REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL NO. E030 OF 2024

CALEB OKOTH OKOTH ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Hon. Lubia, SRM, given on 28.05.2025 in Nyeri CMCR No. E338 of 2020. The appellant was found guilty and fined Ksh 50,000/= in default of one year's imprisonment for one count of stealing by a public servant, six counts of destroying evidence, one count of forgery, and one count of uttering a false document, all amounting to 10 counts.

2. The entire edifice of charges relating to destroying evidence was dismissed, and there is no appeal in that respect. This leaves only counts 1, 8, and 9. The said offences were thus: Count 1 was stealing by a person employed in the public service, contrary to section 280 of the Penal Code. The particulars were that between 1.08.2018 and 10.1.2020 at the Kenya Anti-Corruption Commission Central Regional Office,

Nyeri, being a person employed in the public service as an Operations Assistant II in the said Kenya Anti-Corruption Commission, stole Ksh. 608,000/=, which came to his possession by virtue of his employment.

3. Count 8 was forgery contrary to section 247(d) (i) as read with section 349 of the penal code. The particulars were that on 11.10.2019, at the Kenya Anti-Corruption Commission central regional office, Nyeri, signed a document, namely, handing over the inventory of trap money for Ksh. 140,000/= in the name of Abdi Guyo, knowing or ought to have known that he had no authority to sign the said document from the said person.

4. Count 9 was uttering a false document contrary to section 353 of the penal code. The particulars were that on 11.10.2019, at the Kenya Anti-Corruption Commission central regional office, Nyeri, knowingly and fraudulently uttered by signing a document, namely handing over the inventory of trap money for Ksh.140,000/= in the name of Abdi Guyo without his authority.

5. Upon conviction, the appellant set out a petition of appeal with the following grounds:
    a) The learned trial magistrate erred in law and fact in convicting the Appellant on charges of stealing by a person employed in the public service, forgery and

uttering a false document which were not proved beyond reasonable doubt.

b) The learned trial magistrate erred in law and fact in convicting the Appellant when the evidence failed to prove the charge.
c) The learned trial magistrate erred in law and fact in convicting the Appellant when the ingredients of the 3 offenses were not proved.
d) The learned trial magistrate erred in law and fact in when the prosecution confirmed that the Appellant did not receive the money.
e) The learned trial magistrate erred in law and fact in convicting the Appellant when the prosecution failed to produce a certificate in line with Section 106 of the Evidence Act.
f) The learned trial magistrate erred in law and fact in failing to consider the strong evidence of the Appellant.
g) The learned trial magistrate erred in law and fact in meting out a harsh sentence.

Proceedings and Evidence

6. PW1 was Charles Nyatundo Rasugu. He was the Deputy Director of the Ethics and Anti-Corruption Commission at the Nyeri Office. He testified that there was what he termed

"Operation Kitty." The money was usually Ksh. 100,000/= which was used to trap people who asked for bribes.

7. He testified that he ordered spot checks by a team of officers. The officer had 100,000/= for operation and used it to trap people when they asked for a bribe. The appellant was the custodian of the money. He had been appointed as a custodian of funds. On 8.12020, he requested Joseph Olilo and Lydia Muoki regarding the availability of funds for operations. A sum of Ksh 22,000/= was missing from the money the appellant was keeping. He had no explanation.

8. The Appellant acknowledged receipt of the money by appending his signature. However, 200,000/= was found to be missing. According to the evidence, and as reflected in the memo dated 27.9.2019, the Appellant was serving as the exhibit officer at the material time.

9. A draft report was prepared and signed by Ashtiva, Maina, and Joseph Elilo. A final report indicated that 200,000/= was missing. The appellant had received the memo appointing him as an exhibits officer. When 1000/= was demonetised, the appellant took the money to Nairobi. When asked to account for it, he could not trace it. The appellant had handled Ksh 200,000/=. The witness was stood down to enable the supply of documents. At the next hearing, the prosecution played ping-pong, which resulted in a warrant issued against the

investigating officer. When an explanation was given for the failure to attend court, PW1 was still stood down because he had not been ready to proceed. PW1 proceeded on 28.6.2022. He was reminded of his oath. The Appellant asked for a chance to replace the lost money. This could not happen as the notes were serialised.

10. On cross-examination, PW1 testified that there were about ten investigators at the office. That the Appellant was an exhibits officer and signed the exhibits. He did not maintain a movement register when he ought to have done so. PW1 could not specify the exact date on which the money was lost. Exhibits were kept by the Appellant.

11. PW2, Joseph Owino Elilo, was an investigator. On 8.1.2020, PW1 instructed him to conduct a spot check on the track money held by the Appellant, which amounted to Kshs. 100,000/=. Upon verification, a sum of Kshs. 22,000/= was not accounted for. When called upon to explain the discrepancy, the Appellant stated that he had given Kshs. 5,000/= to Hillary, Kshs. 3,000/= to Mercy, Kshs. 3,000/= to another officer, and retained Kshs. 11,000/= for himself. However, the persons named by the Appellant denied receiving the amounts in question.

12. On cross-examination, it was his case that the report did not indicate the currency and denominations of the missing

money. The Appellant was the custodian of the trap money. The first spot check was done in Nyeri. The Appellant did not avail Ksh. 40,000/=. Any officer would have access to the store key.

13. PW3 was Abraham Koech Kemboi. He was an investigator based in Nyeri. He was the deputy regional manager. They asked each officer who held trap money to provide an inventory of the money exhibits. The Appellant was to collect demonetized notes to hand to one Waihenya at CBK, Nairobi. There was, however, no documented evidence of handing over. The Appellant said that he had misplaced the exhibits. The inventory dated 12.9.2019 stated that the Appellant had handed over Ksh. 200,000/= to CBK.

14. It was his further testimony that overall and as per the report dated 21.1.2020, Ksh. 536,000/= being monetary exhibits could not be accounted for by the Appellant. On cross-examination, it was his case that he could not tell if there was an inventory handing over the money to the Appellant. In all cases, the Appellant confirmed that he signed the reports. He reiterated that Ksh. 536,000/= was missing.

15. PW4 was Abdi Guyo. He produced exhibits. It was his case that the money was to be used in trap operations. On cross-examination, he testified that he did not mix Ksh. 100 and Ksh.

1,000 denominations. The area where money was kept was open to everybody.

16. PW5 was Livingstone Waihenya. He was an Investigator. Ksh. 1,000 notes were to be changed to the new currency. Old generation notes were to end by 30.9.2019. All cash exhibits in denominations of Ksh. 1,000 were to be returned to CBK. He received a memo dated 12.9.2019 for Ksh. 200,000/=. This was forwarded with a list of cases for which money was forwarded by the Appellant.

17. He testified that Ksh. 2,907,000/= was changed, and they received new notes in Ksh. 1,000 denominations. Ksh. 4,149,000/= was perforated and returned for cases pending under investigation before the courts. The Appellant handed over Ksh. 200,000/=. Later, the regional manager informed him that the amount that came from Nyeri was Ksh. 600,000/= and not Ksh. 200,000/=.

18. On cross-examination, it was his stated case that the details of money received were in the inventory and not registered. There were no details about the money returned to Nyeri.

19. PW6 was Mayner Ashitiva. A legal officer at EACC who stated that they relied on the Appellant's recovery inventory. She stated that the inventory the appellant presented on

9.1.2020 was fake. Some money was missing and missing money was what was availed by the Appellant. He had taken money from other files and presented it as from his file. According to her, some exhibits were not available. They recommended further investigations. On cross-examination, she stated that there were instances in which counterfeit money was being placed in the files. KRA, for instance indicated that Ksh. 140,000/= was genuine money out of Ksh. 500,000/= presented. The fake money was not returned.

20. PW7 was Mercy Gutari. According to her, the Appellant confirmed to her that he had taken the money to Nairobi. The money was in different envelopes in her office. The witness said that Ksh. 75,000/= had been mixed up.

21. On cross-examination, she testified that there was a case of *Republic v Barnice Kalwe Munanie* that the Appellant handled, involving Ksh. 140,000/=. The Appellant held the amount. She had not called a witness to support the assertion that the Appellant told her that money was lost. No one signed that they had taken money from her cabinet. Ksh. 75,000/= in respect of her case was lost.

22. PW8 was Hillary Cheruiyot Chepkwony. He was an investigator. The Appellant had not given him any money. They withdrew old currency notes of Ksh. 40,000/= to be

taken to Nairobi. The Appellant received the money per his acknowledgement dated 13.9.2019.

23. On cross-examination, it was his case that he did not have a register of cash exhibits. He could not tell how much he had lost. Ksh. 2,000/= was recovered later on. Money could not be used in a different case. He could not tell where Ksh. 40,000/= was.

24. PW9 was No. 92783 PC Josphine Asmit. She relied on her witness statement and the produced exhibits. According to her, she could not recall signing any inventory.

25. PW10 was Lydia Mueni Muoki. She testified that the Appellant was supposed to have Ksh. 62,000/= but he had Ksh. 40,000/=. The Appellant, according to her, had taken exhibits from other cases and presented as his own exhibits. On cross-examination, it was her case that Ksh. 56,000/= was handed to her in cash in 2018. She handed it over to him, but he did not write a response letter. She did not have the auditor's report. The Appellant was given Ksh. 100,000/= in fake currency from Nairobi, Ksh. 100,000/= genuine from the headquarters and Ksh. 100,000/= from the regional office. There was no inventory showing that the Appellant took the money. They did not recommend prosecution.

26. PW11 was No. 235221 Chief Inspector Benard Cheruyoit. He produced his report on the forensic examination of the

signature dated 21.6.2021, and the report by Chief Inspector Susan Wambugu dated 22.10.2021. According to him, the signatures were made by the same person. On cross-examination, he testified that he did not know where the specimen signature came from. He did not know who generated the documents examined. They were computer-generated.

27. PW12 was No. 231178 Chief Inspector Raymond Malel. It was his case that he received an exhibit memo dated 10.1.2020 indicating that there was monetary exhibit not accounted for by the Appellant. On cross-examination, he testified that he did not have access to the EACC Audit report. Exhibit one did not indicate the Appellant's name. The Appellant signed both fake and genuine inventories.

28. The court found the Appellant with a case to answer. He was placed on his defence. Section 211 of the Criminal Procedure Code was complied with. The appellant chose to give sworn evidence.

29. In his defence, he testified as DW1. He stated that he was employed by the EACC as Operations Assistant 2. He testified that anyone could pick the key and open the door. Everyone used to keep their own exhibits. There was an overall exhibit room. The key was kept by Mutahi, a forensic investigator. He could not remember the figure Alfred Kinoti handed to him. It

was in the seventies of thousands. The money was fully used in operations. Roughly, it was Ksh. 76,000/=. Money recovered was Ksh. 15,000/=. He was given Ksh. 56,000/= for operations, and he acknowledged receipt. He handed it over to Mercy Gitari. No audit was produced to show that money was lost. He took Ksh. 200,000/= to Nairobi. There was also Ksh. 40,000/= from the courts. That is what he received. He took the money to Nairobi on 13.9.2019. The money used for the trap was Ksh. 100,000/=. There was no evidence that he was given Ksh. 608,000/=. He was never invited during the investigations.

30. On cross-examination, he testified that he signed Exhibit 8 on 21.1.2020. He maintained that it was not true that any money had been handed over to him. However, he conceded that he signed the memo relating to Ksh. 200,000/=, though he stated that he did not read its contents before signing. He further stated that he was not aware of the memo signed by Mr. Rasugu and denied having received any money from Mr. Kemboi.

Submissions

31. The appellant filed submissions dated 26.09.2025. He submitted that he was acquitted of counts 2-7 and convicted of charges 1, 8, and 9. It was their submission that there was no evidence on how a sum of Ksh. 608,000/= was arrived at.

Further, the witnesses did not say that money was handed over to the appellant. There were no handover notes or memos for money from Mercy and Hillary. They pointed out an indication of Ksh. 536,000/= and no explanation of what this was. Reliance was placed on the case of **Oyona v Republic [2024] KEHC 16743 (KLR)**, in which the court, Adagi J posited as follows:

> 18. To establish a charge of stealing by a servant and to secure a conviction under the above section, the prosecution must prove the following:
>
> - The accused was an employee of the complainant.
> - The property came into the accused's possession while they were employed;
> - The accused dishonestly took the property, defrauding the employer.
>
> 19. Stealing is defined in Section 268 of the Penal Code as taking something capable of being stolen without claim of right, or fraudulently converting property to the use of someone other than the owner.

32. It was submitted that section 106B (4) of the Evidence Act was not complied with. They stated that no certificate was produced as required. They relied on the case of **Peter Waihiga Kabiru & 2 others v Republic [2019] KECA 8 (KLR),** where the court of appeal[**NAMBUYE, SICHALE & KANTAI, JJ.A**] held as follows:_

In a recent case by this Court sitting at Kisumu, **County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board & 6 Others [2015] KLR,** it was held that the provisions of Section 106 B of the said Act were mandatory in nature and that a court should not admit in evidence or rely on manipulated electronic evidence or record. At paragraph 67 of the judgment in relation to production of electronic evidence, it was held that:

> *"....the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that persons activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced."*

In the matter before the trial court, Ruteere did not testify that he had control over the computer; he did not testify how the computer or its output was recorded and how the computer operated during that period, and he did not give any certificate as required by the Evidence Act. We agree with Mr. Wahome, counsel for the 2nd appellant, that it was

wrong for the trial court to rely on that electronic evidence when that evidence had not been properly produced before the trial court. It was wrong for the High Court to rely on the same on the first appeal.

33. They submitted that counts 8 and 9 are defective as they do not disclose an offence. Count 8 was said to be forgery contrary to section 277(d)(i) as read with section 349 of the penal code. Count 9 was uttering a false document under section 353 of the penal code. It was the appellant's submission that there is no section 247(d)(i) of the Penal Code.

34. Reliance was placed on the case of **Wilson Mwangi Wanjohi V Republic** (2018) eKLR:

> "3.It is trite in our jurisdiction that a criminal offence will be created by statute, the common law or international law having the force of law. In other words, a criminal offence must be declared to be so by law. See Article 50(2) (n) of the Constitution of Kenya, 2010. See also the definition of offence in section 4 of the Penal Code.
>
> 4. Section 349 of the Penal Code creates the offence of forgery in the following words:
>
> "349. Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony, and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged, some other punishment is provided, to imprisonment for three years."
>
> Forgery is defined as follows in section 345 of the Penal Code in the following terms"345. Forgery is

the making of a false document with intent to defraud or to deceive."

5. The circumstances that constitute the making of a false document (that is, the definition of making a false document) are set out in section 347 of the Penal Code.

6. Finally, intent to defraud is defined in section 348 of the Penal Code.

7. From the above provisions of the law, it can be seen immediately that making a false document as defined in section 347 of the Penal Code is one of the ingredients of the offence of forgery created by section 349 of the Penal Code and defined by section 345 of the same Code. It is the actus reus of the offence.

8. The other ingredient of the offence of forgery (*the mens rea*) is the intent to defraud or to deceive as defined by section 348 of the Penal Code.

9. Of itself, making a false document does not constitute a criminal offence, and section 347 aforesaid does not create an offence. Similarly, intent to defraud or to deceive does not of 2itself constitute a criminal offence, and section 348 aforesaid does not create an offence. It is only when the two come together, the actus reus and the mens rea, that the offence of forgery, as created by section 349 of the Penal Code, is disclosed."

35. They prayed that the court find that the Respondent did not prove its case beyond a reasonable doubt in Count 1 and Count 8 and 9 were fatally and incurably defective. We pray

that you quash the conviction and set aside the sentences, and the fine paid be refunded to the Appellant.

36. The Respondent filed submissions dated 19.08.2025 and stated that the state proved the three counts beyond a reasonable doubt. They averred that it was not disputed that the appellant was an employee of the complainant. They stated that PW2 testified that the appellant could not account for 22,000/= handed over to him. Further, PW3 testified that Ksh. 608,000/= given to the appellant was not accounted for.

37. They further submitted that the fact that the appellant, in his evidence, admitted to being an employee of the complainant, a sum of Ksh. 608,000/= was given to the appellant, but the appellant accounted for only Ksh. 200,000/=. Further, a sum of Ksh 200,000/= was given to the appellant, but only a sum of Ksh 59,0000/= was accounted for.

38. Further, they stated that the ingredients of the offence of forgery were proved. Reliance was placed on the case of **Joseph Mukuha Kimani v Republic [1983] KEHC 6 (KLR)**.

39. It was thus submitted that the Respondent tendered overwhelming evidence and the case against the Appellant was proved beyond reasonable doubt.

40. On 4.202020, the matter was placed before the Hon. Okuche, where one count was read, wherein the court indicates that the appellant pleaded not guilty. There is no indication of a plea on any other count. The matter was reallocated to Hon. Macharia, who redirected it back to Court 1 for reallocation to the Anti-Corruption Court. The appellant had been charged with one count vide a charge sheet dated 4.2.2020.

Analysis

41. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** 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 different.

42. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of *Mbogo and Another vs. Shah [1968] EA 93* the Court stated:

> "…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

43. The degree need not reach certainty, but it must carry a high degree of probability. It was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR** as doth:

> "What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
> 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility

in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

44. On my reevaluation, the Appellant was convicted on count one on the offence of stealing by a person employed in the public service contrary to Section 280 of the Penal Code.

45. He was also convicted on count 8 on the charge of forgery contrary to Section 247 D(1) as read with Section 349 of the Penal Code, and count 9 on the charge of uttering a false document contrary to Section 353 of the Penal Code. The Appellant was however, acquitted on counts two, three, four, five, six and seven.

46. In the the case of **Oyona v Republic [2024] KEHC 16743 (KLR)**, the court, Adagi J stated as doth:_

> 18. To establish a charge of stealing by a servant and to secure a conviction under the above section, the prosecution must prove the following:
>
> - The accused was an employee of the complainant.
> - The property came into the accused's possession while they were employed;
> - The accused dishonestly took the property, defrauding the employer.

> 19. Stealing is defined in Section 268 of the Penal Code as taking something capable of being stolen without claim of right, or fraudulently converting property to the use of someone other than the owner.

47. To this court, it was common position of the parties that the Appellant was public servant and custodian of monies that came in his possession and that money had indeed been lost. The law does not countenance an illegality without a remedy. Someone had to be accountable for loses. The Respondent maintained that the Appellant was accountable while the Appellant's case was that there was no evidence linking him to the vice as the case against him was not proved.

48. The Appellant was charged with stealing by person employed in public service contrary to section 280 of the *Penal Code* which provides thus: *"If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years."*

49. The evidence of PW3 as corroborated with PW5 and P6 was that the Appellant was the custodian of the money transported to Nairobi for demonetization. There was also produced an inventory for Ksh. 200,000/= to support this assertion. The amount that could not be accounted for was clearly in the custody of the Appellant. I have no basis to doubt the finding

of the trial court.

50. As a public servant, the Appellant had the obligation to account for the monies that passed through his hand. It was improper for him to give explanations implicating his colleagues without evidence. I am unable to find otherwise for the reason also that the forensic reports established the signatures to be appended by the appellant and were credible. The offence of stealing by a person employed in the public service was proved to the required standard.

51. As relates to the offence of forgery, Mativo J in **Caroline Wanjiku Ngugi v Republic [2015] eKLR** held that:

> "Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus the elements of forgery are:-
>
> i. False making of – The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated or engraved.
>
> ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine contents of the document.

iii. Ability to defraud – The document or writing has to look genuine enough to qualify as having ability to mislead others to think it is genuine.

iv. Legal efficacy – the document or writing has to have some legal significance.

v. Intent to defraud – the specific state of mind for forgery does not require intent to steal but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer."

52. Therefore, on forgery and uttering a false document, the court has appraised itself with the evidence of the inventories in exhibits 9 and 11 that formed the bulk of this allegation. The Appellant's case was that he was not the one who signed the inventory. The inventory was dated 11.10.2019. However, credible expert evidence of PW11 and PW12 established that the Appellant signed the inventory dated 11.10.2019. I have no doubt that the charge of forgery and uttering a false document were proved to the required standard. In the case of **KILEE v REPUBLIC [1967] EA 713 at p 717**, it was stated that:

> **The false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: Omar Bin Salem v R [1950] 17 EACA**

158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see Samuels V Republic [1968].

53. Therefore, there is need to prove that the person charged was indeed the one who put ink to paper and created the document deemed a forgery. This is further reaffirmed in **R v Gambling [1974] 3 All ER 479** where the court held that:

> "…'forgery is the making of a false document in order that it may be used as genuine.' This definition involves two considerations: first, that the relevant document should be false; and secondly, that it was made in order that it might be used as genuine. […]
>
> Given […] that each application was 'false' was it made 'in order that it might be used as genuine'? Indeed, what do these words involve in the context of the present case? Clearly they require proof of an intent on the part of the maker of the false document that it shall in fact be used as genuine. We think that they also involve that the untrue statement in the document must be the reason or one of the reasons which results in the document being accepted as genuine when it is thereafter used by the maker. It is this concept which we think is sought to be expressed in the aphorism – as to the usefulness of which views may differ strongly – that the document must not only tell a lie, it must tell a lie about itself. […] If this is correct, then it seems to us to follow that in cases such as the present in which the falsity of a document arises from the use of a fictitious name or signature, or both, then that document is a forgery

only if, as counsel for the appellant contended, having regard to all the circumstances of the transaction, the identity of the maker of the document is a material factor. [..]

In many cases the materiality of the identity of the maker would be so obvious that evidence would be unnecessary: for example, when the document is a cheque or a bill of exchange and the purported signature of the drawer, or endorser, or the acceptor has been written by the someone other than the person whose signature it purports to be. In other cases, such as the present, evidence would be required, and the materiality or otherwise of the identity of the maker of the document must be a matter for the [court]."

54. I equally do not see the manner in which the court failed to consider section 106 B(4) of the Evidence Act on the ground that no certificate was produced. The full text of the relevant Section 106 provides thus:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be

admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period,

in whatever order, of one or more computers and one or more combinations of computers,

then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the

course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

55. The conditions for the production of such evidence were set out in part in the case of **County Assembly of Kisumu & 2 Others vs. Kisumu County Assembly Service Board & 6 Others** [2015] KLR as follows:

> "….the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that persons activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced."

56. The objection was on the basis that the document was not signed, and the trial court overruled the objection. The court properly considered the objections levelled by the Appellant's advocate, and I have no reason to interfere with the finding of the court. Section 106B (4) relates to the proof of electronic records.

57. The Appellant also lamented a harsh sentence. I have already stated that the relevant section provided for 7 years imprisonment. The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

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

58. The trial court fined the Appellant Ksh. 50,000/= for each of the three counts for which he was convicted. For this court to interfere with the sentence, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied, or that, short of these, the sentence itself is so excessive and therefore an error of principle that must be interfered with. In the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

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

59. The court also has to establish whether, in sentencing, the trial court overlooked some material factors. Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

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

60. Therefore, if this court finds that the sentence was manifestly excessive, was illegal, improper, or founded on misrepresentation of material facts, then it will interfere with it. In **Hillary Kipkirui Mutai v Republic [2022] eKLR**, the Court of Appeal stated thus:

> **9. Sentencing is an important aspect of the administration of justice. Noting that sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was**

manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts.

61. Consequently, I do not find the basis to interfere with the sentence meted out by the trial court, which I find most lenient.

Determination

62. The upshot of the foregoing is that I make the following orders: -

a) The appeal is devoid of merit and is dismissed.

b) Right of appeal 14 days.

c) File is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **17th** day of **February, 2026**. Judgment delivered physically in open court.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms Kaniu for the State

Mr. Wahome Gikonyo for the Appellant

Appellant present

Court Assistant – Michael