



**Aseneka & 2 others v Republic (Criminal Appeal E018, E019 & E020 of 2025  
(Consolidated)) [2026] KEHC 1893 (KLR) (15 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 1893 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E018, E019 & E020 OF 2025 (CONSOLIDATED)**

**JM OMIDO, J  
JANUARY 15, 2026**

**BETWEEN**

**REUBEN ANDOLO ASENEKA ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH MBUGUA MWANGI ..... 2<sup>ND</sup> APPELLANT**

**MUTAI MICAH ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgement and Conviction of Hon. D.O. Onyango, Chief Magistrate, delivered on 10th February, 2025 and subsequent sentences imposed on 18th February, 2025 in Kisumu MCCR No. E328 of 2023 Republic v Reuben Andolo Aseneka & 2 others)*

**JUDGMENT**

1. This consolidated appeal emanates from the judgement and conviction of Hon. D.O. Onyango, Chief Magistrate delivered on 10<sup>th</sup> February, 2025 and subsequent sentences imposed on 18<sup>th</sup> February, 2025 in Kisumu MCCR No. E328 of 872 of 2023 Republic v Reuben Andolo Aseneka & 2 others.
2. The Appellants herein, Reuben Andolo Aseneka, Joseph Mbugua Mwai and Mutai Micah were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons respectively, before the trial court.
3. The three Appellants were charged in the trial court as follows:

**Count I:**

Charge: Conspiracy to commit a felony contrary to Section 393 of the Penal Code, Cap 63 Laws of Kenya.

Particulars of the offence: On the 8<sup>th</sup> of September, 2022 at Kenya Pipeline Company Kisumu terminal in Kisumu Central Subcounty within Kisumu County, jointly with others not before



the court, the three Appellants conspired to steal 13,852 litres of motor spirit premium (MSP), loaded on road tanker registration number KBJ 564D/ZD 1473 valued at Ksh.2,431,178/-, the property of Oil Marketers Companies (OMC), which property was in the custody of Kenya Pipeline Company.

**Count II:**

Charge: Stealing contrary to Section 268 as read with Section 275 of the Penal Code, Cap 63 Laws of Kenya.

Particulars of the offence: On the 8<sup>th</sup> of September, 2022 at Kenya Pipeline Company Kisumu terminal in Kisumu Central Subcounty within Kisumu County, jointly with others not before the court, the three Appellants stole 13,852 litres of motor spirit premium (MSP), loaded on road tanker registration number KBJ 564D/ZD 1473 valued at Ksh.2,431,178/-, the property of Oil Marketers Companies (OMC), which property was in the custody of Kenya Pipeline Company.

**Count III:**

Charge: Illegally interfering with felfacs and accuload being apparatus of Kenya Pipeline Company contrary to Section 99(1)(d) as read with Section 99(1)(ii) of the [Petroleum Act](#), No. 2 of 2019, 63 Laws of Kenya.

Particulars of the offence: On the 8<sup>th</sup> of September, 2022 at Kenya Pipeline Company Kisumu terminal in Kisumu Central Subcounty within Kisumu County, without lawful excuse, the 1<sup>st</sup> and 3<sup>rd</sup> Appellants interfered with fuelfacs and acculoads by illegally changing meter factor from 0.99532 to 0.65806 leading to the excess loading of 13,852 litres of motor spirit premium (MSP), onto the road tanker registration number KBJ 564D/ZD 1473 valued at Ksh.2,431,178/-, the property of Oil Marketers Companies (OMC), which property was in the custody of Kenya Pipeline Company.

**Count IV:**

Charge: Unauthorized access to computer system contrary to Section 14(1) of the Computer Misuse and Cybercrime Act No. 5 of 2018 Laws of Kenya.

Particulars of the offence: On the 8<sup>th</sup> of September, 2022 at an unknown place, being an employee of Kenya Pipeline Company as Principal Technician, Electrical Station, Nairobi terminal, the 3<sup>rd</sup> Appellant illegally and remotely gained unauthorized access to the fuelfacs system of the instrumentation and control section, computer system for Kenya Pipeline Company Kisumu terminal leading to the unauthorized change of meter factor from 0.99532 to 0.65806 hence leading to the excess loading of 13,852 litres of motor spirit premium (MSP), onto the road tanker registration number KBJ 564D/ZD 1473 valued at Ksh.2,431,178/-, the property of Oil Marketers Companies (OMC), which property was in the custody of Kenya Pipeline Company.

**Count V:**

Charge: Unauthorised access to computer system contrary to Section 14(1) of the Computer Misuse and Cybercrime Act No. 5 of 2018 Laws of Kenya.

Particulars of the offence: On the 8<sup>th</sup> of September, 2022 at Kenya Pipeline Company Kisumu terminal in Kisumu Central Subcounty within Kisumu County, the 1<sup>st</sup> Appellant temporarily infringed security measures knowing that such access is unauthorized by pressing the accuload meter and changing it from 0.99532 to 0.65806 leading to the excess loading of 13,852 litres of



motor spirit premium (MSP), onto the road tanker registration number KBJ 564D/ZD 1473 valued at Ksh.2,431,178/-, the property of Oil Marketers Companies (OMC), which property was in the custody of Kenya Pipeline Company.

**Count VI:**

Charge: Being in possession of petroleum product contrary to Section 99(1)(e) as read with Section 99(1)(ii) of the [Petroleum Act](#) No. 2 of 2019 Laws of Kenya.

Particulars of the offence: On the 8<sup>th</sup> of September, 2022 at Kenya Pipeline Company Kisumu terminal in Kisumu Central Subcounty within Kisumu County, the 2<sup>nd</sup> Appellant illegally acquired petroleum product amely motor spirit premium (MSP), to wit 13,852 litres loaded onto road tanker registration number KBJ 564D/ZD 1473 valued at Ksh.2,431,178/-, the property of Oil Marketers Companies (OMC), which property was in the custody of Kenya Pipeline Company.

4. All the three 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 18 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 three Appellants were charged with and they were all convicted on the same. The learned trial Magistrate then went on to sentence the three 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 learned trial Magistrate erred in law and in fact by convicting the Appellants where there was no evidence to prove the charges beyond reasonable doubt.
  - b. The learned trial Magistrate erred in law and in fact by failing to properly analyze the evidence of the prosecution witnesses.
  - c. The learned trial Magistrate erred in law and in fact by ascending into the arena of the case and proceeding to fill in gaps in the prosecution case.
  - d. 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.
  - 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 respective sentences that were imposed by the learned trial Magistrate were manifestly excessive.
8. The Appellants propose that their respective appeals be allowed, the respective convictions be quashed and the respective sentences imposed by the trial court be set aside.
9. This court directed that the appeal be canvassed by way of written submissions. The three 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. The court observed as follows in that case:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] EA 336) 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 (*Shantilal M. Ruwala v R* [1957] EA 570). 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; it must make its own findings and draw its own 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.”

11. The duty of the first appellate court in a criminal case was prior to *Okeno* addressed in the case of *Pandya v Republic* [1957] EA 336, where the court 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 Chief Inspector of Police Abel Onyapidi (PW1), who told the trial court that he was the officer in charge at Crime Scenes Investigations unit in Kisumu and a gazette crimes scenes officer. The witness recalled the events of 16<sup>th</sup>



- March, 2023 and told the trial court that on that day at about 2pm, accompanied by Chief Inspector of Police Fredrick Baraza (PW3) and Inspector of Police Owiti, he visited the Kenya Pipeline Company (hereinafter referred to as “KPC”) operation area and proceeded to document by photographing the scene, that was the subject of investigations.
15. PW1 told the court that he took 45 photographs of the scene, which he produced as PExh1 (i to xlv). The officer also produced as PExh2 the accompanying certificate. Among the items that PW1 photographed was motor vehicle registration number KBJ 564D with a trailer registration number ZD 1473.
  16. Upon being cross-examined by learned counsel for the Appellants, the witness told the trial court that he did not know the nature of the investigations that were being conducted and the charges that the Appellants faced, adding that his role was limited to documenting the scene.
  17. Robert Ojukwu (PW2) was the second prosecution witness. In his testimony before the trial court, the witness stated that he worked at KPC Kisumu depot as the chief loading technician and was in charge of the loading operations which entailed loading and clearing of trucks.
  18. PW2 explained to the trial court the process of loading at the KPC depot. He stated that a customer would first make a request or order to the oil marketing company and the driver of the motor vehicle that was to be loaded would then take the vehicle to the safety inspection bay and the same, once inspected and cleared by a safety officer and the requisite procurement done, would queue.
  19. The witness stated that the order would be viewed by the accountants who would then proceed to process it in the SP system, whereafter the same would then be moved to the dispatch office. At the dispatch office, a slip known as filling advice note (FAN) would then be prompted and the filling advise would be taken to the gate, depending on availability of the particular product. The witness further explained that the driver of the vehicle was able to monitor the processing of the order via phone or through provided screens.
  20. PW2 went on to explain that at that juncture, the driver would then collect the slip and take the vehicle to the entrance gate, where it would again be inspected for safety, and then taken to the loading bay, where loading would then be done by an operation staff of KPC. After loading, the driver would then receive the requisite bill of lading, clears with the Kenya Revenue Authority, which had an office within the premises and the driver would then be allowed to drive off.
  21. The trial court record bears it that the court moved to the locus in quo at KPC where it was taken through the process.
  22. PW2 identified at the scene motor vehicle registration number KBJ 564D and trailer registration number ZD 1473 (produced as PExh3).
  23. The witness recalled the events of the month of August, 2022. He told the trial court that there was a large discrepancy between the volume of super petrol that had been loaded onto the motor vehicle and the volume that left the tank at KPC. He decided to do an analysis of previous loadings. He explained that on 18<sup>th</sup> August, 2022, Galana Energies Limited made an order/request for motor vehicle registration number KBJ 564D and trailer registration number ZD 1473, which had a capacity of up to 42,000 litres to be loaded 25,000 litres of super petrol. He asked his colleague Benard Nalianya (PW6) to keep watch and confirm that the correct amount of super petrol was loaded.
  24. The witness stated that the loading proceeded and when the same was completed, he asked the driver of the vehicle to open the three fuel compartments. The witness and his colleagues then proceeded to check the compartments and found that the fuel that had been loaded appeared to be more than that



- had been ordered. The vehicle was properly sealed and remained at the premises until the next day as it was late and darkness had set in. The driver handed over to PW2 the vehicle's calibration chart (PEXh6) and dipsticks (PEXh5 a to c).
25. PW2 told the trial court that on the following day, in the company of Moses Tarus (PW8), Benard Nalianya (PW6), a representative of Galana Energies Limited (hereinafter "Galana" or "Galana Energies") and the 2<sup>nd</sup> Appellant, whom the witness said was the driver of the vehicle, measurements of the fuel in the three compartments was done and the first compartment had 4,641 extra litres, while the second and third had 4,672 and 4,539 extra litres, respectively, making a total of 13,852 extra litres of super petrol, above the 25,000 litres that were ordered. The matter was referred to Martin Makokha, the security manager at KPC, who in turn referred the same to the police. The witness prepared a report/summary (PEXh7) of the measurements
  26. On being cross-examined, the witness told the trial court that the fuel belonged to oil marketers. He explained that the duties of the safety checks included ensuring that the truck was empty before loading proceeded. He stated that as per the FAN, compartment 1, 2 and 3 were to be loaded with 7,000 litres, 9,000 litres and 9,000 litres respectively. The witness stated that there were CCTV cameras at the depot and that the same were at the time working.
  27. The third prosecution witness was Chief Inspector of Police Fredrick Baraza (PW3) who testified and identified the motor vehicle registration number KBJ 564D and trailer registration number ZD 1473, which he stated he took possession of on 16<sup>th</sup> March, 2022 from Nelson Makokha, the officer in charge of security at KPC Kisumu depot. Witness identified an inventory (PEXh4) that was prepared by Makokha. He explained that there were noticeable leaks in the 1<sup>st</sup> and 3<sup>rd</sup> compartment of the truck.
  28. PW3 explained that at the time he took custody of the vehicle and trailer, the trailer was loaded with 30,307 litres of motor spirit premium, which he stated was also known as super petrol. He stated that he also took custody of three calibration sticks (PEXh5 a to c) and chat (PEXh6) that were used to measure the contents of the trailer tank, which he said were unique to the vehicle.
  29. It is instructive from the record of the trial court that the contents of the vehicle were measured and the same was found to have (as per the trial court) 34,760 litres of petrol.
  30. The witness stated that in the course of investigations, he was informed by Alphonse Mwakulomba, the in-charge safety at the Kisumu depot that motor vehicle registration number KBJ 564D/ZD 1473 that was being driven by the 2<sup>nd</sup> Appellant was cleared for loading of 25,000 litres of super petrol. The vehicle was then checked by Elizabeth Akinyi (PW5) and then proceeded to the loading island that was being manned, as per the duty roster (PEXh16) by the 1<sup>st</sup> Appellant, after overtaking another vehicle. The officer produced the occurrence book (OB) (PEXh17) that indicated that the 1<sup>st</sup> Appellant checked in at 1220hrs and checked out at 1930hrs on 8<sup>th</sup> September, 2022.
  31. The officer stated that he recorded statements including that of the 1<sup>st</sup> Appellant, who indicated that his analysis had revealed anomalies in the loading of the vehicle. He stated that he received the system audit report and CCTV analysis report, which he produced as PEXh18 and PEXh19 respectively, and the CCTV compact discs as PEXh20.
  32. PW3 was cross-examined and stated that he was not aware that calibration and measurement of the contents of the vehicle were supposed to be accompanied with a certificate verifying the same, which was supposed to be sealed.
  33. On being cross-examined further, PW3 stated that during his investigations, the owner of the vehicle, whom he did not name, indicated that the vehicle entered the KPC premises while loaded with some



- fuel and that he did not obtain any statement from the same person rebutting that position. He however contradicted himself by stating that he did not find out who the owner of the vehicle was.
34. On being questioned further, PW3 told the trial court that he obtained call logs from mobile phone service providers that showed that the three Appellants had been communicating. He again contradicted himself when cross-examined further by stating that from the call logs, there was no evidence of direct communication by or between the three Appellants.
  35. The witness stated that he did not record the statement of the driver whose vehicle was overtaken by the 2<sup>nd</sup> Appellant's vehicle.
  36. On being re-examined, the witness stated that calibration, measurement and sealing was done in the presence of officials of KRA, KPC and Galana Oil Marketers.
  37. The prosecution called Alphonse Tolle Mwakulomba as PW4. In his testimony, the witness told the trial court that he was a senior safety assistant at KPC Kisumu depot and that on 8<sup>th</sup> September, 2022, he inspected motor vehicle registration number KBJ 564D and trailer registration number ZD 1473 using a check list (PEXh8) that had 23 items and confirmed that the same was fit to be loaded with fuel. In particular, he confirmed that the three compartments were empty by opening the valves. He then cleared the vehicle for the next department.
  38. Upon cross-examination, the witness stated that the completion of the inspection form was done through the computer system and not manually.
  39. PW5 was Elizabeth Akinyi Gor, a security personnel at KPC Kisumu depot. In her evidence, the witness told the trial court that as per FAN ticket for motor vehicle registration number KBJ 564D and trailer registration number ZD 1473, the driver of the vehicle was Joseph Mbugua.
  40. The witness, without particularizing the date, (simply stating September, 2022) stated that she confirmed that the driver had the appropriate attire and further that the vehicle had no dangerous weapons and that it was properly sealed. The vehicle was then allowed into the KPC premises and that she left it there when she retired from work later that day. She stated that her duties were in respect of security matters and not the safety or fitness of the vehicle to carry fuel.
  41. Benard Nalianya Wafula testified as the 6<sup>th</sup> prosecution witness (PW6) and told the trial court that he was an employee of KPC as a loading supervisor and his duties included managing the loading process.
  42. The witness told the court that on 8<sup>th</sup> September, 2022, PW2 told him that motor vehicle registration number KBJ 564D and trailer registration number ZD 1473 was of interest as there had been noted discrepancies on the amount of petrol previously loaded. PW2 told PW6 to ascertain the amount of fuel that the vehicle would draw on that day.
  43. PW6 explained that the vehicle had an order of 25,000 litres of super petrol and was later that day loaded. As it was getting dark, PW5 put off the process to the next day and ensured that the driver sealed its three compartments. KPC's security officer Martin Makokha (PW7) was mandated with ensuring the security of the vehicle that night.
  44. The witness stated that on the next day, the fuel in the vehicle was measured and found to be 38,352 litres. It had an extra load of 13,852 litres. The vehicle was sealed and the matter taken over by investigators.
  45. Upon being cross-examined, PW6 stated that he could not tell how the extra petrol of 13,852 litres came about. He stated that the duty of the 1<sup>st</sup> Appellant, who was also an employee of KPC, was to key into the system the contents of the FAN ticket.



46. The seventh prosecution witness was Martin Wanyonyi Makokha (PW7), a security officer at KPC Kisumu depot. PW7's evidence before the trial court was that on 8<sup>th</sup> September, 2022, he received an email from PW6 allowing him to detain motor vehicle registration number KBJ 564D and trailer registration number ZD 1473 so that the same would not accrue overnight charges.
47. The witness explained that on the next morning, PW6 requested him to accompany him to the latter's office, where PW2 joined them and the two briefed the witness that the vehicle had been found to be carrying an excess of 13,852 litres. PW7 requested that another measurement be done, and that the same was done in the presence of the 2<sup>nd</sup> Appellant who was the driver of the vehicle, PW6 and one Leonard Okango from Galana and the excess confirmed. PW7 reported the matter to KPC security office.
48. On being cross examined, PW7 stated that he was not present when the vehicle was sealed on 8<sup>th</sup> September, 2022. The witness stated that he had access to CCTV footage of 8<sup>th</sup> September, 2022.
49. The 8<sup>th</sup> prosecution witness was Moses Kipkemei Tarus (PW8), an engineer at KPC Kisumu depot, who told the trial court that on 8<sup>th</sup> September, 2022, he and PW6 were requested by PW2 to inspect, after loading, motor vehicle registration number KBJ 564D and trailer registration number ZD 1473, which was to be loaded with 25,000 litres of super petrol. As it was dark, the exercise was pushed to the next day.
50. PW8 stated that on 9<sup>th</sup> September, 2022, in the presence of the driver of the vehicle – the 2<sup>nd</sup> Appellant – and a representative from Galana, measurements were taken and the vehicle found to have an excess of 13,852 litres of super petrol, yet the KPC system indicated that 25,000 litres had been loaded. The truck was detained and the matter handed over to KPC's security department.
51. PW9 was Catherine Kushakwenda, a clerk at KPC Kisumu depot. The witness identified the FAN ticket (PEXh8) that was prepared for the transaction, which she printed out and gave to her supervisor Nathan Otieno. She explained that the contents of the ticket included the following: Name of the oil marketer – Galana Oil Company. Customer – Jamhuri Energy. Destination – Jamhuri Energy. Name of the driver – Joseph Mbugua. Registration number of the vehicle: KBJ 564D and trailer registration number ZD 1473. The product to be carried: super petrol. The product capacity: 7,000 litres in the first compartment, 9,000 litres in the second compartment and 9,000 litres in the third compartment. Owner of the vehicle/carrier – Njenege Company. Shipment number – 1001422728. Certifications – none.
52. The witness stated that there were no Energy and Petroleum Regulatory Authority (EPRRA) certifications for the driver and the vehicle.
53. The witness, on being cross examined, stated that she did not confirm if the vehicle had excess fuel.
54. Anne Cherageni testified as the 10<sup>th</sup> prosecution witness (PW10) and told the trial court that she worked at KPC Kisumu station as a clerk and her duties included generating bills of lading (BOLs) which she would then forward to the requisite oil marketers.
55. With regard to this case, the witness told the court that on 8<sup>th</sup> September, 2022, PW9 presented to her the particulars of a motor vehicle, being registration number KBL 564D and asked her not to release the BOL and to alert him once the FAN ticket was presented. She stated that the driver of the vehicle presented to her the FAN ticket, which she immediately took to PW6, who later asked her to prepare the BOL (PEXh10), which she did. She also prepared a certificate for the same (PEXh14).



56. Upon cross-examination, PW10 stated that the BOL captured, inter alia, the amount of fuel in each compartment and that its contents had to correspond with those of the FAN ticket.
57. Martin Peter Ogendo Ogolla (PW11), the chief technician instrumentation and control at KPC testified as the prosecution's eleventh witness.
58. The witness recalled the events of 8<sup>th</sup> September, 2022 and told the trial court that on that day he was informed by PW2 on the discrepancy in the loading of motor vehicle registration number KBJ 564D and trailer registration number ZD 1473, which had an excess of 13,582 litres above the required 25,000 litres. Upon checking the fuelfac system, PW11 found nothing unusual as the same showed that 25,000 litres had been dispensed from the KPC tanks. He however noted that the fuelfac system had been off from 1815hrs.
59. The witness further told the trial court that on 11<sup>th</sup> September, 2022, he checked the transaction and audit logs of the accuload that was connected to the fuelfac system and noted that the system had been disabled at about 1814hrs on 8<sup>th</sup> September, 2022. He prepared a system analysis report on his findings (PEXh10) and a certificate for the same (PEXh11). The witness explained that he noted from the system that at 1814hrs and 28 seconds, there was a parameter change from 0.99532 to 0.65805 and at 1848hrs and 54 seconds, a reversal of the parameter change was done. The changes were done through a key pad at the accuload.
60. Upon being cross-examined, Pw11 told the trial court that PEXh11, whose date was stated as 5<sup>th</sup> October, 2022 did not give the dates of the activities it related to. He stated that he did not have exclusive access to the system, adding that several other persons, whose names he did not readily have, had access. The witness stated that access to the system was assigned by Engineer Quincy Ongondo. The witness further stated that there were no electronic footprints in the system and one could not therefore be able to tell who effected the changes.
61. The twelfth prosecution witness was Geoffrey Omeke Mosongo (PW12), an ICT officer at KPC headquarters in Nairobi.
62. In his testimony before the trial court, PW12 stated that on 15<sup>th</sup> September, 2022, on the basis of directions from his superiors, he went to the KPC Kisumu depot and joined PW11 whereby the two proceeded to analyze the system, its check point firewalls and server and obtained logs and other data. A report (PEXh10) was prepared to that effect. The witness also prepared his certificate on the report (PEXh12).
63. The witness explained that the system was designed in such a way that for one to access it, a VPN was required, then log in using a username and a password. The authentication was done through firewall.
64. The witness told the trial court that from the system, there was a request to log in done by Micah Mutai (the 3<sup>rd</sup> Appellant) on at 1654hrs and 24 seconds and the same successfully logged in until 1931hrs and 31 seconds on 8<sup>th</sup> September, 2022. The witness stated that the log in was done by the 3<sup>rd</sup> Appellant vide the IP address 172.29.10.57, who then proceeded to the Ps28ff server which had the IP address 172.18.17.111.
65. PW12 further explained that the system showed that the 3<sup>rd</sup> Appellant made changes to the system while logged in.
66. PW12 was cross-examined and told the trial court that he did not have exclusive access to the firewall asset log A05064035 and the CCTV server.



67. The witness stated that his certificate (PEXh12) only covered the system IP addresses but did not capture the events of 15<sup>th</sup> September, 2022. He stated that the system had 5 administrators who had the capacity of assigning rights into the system, adding that the assignments were not included in the report (PEXh10).
68. The witness further stated that the report did not indicate the IP address of the gadget that the 3<sup>rd</sup> Appellant used. He stated that the username and password were personal to the 3<sup>rd</sup> Appellant and denied that he, or any other person hacked the 3<sup>rd</sup> Appellant's account and explained that if there was a hacking incident, a real time alert would have been sent through the system.
69. Justus Ondieki Karori testified as PW13 and told the trial court that he worked with KPC Kisumu depot as an accounts assistant. He stated that on 8<sup>th</sup> September, 2022, he received loading instruction order no. 11000091501 (PEXh13) through the system for motor vehicle registration number KBJ 564D/ZD 1473 for 25,000 litres of motor spirit premium or super petrol and posted it to the next level for further processing.
70. The witness, on being cross-examined stated that he did not find any anomaly with the order and that he did not handle the FAN ticket (PEXh8).
71. Elnather Kipng'eno, a technician at KPC was PW14. His evidence before the trial court was that he received the FAN ticket (PEXh8) and handed it over to Elizabeth Keya of security department. He stated that there was no anomaly in the FAN ticket.
72. The 15<sup>th</sup> prosecution witness was Leonard Okango (PW15), an operations manager with Galana Energies, a company that dealt with and traded in petroleum products.
73. The witness told the trial court that on 8<sup>th</sup> September, 2022, Galana received an order from its customer Jamhuri Energy through loading instructions or a local purchase order (LPO) (PEXh13) and the same was processed. The customer requested for 25,000 litres of super petrol. PW15 forwarded the LPO to KRA for verification and then put it through the KPC system for processing. He was later informed by PW2 that the vehicle that was to collect the fuel had been found to hve excess fuel of over 13,000 litres.
74. On being cross-examined, PW15 stated that he was not present when measurements of the vehicle's contents were taken on 8<sup>th</sup> September, 2020 but that he was present on the next day when dipping was done. He said that he saw seals that were intact but added that the sealing was not done in his presence. Galana, he said, did not suffer any losses.
75. The prosecution called Pius Ojwang Okango (PW16), a director of Jamhuri Energy as the sixteenth witness. The witness told the trial court that on 8<sup>th</sup> September, 2022, he received a call from his client one Kevin Nderitu, who placed an order for 25,000 litres of super petrol. The witness contacted Galana Energies, an oil marketer for the fuel and Galana provided a vehicle for the fuel. The witness later learnt that the vehicle, whose driver was the 2<sup>nd</sup> Appellant, was found with excess fuel of over 13,000 litres.
76. The witness was shown the BOL (PEXh9) and stated on cross-examination that the document showed that 24,733 litres of fuel were loaded.
77. Major (Ret.) Isaac Mati Wanderi (PW17) testified as the prosecution's seventeenth witness. He told the trial court that he worked with KPC as a senior pipeline wayleave officer and acting security officer and head of investigations.
78. PW17's brief testimony was that he received a complaint on 9<sup>th</sup> September, 2022, he received a report that motor vehicle registration number KBJ 564D/ZD 1473 had been loaded with excess fuel and immediately informed Captain John Kiptoo to visit the Kisumu depot to conduct investigations,



alongside PW7. He later joined the two together with a technical team including PW12 one Martin Opiyo. Upon conclusion of internal investigations, the matter was referred to the police.

79. The last prosecution witness that the prosecution called was Emily Wanjiku Thathi (PW18), a senior human resource officer at KPC, whose evidence before the trial court was that the 1<sup>st</sup> and 3<sup>rd</sup> Appellants were permanent and pensionable employees of KPC. The 1<sup>st</sup> Appellant was employed on 10<sup>th</sup> January, 1996 and terminated on 11<sup>th</sup> April, 2023 while the 3<sup>rd</sup> Appellant was employed on 3<sup>rd</sup> November, 2016 and terminated on 11<sup>th</sup> April, 2023. The witness told the trial court that the 3<sup>rd</sup> Appellant's station was terminal L at KPC Nairobi.
80. The prosecution case was closed at that stage. In the trial court's considered ruling that was rendered on 25<sup>th</sup> June, 2024, the learned trial Magistrate, found that a prima facie case has been established against all the three Appellants on all the respective charges and each of the three was placed on his defence.
81. The three Appellants called one common witness, Kevin Nderitu Mwangi (DW1), who told the trial court that he was a businessman who dealt with petroleum products as an intermediary and who sourced for the products for his customers from Jamhuri Energy, which entity obtained the same from KPC through Galana Energies.
82. The witness told the trial court that he knew the 2<sup>nd</sup> Appellant as he had worked with him since the year 2019. He stated that on 6<sup>th</sup> September, 2022, he placed an order for 22,000 litres of fuel to be delivered to a client in Mbita and paid Ksh.3,720,000/- to Jamhuri Energy and the same was loaded on 6<sup>th</sup> September, 2022. The witness produced a receipt dated 6<sup>th</sup> September, 2022 as DExh1.
83. DW1 further explained that the 2<sup>nd</sup> Appellant offloaded 10,000 litres as the client did not have sufficient storage space, leaving 14,000 litres in the vehicle, which had a capacity of 42,000 litres. As there was a looming fuel shortage that would affect the prices which DW1 wanted to take advantage of and maximize profits as prices would soar, he ordered for another 25,000 litres from Jamhuri Energy on the evening of 6<sup>th</sup> September, 2022. The order, DW1 explained, was called "flybooking" as the same was made without payment being made. The 2<sup>nd</sup> Appellant was then asked to collect the fuel from KPC Kisumu depot.
84. DW1 told the trial court that on 8<sup>th</sup> September, 2022, the 2<sup>nd</sup> Appellant confirmed his arrival at KPC Kisumu following which DW2 proceeded to Jamhuri Energy and paid for the order. He produced a remittance advise (DExh2) and bank transfer (DExh3) for Ksh.3,900,000/- and a bill of lading (DExh4). That later on that day, the 2<sup>nd</sup> Appellant informed him that there was a problem at the depot because of the extra 14,000 litres of fuel that was in the vehicle and that the vehicle had remained at the depot.
85. On being cross-examined, DW1 told the trial court that he did not visit the KPC depot at Kisumu and that he had never witnessed the process of fuel loading. He stated that the amount of Ksh.3,900,000/- was paid to Toba Petrol Limited and that Jamhuri Energy had an account with Toba. He stated that DEXh4 was in respect of the order that the 2<sup>nd</sup> Appellant was to collect on 8<sup>th</sup> September, 2022.
86. The 1<sup>st</sup> Appellant testified as DW2 and told the trial court that prior to his arrest, he worked with KPC Kisumu depot as a senior technician operator.
87. DW1 told the court that on 8<sup>th</sup> September, 2022, he was on duty for the afternoon shift that ran from 1200hrs to 2000hrs. He took over the shift at 1220hrs and embarked on controlling the drivers' access to the loading parking area on island 3 with his colleague Titus Kimutai manning island 1 while his other colleague Kizito Wanyole was on island 2. Upon conducting all necessary steps and confirming the documentation which included the FAN ticket (PExh 8) and confirmation from the



- system, motor vehicle registration number KBJ 564D/ZD 1473 was loaded with 25,000 litres of super petrol immediately after another vehicle with six compartments was loaded with the same fuel product.
88. The 1<sup>st</sup> Appellant explained that cellphones were not permitted at the the loading island areas as they could ignite fire and that one could not, therefore, communicate on phone while at that area.
89. DW1 stated that he finished his shift on 8<sup>th</sup> September, 2022 at about 1930hrs and left the station. The next day, he reported for work at 0350am for the morning shift and went to the loading island area where he worked from up to 1300hrs and left. He was summoned back to work on the same day at 1630hrs and recorded a statement. At about 1730hrs, he was informed that he was under arrest.
90. On being cross examined, the 1<sup>st</sup> Appellant admitted that he was the one who loaded motor vehicle registration number KBJ 564D/ZD 1473 on island 3 after confirming the details of the FAN ticket.
91. The 2<sup>nd</sup> Appellant testified as DW3 and told the trial court that he was the owner and driver of motor vehicle registration number KBJ 564D/ZD 1473 and that on 6<sup>th</sup> September, 2022, DW1, whom he referred to as a business colleague, made an order for 24,000 litres of super petrol through Jamhuri Energy. He proceeded to the KPC Kisumu depot and the fuel was loaded onto his vehicle. He then took the fuel to Mbita where 10,000 litres were off loaded and 14,000 litres remained in the vehicle as the customer at Mbita did not have sufficient storage.
92. DW3 explained further that DW1 made another order of 25,000 litres and the two agreed that DW3 would proceed to the Kisumu depot to collect the fuel with the 14,000 litres still on board, as the vehicle had capacity of 42,000 litres. He stated that on 8<sup>th</sup> September, 2022, he proceeded to the KPC Kisumu depot where his vehicle was allowed in with the 14,000 litres and upon all checks and procedures being undertaken, DW2 loaded his vehicle with the 25,000 litres of super petrol. He was then told by PW2, PW6 and PW8 that there was need to measure the fuel in his vehicle.
93. The 2<sup>nd</sup> Appellant produced as DExh5 and DExh 6 a copy of a sample gate pass that was issued at the KPA Kisumu depot and a KRA certificate.
94. Upon being cross-examined, DW3 said that on 7<sup>th</sup> September, 2022, his vehicle was loaded with 24,000 litres of fuel (8,000 litres in each compartment) and that he proceeded to Mbita where he offloaded 10,000 litres at a petrol station, leaving 14,000 litres in the vehicle. DW3 told the trial court that PW4 inspected his vehicle on 8<sup>th</sup> September, 2022 and cleared him and allowed him to proceed with the 14,000 litres of fuel in the vehicle. He stated that he did not know the quantity of fuel in each compartment. The witness stated that while DExh5 read a quantity of 24,000 litres, DExh6 indicated 23,759 litres but explained that sometimes there were minor discrepancies occasioned by factors such as fuel density. He stated that he did not have the FAN for 6<sup>th</sup> September, 2022 as the FAN documents were retained at the KPC depot loading bay.
95. The 3<sup>rd</sup> Appellant testified as DW4 and told the trial court that he worked with KPC as a principal technician electrical before his apprehension.
96. The 3<sup>rd</sup> Appellant stated that he worked with artisans in the course of his duties and his work involved, among others, checking generator pumps, switch gears and frequency drivers. He stated that he used screw drivers, testers and other gadgets for measuring meters. He stated that he did not have an official cell phone but had been issued with a laptop, which was monitored.
97. The 3<sup>rd</sup> Appellant explained that his laptop and two cell phones were confiscated on 23<sup>rd</sup> September, 2022 by PW17 a security officer at KPC. He was informed that the laptop had been used to access the system in Kisumu depot. He was later informed that no such access had been made using the laptop.



- He stated that there were no servers at the electrical department where he worked and that he could therefore not have access to the same.
98. On being cross examined, DW4 stated that it was not possible to have remote access to the system at Kisumu without being authorized.
99. On being re-examined, DW4 stated that his footprints were not identified as having stepped into the system and that the ICT department had software that restricted access to the system.
100. The defence case was closed at that stage.
101. Upon considering the evidence of the 18 prosecution witnesses, the exhibits produced and the three Appellants' sworn defences, the evidence of their witness (DW1) and the submissions filed by the parties, the learned trial Magistrate found that the prosecution had satisfied all the ingredients of all the counts and the three Appellants were convicted on all the respective charges that each of them was faced with.
102. The Appellants were subsequently sentenced as follows: In respect of Count I, each of the three Appellants was fined Ksh.100,000/- in default to serve 12 months imprisonment. In respect of Count II, each of the three Appellants was fined Ksh.100,000/- in default to serve 12 months imprisonment. In respect of Count III, the 1<sup>st</sup> and 3<sup>rd</sup> Appellants were each fined Ksh.10,000,000/- in default to serve 5 years imprisonment. In respect of Count IV, the 3<sup>rd</sup> Appellant was fined Ksh.100,000/- in default to serve 12 months imprisonment. In respect of Count V, the 1<sup>st</sup> Appellant was fined Ksh.100,000/- in default to serve 12 months imprisonment. In respect of Count VI, the 2<sup>nd</sup> Appellant was fined Ksh.5,000,000/- in default to serve 5 years imprisonment.
103. 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.
104. The three Appellants preferred the instant consolidated appeals, being aggrieved by the convictions and sentences. The appeal proceeded by way of written submissions.
105. 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.
106. Having outlined the factual and procedural history of this appeal, 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 three Appellants were convicted on beyond reasonable doubt.
107. The principal questions for resolution are:
- a. Whether the prosecution proved each element of the offences beyond reasonable doubt.
  - b. Whether the evidence was internally consistent and legally sufficient.
  - c. Whether the learned trial Magistrate properly analyzed the defences of the Appellants.
  - d. Whether there was impermissible descent into the arena of litigation by the trial court.



- e. Whether the sentences imposed were lawful and proportionate having regard to applicable sentencing jurisprudence under the [Petroleum Act](#) No. 2 of 2019 and well-established criminal sentencing principles.
108. The evidence adduced at trial was voluminous, including testimony from 18 prosecution witnesses, documentary exhibits, system logs, calibration charts and scene photographs. Despite its quantity, the weight and quality of the evidence must be judged by its coherence, consistency and ability to exclude reasonable alternative hypotheses of innocence.
109. It is not in dispute that upon measurement undertaken on 9<sup>th</sup> September, 2022, the tanker (Reg. No. KBJ 564D/ZD 1473) was found to contain an excess of 13,852 litres of motor spirit premium above the authorised 25,000 litres ordered for loading.
110. This fact was consistently adduced through the testimony of PW2 (chief loading technician), PW6 (loading supervisor), PW7 (security officer) and PW8 (engineer), all of whom were present during the measurement exercise. They each testified, with reasonable clarity, that the tanker was loaded on 8<sup>th</sup> September, 2022 and that subsequent dipping confirmed an aggregate excess of 13,852 litres.
111. PW2 described the routine loading process, confirming that after the requisite safety inspection, procurement and system processing, the vehicle was loaded with the fuel ordered. He recounted that the compartments were sealed at the end of loading in the presence of security personnel and remained sealed under KPC's custody overnight.
112. PW6 and PW8 corroborated that the measurements taken the following day, in the presence of KPC officials and the 2<sup>nd</sup> Appellant (who was the driver of the tanker), revealed the excess inventory. PW7, in charge of security, testified to assisting in the measurement and confirming the excess.
113. Crucially, all of these witnesses agreed that the tanker never exited the KPC premises after the loading process on 8<sup>th</sup> September, 2022. This factual context is significant because it bears directly on whether the excess fuel was ever removed from KPC custody, and on the nature of the alleged unlawful conduct.
114. The prosecution also presented evidence from ICT personnel (PW11 and PW12), who analyzed the fuelfacs and accuload system logs and prepared a joint report that was produced as PExh10. PW11 testified that a parameter change occurred in the system at around 1814hrs on 8th September, 2022, with a reversal at about 1848hrs, suggesting tampering. However, the witness expressly stated that it was not possible for one to identify the person responsible for effecting the changes, that several individuals had access to the system and that the system did not retain electronic footprints capable of identifying the specific user.
115. On his part, and for reasons that were not explained to the trial court, PW12 drastically contradicted the position taken by PW11 by stating that the 3<sup>rd</sup> Appellants credentials were used to log into and make changes to the system. The witness stated that the 3<sup>rd</sup> Appellant had logged into the system on the material date. He however admitted under cross-examination that his analysis did not specify the device used, did not disclose the assignment of user rights, and did not conclusively link the parameter change to the 3<sup>rd</sup> Appellant's login session. The evidence on system manipulation was therefore not only contradictory, but also circumstantial and equivocal.
116. In the first count, the three Appellants are charged with the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code, Cap 63 Laws of Kenya. The legal framework for conspiracy under Section 393 of the Penal Code is well established. The offence is constituted in the agreement



between two or more persons to commit a felony. In *Kariuki v Republic* [1985] KLR 504, the Court of Appeal observed:

“The essence of the offence of conspiracy is the agreement. The agreement may be inferred from conduct, but such inference must be clear, unequivocal and irresistible.”

117. In the present case, the prosecution did not lead any direct evidence of an agreement between the Appellants. No witness testified to having seen or heard the Appellants discuss a plan to commit an offence. The prosecution instead sought to rely on inferred communication, system access logs and the fact of excess fuel as circumstantial evidence of common design. That approach was in my view legally flawed.
118. PW3, a police investigator, initially suggested that call logs showed communication among the Appellants. However, on cross-examination, he conceded that the call data did not demonstrate any direct communication between them. This contradiction undermines any inference of a meeting of minds.
119. In *Sawe v Republic* [2003] KLR 364, the Court of Appeal cautioned that:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence.”
120. On the record before this court, the inference of conspiracy was drawn from the mere existence of excess fuel and the assumption of collusion, without evidence of prior agreement or mutual conduct pointing unerringly to a common unlawful plan. The conviction on count I, therefore, was not supported by evidence that met the high threshold required for a conspiracy offence.
121. The charge in count II against all the Appellants was that of stealing contrary to Sections 268 and 275 of the Penal Code. The offence of stealing requires proof of dishonest appropriation of property belonging to another with the intent to permanently deprive. The prosecution’s case was that the excess fuel constituted stolen property. However, the evidence does not sustain that allegation.
122. PW11’s testimony demonstrated that the fuelfacs system records indicated that only 25,000 litres were dispensed from KPC tanks. There was no evidence presented of loss of fuel from KPC tanks. The excess fuel was discovered while the tanker was still within the depot’s control, and no evidence was adduced showing that the excess fuel was removed, diverted or sold.
123. The Appellants explained, through DW1 and DW3, which evidence was not rebutted, that the tanker entered the depot already containing fuel from a previous lawful loading and that the purported excess may have been present before the loading on 8<sup>th</sup> September, 2022. This explanation was supported by documentary evidence produced in defence and was not, as I have stated, conclusively rebutted by the prosecution.
124. In the case of *Mwangi v Republic* [1983] KLR 522, the Court of Appeal held:

“Where an accused offers a reasonable explanation which is not displaced by the prosecution, the accused is entitled to an acquittal.”
125. The learned trial Magistrate erred in discounting the defence explanation without adequate analysis of whether the prosecution had displaced it. A conviction for stealing cannot rest merely on suspicion or outcome; it must be founded on evidence of dishonest taking and intention to permanently deprive. On this record, that threshold was not met.



126. Under count III, the 1<sup>st</sup> and 3<sup>rd</sup> Appellants were charged with the offence of illegally interfering with fuelfacs and accuload systems contrary to Section 99(1)(ii) of the *Petroleum Act*. The prosecution alleged that the parameter change in the fuelfacs/accuload system was evidence of interference with apparatus of KPC, contrary to the *Petroleum Act*.
127. It is instructive from the evidence of PW11 (as noted above) that the witness conceded that it was not possible to identify who effected the parameter changes and that multiple individuals had access to the system. PW12's evidence was similarly equivocal, lacking a forensic linkage between any specific access session and the parameter change. Although the witness stated that it was the 3<sup>rd</sup> Appellant that effected the changes to the system, he did not make any reference to the report that he jointly prepared with PW10 to point out specifically the evidence that indicated the tampering by the 3<sup>rd</sup> Appellant.
128. From the foregoing, the evidence against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants was therefore purely circumstantial, being that they worked at KPC, as there was no direct evidence adduced that either or both of them effected the changes. The evidence, as I have stated above, was also unreliable in that the two witnesses who prepared the report contradicted each other as to whether the 3<sup>rd</sup> Appellant's electronic footprints were traceable in the system.
129. How is the court to treat such evidence? Courts have consistently held that where the prosecution evidence contains contradictions, discrepancies or inconsistencies that are material and go to the heart of the case, those contradictions must be resolved in favour of the accused because the prosecution bears the burden of proving guilt beyond reasonable doubt.
130. In the case of *Richard Munene v Republic* [2018] KECA 186 (KLR), the Court of Appeal expressly stated that contradictions, discrepancies and inconsistencies in the evidence of the prosecution witnesses go to discredit of the prosecution case as being unreliable and that "where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused. However, the court clarified that this principle applies only where the contradictions are substantive; minor or trifling inconsistencies that do not affect the core of the prosecution's case will not automatically be fatal.
131. This principle has been repeatedly applied in subsequent Kenyan authorities. For example, in *Mwiti v Republic* [2024] KEHC 10753 (KLR), the High Court reiterated that contradictions and inconsistencies, unless satisfactorily explained, must be resolved in favour of the accused, especially where they raise reasonable doubt about the prosecution's case. Similarly, the case of *Juma v Republic* [2024] KEHC 13439 (KLR) reaffirmed that where contradictions are material and fundamental to the issues for determination, the accused is entitled to benefit from them, and the evidence may be rejected if it cannot support a conviction beyond reasonable doubt.
132. The contradictions between the two authors of the PExh10 (PW11 and PW12) as to whether the 3<sup>rd</sup> Appellant's electronic footprints were traced in the system go to the nerve of the charge in count III and are therefore material. The trial court ought to have resolved the same in favour of the 3<sup>rd</sup> Appellant.
133. Moreover, the evidence being circumstantial, must be such that it irresistibly points to the guilt of the Appellants and excludes all reasonable hypotheses of innocence. In the case of *Republic v Kipkering arap Koske & Another* [1949] 16 EACA 135, it was held that:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."



134. With respect to the 1<sup>st</sup> Appellant and noting (as I have above found) that conspiracy was not proved, there was no iota of evidence adduced to show that he in any way or manner interacted with the fuelfacs and accuload systems.
135. As for the 3<sup>rd</sup> Appellant, the position taken by PW11 that he could not tell or identify from the system who effected the parameter changes and that multiple individuals had access thereto gives the possibility that a person, other than the 3<sup>rd</sup> Appellant made the changes.
136. In my view, the evidence tendered failed the test in Kipkering arap Koske as the parameter changes could not be conclusively attributed to the 1<sup>st</sup> and 3<sup>rd</sup> Appellants to the exclusion of any other persons, nor was the manner of its effect established with the requisite degree of certainty. The conviction on count III was therefore unsafe.
137. The charges in counts IV and V were respectively against the 1<sup>st</sup> and 3<sup>rd</sup> Appellant and the offences were those of unauthorized access to computer systems contrary to Section 14(1) of the Computer Misuse and Cybercrime Act.
138. The offences under the Computer Misuse and Cybercrime Act require proof of unauthorized access and resulting misuse. The prosecution relied on system logs that allegedly showed that the 3<sup>rd</sup> Appellant's credentials were used on the system and that the 1<sup>st</sup> Appellant had physical access to the accuload keypad. I have already addressed myself on the unreliable contradictory evidence presented before the trial court on this issue.
139. As was held in the case of *Musili Tulo v Republic* [2014] eKLR, where technical or scientific evidence is relied upon, it must be cogent and supported by expert testimony demonstrating causation. The evidence here did not establish that the 3<sup>rd</sup> Appellant's alleged login resulted in the system parameter change, nor did it robustly prove that the 1<sup>st</sup> Appellant's alleged keypad operations resulted in the alleged interference. The convictions on counts IV and V accordingly lacked sufficient evidential basis.
140. In count VI, the 2<sup>nd</sup> Appellant was faced with the charge of possession of petroleum product contrary to Section 99(1)(e) as read with Section 99(1)(ii) of the *Petroleum Act*.
141. The offence under Section 99 of the *Petroleum Act* penalises unlawful possession of petroleum products. The 2<sup>nd</sup> Appellant admitted possession of the fuel, but explained that it was lawfully acquired. PW4, the safety officer, confirmed that the vehicle was inspected and cleared by KPC on 8<sup>th</sup> September, 2022 for purposes of being loaded with fuel. The FAN ticket relied upon by the prosecution showed that the 2<sup>nd</sup> Appellant was the authorized driver of the vehicle.
142. In the case of *Njue v Republic* [2008] KLR 622, the Court of Appeal held:

“Possession which is explained or which is reasonably consistent with innocence cannot sustain a criminal conviction.”
143. The prosecution failed to establish that the 2<sup>nd</sup> Appellant's possession was unlawful. Instead, the evidence tended to show lawful possession at least until the excess was discovered within the depot, and no evidence was adduced of unlawful disposal.
144. The third and fourth issues for me to address are whether the learned trial Magistrate properly analyzed the defences of the Appellants and whether there was impermissible descent by the court into the arena of litigation.



145. A critical role of an appellate court on first appeal is to re-evaluate the evidence rather than merely scrutinise whether there was some evidence to support the trial court's findings.
146. From the evidence adduced before the trial court and the judgement of the trial court, it is apparent that the learned trial Magistrate did not consider and properly analyze the defence evidence, particularly regarding the position by the 2<sup>nd</sup> Appellant and his witness that there was pre-existing fuel in the tanker before the vehicle was allowed into the KPC premises.
147. This explanation, with profound respect to the trial court, was without tenable reason as to its credibility or otherwise dismissed, leaving an avenue that resulted in the trial court drawing inferences based on conjecture. No reason was given as to why the trial court opted to believe the testimony of the prosecution witness who stated that there was no fuel in the tanker and not that of the 2<sup>nd</sup> Appellant and his witness, who stated that there was fuel that had remained after a previous lawful transaction, which position was supported by documents produced by DW1. That, in my view, amounted to the trial court filling in gaps that the prosecution had left unexplained.
148. In the case of *Oluoch v Republic* [1985] KLR 549, the Court of Appeal warned that:
- “A court must not descend into the arena of litigation and fill gaps in the prosecution case.”
149. On this record, the trial court impermissibly filled evidentiary gaps, which amounted to descending into the arena.
150. The last issue for determination is whether the sentences imposed were lawful and proportionate having regard to applicable sentencing jurisprudence under the *Petroleum Act* No. 2 of 2019 and well-established criminal sentencing principles.
151. Even assuming, for the sake of argument, that the convictions were sustainable, the sentences imposed were manifestly harsh and disproportionate. The learned trial Magistrate failed to specify whether the sentences were to run concurrently or consecutively. In the absence of such specification, by operation of Section 14 of the Criminal Procedure Code, Cap 75, the sentences were cumulatively consecutive.
152. It is settled that where offences arise out of the same transaction, sentences should ordinarily run concurrently in the interests of justice and proportionality. In the case of *David Jefwa Kalu v Republic* [2007] KLR, the Court of Appeal stated:
- “Where offences are committed in the course of the same transaction, the sentences should run concurrently.”
153. Furthermore, recent jurisprudence under the *Petroleum Act* highlights that sentencing for offences under the Act contemplates not only fines and imprisonment but also additional orders such as forfeiture of property used in the commission of the offence and the proceeds of the offence.
154. For example, in *Kariuki v Republic* [2025] KEHC 14561 (KLR), the High Court noted that under Section 120 of the *Petroleum Act*:
- “Where a person is convicted of an offence under this Act, in addition to any other penalty imposed, an order shall be made for forfeiture of any vehicle, aircraft, vessel or equipment used in the commission of the offence... and for the payment by that person to the national government of an amount equal to the proceeds of the sale of the petroleum so received.”



155. Although the learned trial Magistrate made no such orders, this court emphasizes that where convictions are made, sentencing should be guided by the comprehensive punitive and remedial regime provided in the *Petroleum Act*, including consideration of forfeiture and restitution where appropriate.
156. For the reasons set out above, this court reaches the persuasion that the prosecution failed to prove the offences against the Appellants beyond reasonable doubt. In the result, the consolidated appeals are hereby allowed. The convictions are quashed and the sentences imposed by the trial court are set aside. Any fines paid (if any) shall be refunded. The Appellants shall be released forthwith unless otherwise lawfully held.
157. It is so ordered.
158. This file is hereby closed.

**DELIVERED, DATED AND SIGNED THIS 15<sup>TH</sup> DAY OF JANUARY, 2026.**

**JOE M. OMIDO**

**JUDGE**

Appellants: All Present.

For Respondent: Ms. Muema, Prosecution Counsel.

For The 1<sup>st</sup> & 2<sup>nd</sup> Appellants: Mr. Onsongo.

For The 3<sup>rd</sup> Appellant: Mr. Omenke.

Court Assistant: Mr. Ngoge.

Mr. Onsongo: I have an application to make. We seek an order that the 13,852 litres of super petrol fuel that were retained by KPC be released to the 2<sup>nd</sup> Appellant.

Ms. Muema: I leave the matter to the court.

Mr. Omenke: No objection.

Court: As there is no objection to the application, the 13,852 litres of super petrol fuel that were retained by KPC to be forthwith released to the 2<sup>nd</sup> Appellant.

**JOE M. OMIDO**

**JUDGE**

**15<sup>TH</sup> JANUARY, 2026.**

