bank had a list dated and stamped on 20<sup>th</sup> July, 2016, that was provided by Maseno University (hereinafter “Maseno” or “the university”), signed by a Registrar at the university, one Matthew Onyango, of names and designations of individuals that were authorized to verify documentation of Maseno employees who wished to apply for loans. The listed persons were the 1<sup>st</sup> Appellant herein (Senior Assistant Registrar), Ezra O. Bwana (Accountant), John King’oina (Senior Assistant Registrar) and Boniface Joseph Alego (Accountant).

16. Pw1 explained that the loan forms for Maseno employees were required to be signed by any of the two persons in the list and that the bank would then contact either of the signatories by making what he referred to as call back phone calls to confirm whether a particular loan applicant was a Maseno



employee who qualified for the same and whether the university was aware of the application before proceeding to process the loan.

17. In his further testimony, the witness told the trial court that he received the following loan application forms from persons who purported to be employees of the university: A loan application form for Oguda Fred Onyango purportedly signed by Grace Ndung'u and Samson Moracha for the university. A loan application form for Ayoma William Odhiambo purportedly signed by Grace Ndung'u and Samson Moracha for the university.
18. The witness stated that he confirmed that all the documents were in order and made call backs to the 1<sup>st</sup> Appellant using her cell phone number 0722XXXXXXX45, who confirmed that the applicants were Maseno employees and that they qualified for the loans that they had applied for. He handed over the documents to the next level for further processing.
19. On being cross examined, PW1 told the trial court that Samson Moracha did not appear in the list of the persons who were authorized by the university to approve employees' loan forms. He stated that he did not make any call back to Moracha. He did not explain why he went further to approve the loans with Moracha's signature, yet the said person's name did not appear in the list provided by the university.
20. PW1 stated upon further cross examination that he could not tell if the cell phone number 0722XXXXXXX45 belonged to the 1<sup>st</sup> Appellant. Asked whether it is Moracha who gave him that number, the witness stated as follows:

“I have no comment on the allegations that it is Moracha who gave me this number.”
21. The witness was referred to the loan application form that was completed by Annah Adoyo Arucho and stated that as per the document, the loan applicant was self-employed.
22. On being further cross examined, the witness told the trial court that the mobile number 0722XXXXXXX45 did not appear anywhere in the list of approvers that the bank received from the university. He stated that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants were employees of the bank at the time material to the impugned transactions.
23. The second prosecution witness was Ronald Maranga Mokaya, an employee of Barclays, who testified and told the trial court that in the months of May and June, 2018, he received five loan application from the following loan applicants: Elijah Ochieng' Onyango, John Okoth Owuor, Fred Onyango Oguda, Annah Adoyo Arucho, William Odhiambo Ayoma.
24. The witness stated that all the above persons were customers of the bank and had accounts with the bank and claimed to be employees of Maseno University. PW2 confirmed that he is the one who opened the five accounts.
25. The witness explained in detail the account opening process. He produced their respective account opening documents for the five accounts which included duly completed forms, passport size photographs, copies of identity cards, KRA PIN certificates and reports generated from the government portal to confirm the veracity of the identity cards.
26. Upon being cross examined, PW2 told the trial court that he did not meet any of the five persons as the persons who had contact with them were the bank's sales persons, who are the bank officials who received the account opening documents from the applicants. Those officials were the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants.



27. The witness explained that the bank's employees' duties on the application were as follows:PW2 would vet the application.PW1, who was PW2's immediate boss would approve the loan applications and would make a "call back" to the university to confirm that the applicants were employees of Maseno.PW2 would then submit the applications to the bank's head office.The bank's head office team would then take up the rest of the process.
28. PW2 told the trial court that in his assessment, all the 5 applications met the required standards as per the bank's standard procedures and that as a result, the bank dispatched loans totaling Ksh.8,143,000/- to the five accounts.
29. The witness stated that he was not aware of any criminal offences that the four Appellants committed regarding the five loan applications.
30. The prosecution called Nicholas Ouma Ombogo as Pw3. The witness told the trial court that he was an employee of the bank. He stated that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants were his erstwhile colleagues at the bank, with the designation of sales representatives. The witness produces the letters of employment on contractual basis of the three.
31. The witness, upon cross examination told the trial court that PW1 was the bank officer charged with the duties of making call backs to Maseno to confirm the veracity of loan application forms made by employees of the university. He stated that it was not the duty of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants to verify the loan forms and documents and that their duties ended when they presented the forms to the compliance officer (PW1) for verification.
32. The witness was asked whether there was any fault on the part of the three former employees in handling the impugned loan forms and answered in the negative, stating that sales representatives did not have access to the bank's systems and could not influence any decision at the verification and compliance stage.
33. PW4 was Maurice Odaga Amwayi, an employee of Maseno University. The witness recalled and narrated the events of 11<sup>th</sup> September, 2018 and told the trial court that the 1<sup>st</sup> Appellant informed him on that day that anti-banking fraud sleuths were investigating a case and asked him to proceed to the offices of the investigators to record his statement, which he did. His sample signature was taken by the investigators. He was shown a payslip that had his employment number but whose other details he said were not his. He was informed that the payslip that bore his employment number was in the name of John Okoth Owuor and that the same had been fraudulently used to obtain a loan. The witness was emphatic that he never applied for any loan and that he did not hold any account with Barclays.
34. Irene Akinyi Acholla testified as the prosecution's fifth witness (PW5) and told the trial court that she was an employee of the university and learnt from the 1<sup>st</sup> Appellant on 11<sup>th</sup> September, 2018 that her staff number had been used to access a loan. The 1<sup>st</sup> Appellant directed her to the investigators' offices where she was shown a payslip that had someone else's name with her staff number. She recorded her statement.
35. The witness stated on being cross examined that the name on the payslip was Elijah Ochieng' Onyango, who was not known to her. She stated that she did not apply for any loan from the bank. She identified her true payslip before the trial court.
36. The 6<sup>th</sup> prosecution witness was Julia Andeyo Okoola, who also told the trial court that she was an employee of Maseno and learnt from the 1<sup>st</sup> Appellant on 11<sup>th</sup> September, 2018 that her staff number had been fraudulently used to access a loan from the bank. She recorded her statement on 13<sup>th</sup> September, 2018.



37. The witness was shown a payslip with the name Anne Adoyo Arocho, which had her staff number but stated that the person whose name appeared in the slip was not known to her. The witness identified her genuine payslip before the trial court. She denied ever applying for any loan from Barclays.
38. Samson Moracha Nyaboga Ombongi testified as the seventh prosecution witness (PW7) and told the trial court that at the time material to the case, he worked as a Senior Administration Assistant at Maseno. The witness stated that he signed the loan forms for William Odhiambo, Annah Adoyo and Fred Oguda “as a second signatory”
39. The witness stated that he relied on the Human Resource office to confirm from the employment records and payroll the details that were in the loan forms. Hence, he relied on the documents that were already signed and stamped by the Human Resource office. He stated that the 1<sup>st</sup> Appellant was at the time the in charge Human Resource.
40. It was the further evidence of the witness that he later learnt from the investigators of fraudulent activities that had been carried out using the loan application forms that he had signed. He recorded his statement.
41. On being cross examined, PW7 stated that he did not know if the bank would make call backs to confirm the loan documentation presented by the university’s employees.
42. Abongo David Onyango testified before the trial court as PW8 and told the court that he worked at Maseno as an Accounts Clerk. He stated that on 13<sup>th</sup> September, 2018, he was interrogated by investigators on his duties and recorded his statement. The witness stated that he would receive loan application forms and verify the same in the payroll system. He stated that the Human Resource Director at the university was one Dr. Midida and that the 1<sup>st</sup> Appellant was his deputy. He stated that he did not receive any of the four questioned loan application forms.
43. The 9<sup>th</sup> prosecution witness was Michael Ngobo, (PW9) a forensic investigator working with the bank. The witness told the trial court that the bank noticed that five loans had been processed on the strength of fraudulent documents provided by persons who alleged to be employees of Maseno University. That upon investigations, the witness noted that the forms had been signed by the 1<sup>st</sup> Appellant and Samson Moracha (PW7), who purported to verify, on behalf of Maseno, that the applicants were employees of the university. The documents bore the university’s stamp.
44. PW9 stated that on examination of the stamp, some matched the sample impressions that were submitted by the university while others did not.
45. The witness told the trial court that one of the M-pesa numbers that benefitted from the funds from the account of Elijah Ochieng’ Onyango was 0748XXXXXXXX65.
46. Ezra Owiti Bwana, a former employee of Maseno in the designation of Accountant, testified before the trial court as PW10. The witness told the trial court that he had at the time of his testimony since retired.
47. With regard to this matter, Pw10 told the trial court that he was interrogated by the investigators in this matter and was shown a payslip in the name of Owuor John Okoth, which he had purportedly signed, alongside the 1<sup>st</sup> Appellant. He told the investigators that the signature was not his and the figures in the payslip had anomalies. He concluded that the payslip was not genuine. As for the other signature, the witness stated that he could not tell if it was the 1<sup>st</sup> Appellant’s.
48. Chief Inspector of Police Vincent Chelongo, a forensic document examiner, testified before the trial court as PW11. The officer told the court that he received several documents and stamp impressions



from the investigating officer and was required to examine the same and compare handwritings and signatures on the said documents, which he did and prepared two reports, which he produced as exhibits.

49. In respect of the stamp impressions, the witness stated in his report that those appearing in the loan applications purported to be from the university's Finance Directorate were not genuine. The ones appearing in the forms purportedly from the Human Resource Directorate were however genuine.
50. On being cross examined, the witness stated that he did not receive any specimen signatures or handwritings from or belonging to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants and did therefore not ascertain if any of the signatures in the loan documents belonged to any of the three Appellants.
51. With regard to the 4<sup>th</sup> Appellant, the witness stated that his specimen handwriting was submitted and when the same was compared with the one on the loan application form purportedly completed by Annah Arucho, the two were found to have been made by the same hand.
52. Corporal Rehema Kombo, the investigating officer in the matter testified as PW12. In her testimony, the witness told the trial court that a bank fraud complaint was made by Barclays vide a letter dated 2<sup>nd</sup> August, 2018 and she was tasked to investigate the same.
53. The witness told the court that the information that she received from the bank was that it had lost Ksh.8,143,000/- through loans that were fraudulently applied for and obtained as follows (as per the loan applications documentation): One Oguda Fred Onyango applied for and obtained a loan of Ksh.2,000,000/-, whereby the loans sales person was the 2<sup>nd</sup> Appellant, who was an employee of the bank. One Ayoma William Odhiambo applied for and obtained a loan of Ksh.2,000,000/-, whereby the loans sales person was the 2<sup>nd</sup> Appellant, who was an employee of the bank. One Onyango Elijah Ochieng' applied for and obtained a loan of Ksh.1,527,000/-, whereby the loans sales person was the 3<sup>rd</sup> Appellant, who was an employee of the bank. One Awuor John Okoth applied for and obtained a loan of Ksh.1,539,000/-, whereby the loans sales person was the 4<sup>th</sup> Appellant, who was an employee of the bank. One Arucho Ann Adoyo applied for and obtained a loan of Ksh.1,077,000/-, whereby the loans sales person was the 4<sup>th</sup> Appellant, who was an employee of the bank.
54. The witness told the trial court that the 1<sup>st</sup> Appellant, Samson Moracha (PW7) and Ezra Bwana (PW10) signed the loan forms on behalf of Maseno University. However, upon conducting investigations, the witness discovered that the beneficiaries of the loans, who were purported to be employees of Maseno did not exist.
55. The witness, in the course of her investigations, recorded the statements of the witnesses and collected specimen signatures from the 1<sup>st</sup> Appellant, Samson Moracha (PW7), Ezra Bwana (PW10) and David Onyango (PW8). The witness also collected stamp impressions of five official rubber stamps from the university's Human Resource and Finance Directorates, together with copies of payslips. She then forwarded the collected items/exhibits to a forensic document examiner for analysis and later received two reports, dated 4<sup>th</sup> October, 2018 and 28<sup>th</sup> March, 2019, both prepared by Vincent Chelongo (PW11).
56. In her further testimony, the investigating officer told the trial court that she found out in the course of her investigations that the 2<sup>nd</sup> Appellant's and the 4<sup>th</sup> Appellant's M-pesa numbers, 0724XXXX44 and 070XXXX32 respectively, on diverse dates received some money from 0748XXXX59, which had been used to withdraw money from Awuor John Okoth's account after the loan proceeds had been deposited in the account. The 2<sup>nd</sup> Appellant's number received Ksh.148,000/- while the 4<sup>th</sup> Appellant's number received Ksh.290,000/- from the said M-pesa number. That on 12<sup>th</sup> May, 2018, the M-pesa



- number the 4<sup>th</sup> Appellant received some cash from one Silas Oyugi and transferred Ksh.10,000/- to the 3<sup>rd</sup> Appellant's number.
57. The witness told the trial court that upon the arrest of the 3<sup>rd</sup> Appellant, a diary was found in his possession that contained account number 203XXXXXX86 and mobile number 0748XXXX22, which was the same number that was in the loan form for Ayoma William Odhiambo.
  58. The witness told the trial court that she went ahead and enquired from the National Registration Bureau who the details of the identity card numbers that had been used to open the five bank accounts that received the loan monies. She established that Oguda Fred Onyango, Onyango Elijah Ochieng<sup>7</sup> and Ayoma William Odhiambo were all deceased, having met their demise on 20<sup>th</sup> March, 2018, 5<sup>th</sup> August, 2015 and 2<sup>nd</sup> May, 2018 respectively. The loan applications were made after the three had died.
  59. With regard to Arucho Ann Adoyo, the witness established that the said person did not apply for any loan from Barclays and was not an employee of the university.
  60. She told the court that Awuor John Okoth was a non-existent person.
  61. In her further testimony, the investigating officer stated that in the course of her investigations, she established that call backs would be made by the bank to the 1<sup>st</sup> Appellant through either her cell phone number 0722XXXXXXXX45 or through her office number 057357620/22 to verify that the loan applicants were employees of the university and had in fact made the applications.
  62. Upon being cross examined, PW12 told the trial court that the writings in the diary that was recovered from the 3<sup>rd</sup> Appellant were not subjected to forensic examination and analysis to prove that they were made by the 3<sup>rd</sup> Appellant. She further stated that she did not ascertain who the owner of that diary was.
  63. The witness further stated that Godwin Nyakenyanya (PW1) informed her that he had made call backs to the 1<sup>st</sup> Appellant to verify the loan applications before approving the loans but admitted that she had no evidence that the said calls were made to the 1<sup>st</sup> Appellant.
  64. The last prosecution witness was Sergeant James Makobe (PW13), a police officer seconded to Safaricom PLC as a liaison officer. The officer testified and produced M-pesa statements for the following numbers:0748XXXXXXXX64 registered under the name of Silas Oyugi Ouko.0722XXXXXXXX45 registered under the name of Grace Mumbi.0708XXXXXXXX32 registered under the name of Silas Oyugi.0724XXXXXXXX44 registered under the name of Polycarp Olela.
  65. The prosecution closed its case at that stage and in the trial court's considered ruling rendered on 14<sup>th</sup> May, 2024, all the four Appellants were placed on their defence on all the respective charges.
  66. In his sworn defence, the 3<sup>rd</sup> Appellant (DW1) told the trial court that he was at the time material to the case, circa 2018, an employee of Barclays in the designation of a sales agent. That he went to Maseno university to sell the banks products, namely insurance and loan accounts, and met persons who introduced themselves as William Ayoma and Fredrick Otieno Odhiambo, who told him that they were employees at the university. He then conversed with the two and they agreed to take loans from the bank. An appointment was fixed for another day to enable the two to prepare the required documentation.
  67. The 3<sup>rd</sup> Appellant (DW3) stated that in their follow-up meeting, the two presented to him the required documents, which he then submitted to the bank to verify. He stated that his duty ended at that point adding that it was not his mandate to confirm the veracity of the documents.



68. As regards the Ksh.10,000/- that his M-pesa number received from the 4<sup>th</sup> Appellant's M-pesa number, the 3<sup>rd</sup> Appellant told the trial court that he borrowed the money from the 4<sup>th</sup> Appellant, who was his workmate.
69. Upon cross examination, the 3<sup>rd</sup> Appellant admitted that the 1<sup>st</sup> Appellant was known to him and worked as Human Resource manager at the university but he denied having transacted with her regarding the loan applications by William Ayoma and Fredrick Otieno Odhiambo. He stated that as per the information that he received from the two loan applicants they were both employees of the university.
70. On his part, the 2<sup>nd</sup> Appellant (DW2) stated in his sworn testimony in defence that he was a sales agent working with Barclays and that he met Elijah Ochieng' Onyango at Maseno University, Siriba Campus, in the course of his work, who donned the university badge and introduced himself as an employee of the university and who agreed to take a loan from the bank after the 2<sup>nd</sup> Appellant informed him of the bank's products.
71. The 2<sup>nd</sup> Appellant testified further that on his second appointment with Elijah Ochieng' Onyango outside the university's Siriba Campus, the customer filled in the forms and gave the 2<sup>nd</sup> Appellant the required accompanying documents, which he submitted to the bank for further processing. The 3<sup>rd</sup> Appellant stated that he did not have any interactions with the 1<sup>st</sup> and 4<sup>th</sup> Appellants regarding the loan application by Elijah Ochieng' Onyango.
72. In his further testimony, the 2<sup>nd</sup> Appellant admitted that he received money from M-pesa numbers 0738XXXX64 and 074XXXXX59 totaling Ksh.148,000/- which he said was meant to boost his second-hand clothes business. He stated that the senders of the money were his uncle and his uncle's son, who were based in Siaya County.
73. On being cross examined, the 2<sup>nd</sup> Appellant was emphatic that he did not interact or deal with the 1<sup>st</sup> Appellant concerning the loan application by Elijah Ochieng' Onyango.
74. In her sworn defence, the 1<sup>st</sup> Appellant (DW3) told the trial court that she worked as the Deputy Director, Human Resource, at Maseno University, which had about 3,000 employees.
75. The 1<sup>st</sup> Appellant told the trial court that she was a designated signatory. She stated that the document examiner (PW11) did not subject her signature to forensic examination to confirm if she was the one who signed the impugned loan application forms, which she denied signing, despite having provided her specimen handwriting and signature.
76. The 1<sup>st</sup> Appellant categorically denied that PW1's allegations that he made call backs to her in respect of the five questioned loan applications. She stated that the prosecution did not produce any call logs to prove that Godwin Nyakenyanya (PW1) made the calls to her number.
77. The 1<sup>st</sup> Appellant, on being cross examined, stated that she never at any one point met the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents regarding the five loan applications. The 1<sup>st</sup> Appellant stated that the stamp impressions on the loan applications that were purported to be those of the university were not from her office. She stated that the five loan applicants were not employees at the university.
78. The 4<sup>th</sup> Appellant (DW4) stated in his sworn testimony that he was the bank's sales agent and that he interacted with John Okoth Owuor and Ann Arucho, whom he met at Maseno University and who both had name tags or badges indicating that they were employees of the university. Upon separately conversing with the two, they agreed to take loans from the bank. He arranged for subsequent meetings



- and the two provided the required documents and completed the relevant forms, which the 4<sup>th</sup> Appellant submitted to the bank for verification and further processing.
79. The 4<sup>th</sup> Appellant stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were his colleagues and that he first met the 1<sup>st</sup> Appellant in court.
80. On the Ksh.290,000/- that was sent to his number, the 4<sup>th</sup> Appellant stated that the money was not sent to him by the bank.
81. On being cross examined, the 4<sup>th</sup> Appellant told the trial court that the Ksh.290,000/- that he received from M-pesa numbers 074XXXXXX64 and 074XXXXXX59 was rental income.
82. The defence closed their case at that point.
83. Upon considering the evidence of the 13 prosecution witnesses, the exhibits produced and the four Appellants' sworn defences, the learned trial Magistrate found that the prosecution had satisfied all the ingredients of the following offences:Count I: Conspiracy to defraud contrary to Section 317 of the Penal Code; as against all the four Appellants.Count II: Stealing by servant contrary to Section 281 of the Penal Code; as against the 2<sup>nd</sup> Appellant.Count III: Stealing by servant contrary to Section 281 of the Penal Code; as against the 3<sup>rd</sup> Appellant.Count IV: Stealing by servant contrary to Section 281 of the Penal Code; as against the 4<sup>th</sup> Appellant.
84. The Appellants were subsequently sentenced as follows:In respect of Count I, all the four Appellants were sentenced to serve 3 years imprisonment.In respect of Count II, the 2<sup>nd</sup> Appellant was sentenced to serve 3 years imprisonment.In respect of Count III, the 3<sup>rd</sup> Appellant was sentenced to serve 3 years imprisonment.In respect of Count IV, the 4<sup>th</sup> Appellant was sentenced to serve 3 years imprisonment.
85. As the learned trial Magistrate was not specific as to whether the sentences would run concurrently or consecutively, it then meant that under Section 14 of the Criminal Procedure Code, Cap 75 Laws of Kenya the sentences would by default run consecutively. The provision states as follows:
- 14(1). When a person is convicted at one trial of two or more distinct offences, the court may sentence him for such offences to the several punishments prescribed therefor which the court is competent to impose; such punishments, when consisting of imprisonment, to commence the one after the expiration of the other, unless the court directs that the punishments shall run concurrently.
86. The four Appellants preferred the instant consolidated appeals, being aggrieved by the convictions and sentences.
87. I have considered the grounds of appeal, the filed submissions, the evidence adduced before the trial court and the lower court's record in its entirety. The main ground of appeal that all the four Appellants proffered was that the learned trial Magistrate erred by convicting the Appellants when the evidence was insufficient to prove the respective charges against them.
88. I will deduce the issues that I am now tasked to determine which culminate in the question whether the prosecution proved the respective offences that the four Appellants were convicted on beyond reasonable doubt, as follows:
- a. Whether the prosecution presented evidence that proved beyond reasonable doubt that the four Appellants conspired to defraud the bank of Ksh.8,143,000/- on diverse dates between 26<sup>th</sup> April, 2018 and 25<sup>th</sup> June, 2018.



- b. Whether the prosecution presented evidence that proved beyond reasonable doubt that the 2<sup>nd</sup> Appellant was an employee or servant of the bank and whether, as an employee or servant, he stole Ksh.10,000/- from the bank.
  - c. Whether the prosecution presented evidence that proved beyond reasonable doubt that the 3<sup>rd</sup> Appellant was an employee or servant of the bank and whether, as an employee or servant, he stole Ksh.148,000/- from the bank.
  - d. Whether the prosecution presented evidence that proved beyond reasonable doubt that the 4<sup>th</sup> Appellant was an employee or servant of the bank and whether, as an employee or servant, he stole Ksh.290,000/- from the bank.
  - e. Whether the respective sentences imposed against the four Appellants were manifestly excessive.
89. Inevitably, this court in determining the appeal herein, must satisfy itself that the ingredients of the respective offences that the Appellants were charged with were proved as against each of the Appellants beyond reasonable doubt, as is the requirement in law, for the respective convictions to be upheld.
90. With respect to Count I, the four Appellants, in their respective submissions, challenged the conviction on the basis that the totality of the evidence that was presented by the prosecution witnesses did not prove the offence of conspiracy to defraud contrary to Section 317 of the Penal Code.
91. The Respondent's position was that the prosecution methodically proved each element of the offence by showing that there were coordinated acts by the four Appellants that resulted in the bank losing the stated amount.
92. Section 317 of the Penal Code provides that:
- “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.”
93. From the reading of the above provision, for the offence under Section 317 of the Penal Code to be proved, there must be an agreement or understanding between two or more persons. That then means that one person alone cannot be guilty of conspiracy. Further, the agreement may be express or implied and the means by which the agreement is to be carried out must involve deceit or some kind of fraud. The parties to the agreement must intend the purpose of the conspiracy to be either: (a). to affect the market price of something publicly sold; or (b). to defraud the public or any person; or (c). to extort property from someone. The intention is crucial.
94. As with all criminal offences, these elements must be proved beyond reasonable doubt for a conviction to follow.
95. A fact that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants did not dispute, one that they, as a matter of fact, admitted in their respective sworn defences is that they were all sales agents of the bank and had the duties of selling the bank's products, which included opening bank accounts and selling loans to members of the public. PW3 produced the employment letters issued to the three Appellants by the bank.
96. The evidence that was presented by Godwin Nyakenyanya (PW1), Ronald Mokaya (PW2) and Nicholas Ouma (PW3), all bank employees was that each of the three (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants)



would individually go out to the public and would be paid commissions, according to the number of customers that they sold the bank products to.

97. With respect of the loans that led to the loss of bank funds, the evidence that was presented by the prosecution witnesses from the bank was that the 2<sup>nd</sup> Appellant was the bank's sales agent in respect of the loan that was applied for by Elijah Ochieng' Onyango, while the 3<sup>rd</sup> Appellant was the agent in respect of the loan applications by William Ayoma and Fredrick Otieno Odhiambo and the 4<sup>th</sup> Appellant the agent in respect of the loan applications by John Okoth Owuor and Anne Arucho. The three Appellants admitted in their respective sworn defences that they were the bank's agents in respect of the loan applications by the stated loan applicants.
98. From the above, what the prosecution portrayed was that the individual loan applicants were sourced and each initially processed separately by the three employees (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants) who then handed over the respective documentation to Godwin Nyakenyanya (PW1) for verification and further processing.
99. From the available evidence, there was no indicator that the three employees of the bank (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants) coordinated in any way in sourcing and/or processing the loans or that they had an agreement together that was aimed at defrauding the bank the total amount of Ksh.8,143,000/-. As I have stated, what the prosecution witnesses from the bank offered was that the loan applications were separately and individually presented by the three employees. There is therefore no evidence of an agreement or a conspiracy between the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. I will come back to the issue of conspiracy later on in this judgement.
100. With respect to the 1<sup>st</sup> Appellant, all that the bank witnesses provided in evidence that purportedly linked her to the five loans was the fact, which she admitted, that she was among the designated officers who would confirm to the bank that a loan applicant was an employee of the university and was eligible to apply for the loan and that the loan forms had been processed by the university.
101. With regard to the allegations by Godwin Nyakenyanya (PW1) and Samson Moracha (PW7) that she signed the five questioned loan forms, the 1<sup>st</sup> Appellant denied ever appending her signature on the same. She categorically denied that PW1 made to her call backs on the five applications and further denied that she confirmed the veracity of the applications and that the loan applicants were Maseno employees. While Moracha admitted that he had signed the impugned loan applications allegedly as a second signatory, following the already appended signature of the 1<sup>st</sup> Appellant, the 1<sup>st</sup> Appellant stated that the signatures on the impugned loan documents were not hers.
102. It is noteworthy that specimen signatures from both Moracha and the 1<sup>st</sup> Appellant were collected for purposes of forensic examination to confirm if the two had signed the impugned documents. Curiously, the document examiner's (PW11's) reports that were produced stated that the 1<sup>st</sup> Appellant's signature was not provided. That was in clear contradiction of PW9's evidence that the 1<sup>st</sup> Appellant's indeed provided her specimen signature and handwriting.
103. Bottomline, there was no indication whatsoever in the reports prepared by PW11 that the 1<sup>st</sup> Appellant's specimen signature and handwriting were compared to her alleged signature on the impugned loan application documents.
104. The questions that remained unanswered are; why did the document examiner not examine the already collected specimen from the 1<sup>st</sup> Appellant to confirm if it matched the questioned signatures on the loan documents that were purported to be hers, which she denied? Why was Moracha, whose signature was admittedly on the impugned documents, and which documents he admitted to have signed,



treated as a witness, yet the 1<sup>st</sup> Appellant, whose signature was not examined, and therefore not found in those documents, treated as a suspect?

105. Needless to state, the evidence by the bank's forensic investigator Michael Ngobo (PW9) that the 1<sup>st</sup> Appellant's signature was not examined for purposes of comparison with her alleged signature in the impugned documents, because she allegedly did not dispute the same is most unsatisfactory. I say so because it is the prosecution's duty to prove every fact that it alleges where an accused person pleads not guilty to a charge.
106. In my view thus, the unexplained differential treatment between Moracha and the 1<sup>st</sup> Appellant speaks volumes, especially in light of the fact that the former admitted that he signed the loan documents and was only treated as a witness while the latter, who denied authoring the signatures in the loan documents, was treated as a suspect. No reason was given as to why the 1<sup>st</sup> Appellant's specimen signature, which she willingly submitted, was not forensically examined to ascertain her signature appeared on the documents, which, without tenable reason, was not done. In my view, the circumstances under which Moracha signed the documents ought to have been properly investigated to establish if he was culpable in the fraudulent activities.
107. Section 107 of the Evidence Act, Cap 80 Laws of Kenya provides that he who alleges a fact must prove the fact. The text of the provision is as follows:
107. Burden of proof.
- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The persuasion I reach is that the allegation that the 1<sup>st</sup> Appellant signed the impugned loan documents was not proved by the prosecution as no examination was conducted to establish whether the questioned signatures on the loan documents were hers or not.
109. In their respective defences, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants stated that they each met, on separate occasions, the persons who introduced themselves as employees of Maseno and who gave them the required loan documents. The three stated that the duty to verify the documents lay with Godwin Nyakenyanya, and they promptly forwarded the same to the said bank officer for action.
110. Although the Nyakenyanya stated that he made call back phone calls to the 1<sup>st</sup> Appellant to confirm that the applicants were Maseno employees, the 1<sup>st</sup> Applicant denied the allegation. It is to be recalled that when Nyakenyanya was cross examined, he stated that he could not tell if the cell phone number 0722XXXXXXXX45, to which he claimed that he made the call backs to, belonged to the 1<sup>st</sup> Appellant. It was curious that when Nyakenyanya was asked whether it is Moracha who had given him that number, all he responded to state was that: "I have no comment on the allegations that it is Moracha who gave me this number." Why would he not have a response to that simple question?
111. As the prosecution did not provide evidence of the calls or call backs allegedly made to the 1<sup>st</sup> Appellant, such as call logs, the issue as to whether the calls were made to the 1<sup>st</sup> Appellant can only be resolved in her favour, that PW1 did not make any such calls to 1<sup>st</sup> Appellant. No reason was given as to why the investigators believed Nyakenyanya's version that he made call backs to the 1<sup>st</sup> Appellant, and not the 1<sup>st</sup> Appellant's version that no such call backs were made and there is therefore no evidence that she participated in any way in processing any of the five loan applications.



112. That being the case, remembering that both PW1 and PW2 stated that it was not the duty or mandate for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants to verify the loan documents, the failure to verify the documents as per the bank's and university's procedures could not be blamed upon the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants. If anything, both PW1 and PW2 did not find any wrongdoing by the three Appellants who were the bank's employees, as it was not within their mandate to do verify the loan documents.
113. That takes me back to the issue whether conspiracy as against the four Appellants was proved by the prosecution. Having reached the finding that there was no evidence to prove that the 1<sup>st</sup> Appellant signed the loan documents of confirmed vide call backs that the loan applicants were employees of the university and that they had applied for and qualified for the loans or that she participated in any way in processing the loan applications, I find that there was no evidence provided to prove that she conspired with any of the other Appellants to defraud the bank.
114. The crucial ingredient of conspiracy as against the four Appellants was therefore not proved. Again, the prosecution failed to discharge its burden under Section 107 of the Evidence Act, of proving what it alleged, that there was such a conspiracy.
115. In his judgement, the learned trial Magistrate stated as follows:
- “In count I, the prosecution and defence was in agreement that the accused introduced the non-existent loan applicant. Benard Ochieng’ Ouma (A1) introduced Willian Ayoma and Fredrick Otieno Odhiambo. A2 Polycarp Otieno introduced Elijah Ochieng’ Onyango. Kennedy Otieno Ochieng’ A4 introduced John Okoth Owuor and Ann Adoyo Arucho. Their application forms were signed by A3. All the application forms were application forms from Barclays Bank....
- From the circumstances of this case, preparing the same and submitting the same while knowing that the applicants were not in existence and by A3 confirming the existence of the applicants only pointed to an implied agreement between all the accused. The court found their action to be sufficient evidence of conspiracy and as soon as they performed their respective roles involving non existent persons, the offence of conspiracy was complete.”
116. The learned trial Magistrate, on the basis of what I have stated above, must be faulted for reaching the findings that the 1<sup>st</sup> Appellant signed the loan forms and thereby confirmed the existence of the loan applicants and that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants knew that the loan applicants did not exist, yet their unchallenged evidence in defence was that they actually met the applicants and that it was the duty of Nyakenyanya to confirm the veracity of the documents, which the bank officer failed to do, as no evidence of call backs to the 1<sup>st</sup> Appellant was presented.
117. The clear position I therefore reach is that the prosecution did not prove that there was a conspiracy or agreement between the Appellants to defraud the bank. Accordingly, the conviction of the Appellants in Count I was not safe.
118. With regard to the Counts II, III and IV, it was alleged that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants stole from their employer – the bank. As I have stated before, the fact that the three were servants and/or employees of the bank was not disputed, and was proved by the production of their letters of employment by the bank. The three admitted in their respective defences that they indeed were employees and/or servants of Barclays.
119. What remains to be determined regarding the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants is whether there was evidence adduced on the part of the prosecution to prove beyond reasonable doubt that they stole from their



employer or whether, in the alternative, they handled stolen property, with the knowledge that the same had been stolen or unlawfully obtained.

120. On this, the prosecution largely placed its reliance on M-pesa statements that were alleged to be those of the three Appellants' M-pesa accounts.
121. In respect of the 2<sup>nd</sup> Appellant Benard Ochieng' Ouma, the evidence of the investigating officer was that he received money from M-pesa numbers 0738XXXX64 and 0748XXXX59 totaling Ksh.148,000/-.
122. While admitting that he received the said amount, the 2<sup>nd</sup> Appellant stated in his defence that the said monies were from his uncle and his uncle's son who were based in Siaya County and was meant to boost his second-hand clothes business.
123. As for the 3<sup>rd</sup> Appellant Polycarp Otieno Olela, the position of the prosecution was that he received Ksh.10,000/- from the 4<sup>th</sup> Appellants M-pesa number and that the same were proceeds from the amount stolen from the bank vide the fraudulent loan applications.
124. In his defence, the 3<sup>rd</sup> Appellant stated that the Ksh.10,000/- that he received from the 4<sup>th</sup> Appellant was money that he borrowed from the 4<sup>th</sup> Appellant, who was his workmate.
125. With regard to the 4<sup>th</sup> Appellant Kennedy Otieno Ochieng', the prosecution's evidence was that he received Ksh.290,000/-, through M-pesa, being part of the stolen money from M-pesa number 0748XXXXXXXX59. In his defence, the 4<sup>th</sup> Appellant stated that the amount was rental income that was sent to him.
126. I have carefully perused and examined the M-pesa statements that were produced by Sergeant Stephen Makobe, (PW13) the liaison officer at Safaricom PLC, particularly those that received money from Barclays and one thing that is clear from the said statements is that although they indicate that money was indeed received from the bank, the bank account numbers from which the same was transferred is not indicated. One cannot therefore state whether the monies received in the various M-pesa accounts were from any of the five questioned loan accounts.
127. A consideration of the 3<sup>rd</sup> Appellant's defence that the Ksh.10,000/- that he admittedly received from the 4<sup>th</sup> Respondent's M-pesa account is a reasonable defence. I say so because in the ordinary course of life, it is not unusual for a person to borrow money from a workmate.
128. A curious observation that I have made in respect of the bank statement for the account that was opened by Oguda Fred Onyango is that the bulk of the loan money that was deposited in the account was withdrawn by way of M-pesa transactions to the M-pesa number 0748XXXX65, yet the M-pesa number in respect of which PW13 produced documents, as belonging to 0748XXXX64. The last digit is different and that makes the entire difference. It would therefore seem, whether deliberately or due to inadvertence, that the wrong number was subjected to investigations.
129. It gets more interesting, that the M-pesa statement that was produced in respect of the number 0748XXXX65 that was investigated, did not, for unclear reasons, have the name of the registered owner, noting that all the other statements had the names of the respective subscribers.
130. As regards the stamp impressions that matched those from the Human Resource Directorate of the university, no concluding investigations were conducted as to who in particular stamped the loan forms. In particular, there was no evidence provided to prove that it is the 1<sup>st</sup> Appellant who did so and what remains of the material that the State offered is merely suspicion that she may have done it.



131. In the case of *Sawe v Republic* [2003] KLR 364, the Court of Appeal was clear that suspicion, however strong, cannot be the basis for a conviction. The Court of Appeal observed as follows:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. ... Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

132. From my foregoing analysis, my irresistible persuasion is that the prosecution did not make available evidence to prove that the source of the monies that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants received in their respective M-pesa accounts was the accounts that were opened by the 5 loan applicants. Counts II, III and IV were therefore not proved as against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants, respectively, beyond reasonable doubt as is the requirement in law. The conviction of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants on Counts II, III and IV was therefore unsafe.

133. Notwithstanding my findings that the conviction of the four Appellants on all the respective counts was unsafe, I will proceed to address myself on the sentences that the trial court imposed.

134. In that regard, I note that under Section 317 of the Penal Code, the maximum sentence for the offence of conspiracy to defraud, which is a misdemeanor, is three years imprisonment.

135. Before being sentenced, all the four Appellants were said to be first offenders and pleaded for leniency. No aggravating circumstances or factors were offered by the prosecution.

136. As a general principle, a court should not impose the maximum sentence for a first offender in the absence of aggravating circumstances.

137. The other issue that I would like to address is what I had earlier on pointed out that learned trial Magistrate was not specific as to whether the sentences would run concurrently or consecutively, which then meant that under Section 14 of the Criminal Procedure Code, Cap 75 Laws of Kenya the sentences would by default run consecutively.

138. The prosecution in the matter before the trial court had presented a case that the offence in Count I was committed in the same transaction as the offences in Counts II, III and IV. Where offences are committed in the same transaction, the sentences for those offences ought to run concurrently and not consecutively.

139. In the case of *David Jefwa Kalu v Republic* [2007] KECA 254 (KLR) the Court of Appeal had the following to say on the subject:

“But the offences on count one and count two were committed in one transaction and there was no legal basis for ordering that the sentences ought to run consecutively. We set aside the order that the sentences are to run consecutively and instead order that the two sentences shall run concurrently. Of course the sentences are to run from the 6th October, 1999 when the appellant was sentenced by the Magistrate. To the extent indicated herein, the appellant’s appeal succeeds.”

140. The learned trial Magistrate ought to have ordered that the sentences run concurrently.

141. However, as I have found that the convictions of the four Appellants on all the respective charges were not safe, the result that I reach is that the Appellants’ appeals on both conviction and sentence are merited and are hereby allowed. Consequently, I proceed to order as follows:



- a. The conviction of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants on Count I is hereby quashed. The sentence of three (3) years that was imposed upon each of the four Appellants is hereby set aside.
  - b. The conviction of 2<sup>nd</sup> Appellant on Count II is hereby quashed. The sentence of three (3) years that was imposed upon the 2<sup>nd</sup> Appellant is hereby set aside.
  - c. The conviction of 3<sup>rd</sup> Appellant on Count III is hereby quashed. The sentence of three (3) years that was imposed upon the 3<sup>rd</sup> Appellant is hereby set aside. The 3<sup>rd</sup> Appellant shall be set at liberty unless he is otherwise lawfully detained.
  - d. The conviction of 4<sup>th</sup> Appellant on Count IV is hereby quashed. The sentence of three (3) years that was imposed upon the 4<sup>th</sup> Appellant is hereby set aside.
142. The sureties of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Appellants are hereby discharged. The securities deposited shall be released to the respective sureties.
143. A copy of this judgement to be supplied to all the Appellants and/or their Advocates and the Prosecution Counsel.
144. This file is hereby closed.

**DELIVERED, DATED AND SIGNED THIS 16<sup>TH</sup> DAY OF OCTOBER, 2025.**

**JOE M. OMIDO**

**JUDGE**

Appellants: All Present.

For Respondent: Ms. Muema, Prosecution Counsel.

For The 1<sup>st</sup> Appellant: Mr. Nyongesa.

For The 2<sup>nd</sup> Appellant: Mr. Okoth Oluoch.

For The 3<sup>rd</sup> Appellant: In Person.

For The 4<sup>th</sup> Appellant: Mr. M.m. Omondi.

Court Assistants: Mr. Juma & Mr. Ngoge.

