Cheboi & another v Republic (Criminal Appeal E037 & E035 of 2024 (Consolidated)) [2025] KEHC 668 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E037 & E035 OF 2024 (CONSOLIDATED)

RN NYAKUNDI, J

JANUARY 30, 2025

BETWEEN

ROSE CHEBOI ..... 1ST APPELLANT

VINCENT KIPLAGAT ROTICH ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Representation:

M/s Mwaka & Co. Advocates

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Mr. Mark Mugun for the stat

1. The appellants herein were charged in the first count with the offence of conspiracy to commit a felony. In the second count they were charged with the offence of stealing by servant. On the third count Vincent Kiplagat was charged with the offence of stealing by servant. In Count 4, 5, 6, 7, 8 and 9th counts, Rose Cheboi was charged with the offence of forgery. In count 10, the Appellants were jointly charged with forgery.

2. The trial court delivered its judgement convicted both the appellants and they were sentenced to 3 years' imprisonment. Both appellants, aggrieved by the trial court's decision to convict and sentence them to 3 years' imprisonment, filed their respective appeals. The first appellant, Rose Cheboi, presented twenty grounds of appeal primarily challenging the trial court's evaluation of evidence, handling of forensic reports, and procedural matters. The second appellant, Vincent Kiplagat Rotich, advanced seven grounds of appeal, focusing on the severity of sentencing, the court's treatment of

evidence, and alleged errors in burden of proof. These appeals were subsequently consolidated for hearing and determination. The separate grounds are captured as hereunder:

1st Appellant's grounds of appeal

a. That the trial magistrate erred in law and fact in convicting and sentencing the appellant.

b. That the learned trial magistrate erred in law by failing to independently analyze and/or evaluate the evidence before drawing conclusion as by law required.

c. That the learned trial magistrate erred in law and in fact by failing to consider the contradictory evidence of the prosecution witnesses called on who exactly handled what duties.

d. That the learned trial magistrate erred in law and in fact by failing to consider or give weight and trashing the defense of the appellant that she was not employed as a cashier or deployed as one.

e. That the learned trial magistrate erred in law and in fact by failing to consider and holding that the complainant's evidence was contradictory and exculpatory in nature.

f. That the learned trial magistrate erred in law and in fact by failing to consider the exculpatory nature of the evidence of DW3.

g. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's evidence in defense, cross examination and submissions.

h. That the learned trial magistrate erred in law and in fact by relying on defective and inadmissible electronic evidence which did not meet the legal threshold as they were not accompanied by the necessary certificate as required to by the law.

i. That the learned trial magistrate erred in law and in fact by holding and arriving at a finding the appellant and his fellow co accused guilty of conspiracy yet the evidence and the ingredients were totally absent.

j. That the learned trial magistrate erred in law and in fact by convicting the appellant for the offence of forgery based on two contradictory and defective forensic reports.

k. That the learned trial magistrate erred in law and in fact by convicting the appellant for the offence of forgery and failed to take into account that the forensic evidence and reports were based on defective material and that the chain of custody was broken.

l. That the learned trial magistrate erred in law and in fact by convicting the appellant based on evidence illegally and unprocedurally obtained and whose chain of custody and recording was absent.

m. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant based on a defective charge sheet as the figures on the charge sheet contradict the evidence produced before court.

n. That the learned trial magistrate erred in law and in fact by holding in his judgment that the charge sheet was defective and there was duplicity of charges and further the charges of stealing by servant had not been proved but still proceeded to convict for the said offence/count.

o. That the learned trial magistrate erred in law and in fact by convicting the appellants despite the fact that crucial witnesses were not called to give their evidence.

p. That the learned trial magistrate erred in law and in fact by convicting the appellants based on defective documentary evidence.

q. That the learned trial magistrate erred in law and in fact by failing to consider the contradictory evidence of the witnesses in the entire proceedings.

r. That the learned trial magistrate erred in law in fact by relying on and convicting the appellant on the doubtful and inconclusive evidence of the prosecution witnesses.

s. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant on flawed procedures.

t. That the learned trial magistrate erred in law and fact by failing to find that the prosecution had not proved its case beyond reasonable doubt.

2nd Appellant's grounds of Appeal

3. The 2nd Appellant sought the appeal to be allowed and conviction be reversed on the following grounds:

a. That the learned trial magistrate erred in law and fact in convicting and sentencing the appellant to 3 years' imprisonment without an option of a fine.

b. That the learned trial magistrate relied on contradictory evidence in the matter.

c. That the Learned Trial magistrate erred in law and fact in shifting the burden of proof to the accused/appellant.

d. That the learned trial magistrate erred in law and fact by employing a very harsh sentence in the circumstance considering that the appellant was a first offender.

e. That the learned trial magistrate erred in law and fact and in law in finding that it was illegal for the appellant to draw the agreement.

f. That the learned trial magistrate erred in law and fact in disregarding the testimonies of the accused persons and their witnesses.

g. That the learned trial magistrate erred in law and fact by rejecting the appellant's mitigation and the pre-sentencing report.

1st Appellant's written submissions

4. Learned Counsel Mr. Mwaka representing the 1st Appellant started by submitting that the state has conceded the appeal on counts 1, 2 and 3 of the charges for each of the Ten counts with the sentences

running concurrently. That the state has conceded the appeal on counts 1, 2 and 3 of charges against the appellant leaving counts 4,5,6,7,8,9 and 10 on which to argue.

5. Counsel submitted that the state having conceded the appeal in the counts of stealing by servant, conspiracy to commit a felony affecting the appellant as no having being proper leads to a collapse of counts 4,5,6,7,8,9 and 10 which relate to forgery of withdrawal slips for the amount said gave been stolen.

6. It is submitted for the 1st Appellant that the Learned trial magistrate erred in law by failing to independently analyze and/or evaluate the evidence before drawing conclusions as by law required. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's evidence in defense, cross examination and submissions.

7. Learned Counsel submitted that the judgment delivered by the Hon. Trial court contained in pages 149 to 151 of the Record of Appeal does not contain any analysis of the evidence given by both the prosecution and defense witnesses and does not also give any reason why the court concluded the appellant was guilty of the offences charged with.

8. Mr. Mwaka posited that the law and practice is very clear that any judicial officer who is called upon to make a decision must lay the basis for their decision and set out the reasons why he has taken a particular path or opinion or vie and which is missing in the judgment delivered by the court.

9. Counsel further submitted that the decision by the trial court to convict the appellant does not contain any mention or analysis of the defense evidence and a comparative analysis of the prosecution's case and why the same prevails over the defence which impeaches the judgment as not proper.

10. Learned Counsel submitted on grounds 3, 5, 7, 10, 11, 17 and 18 and argued that the judgment delivered by the Hon. Trial Court relied on contradictory forensic examination reports produced in court concerning counts 4,5,6,7,8,9 and 10 which relate to forgery of withdrawal vouchers.

11. That PW7 the forensic examiner in his evidence in chief testified and produced two reports in which he testified that the signatures in the payment vouchers marked as A1-A7 were actually signed by Vincent Rotich and that he was supplied with the appellant's specimen signatures later and upon re-examining the same vouchers arrived at a conclusion that the appellant (Rose Cheboi) had signed only six of them. Learned Counsel argued that the trial court relied on the said forensic examination reports to convict the 1st appellant in its judgment wherein the court failed to take into account the two reports which had at first attributed the forged signatures to Vincent Rotich and later in the second report to the appellant without any reason. That the court also convicted the appellant with her co-accused in count 1 for having jointly forged one voucher and having signed for the complainant which is an absurdity and impossibility.

12. Learned counsel drew a conclusion that the trial court failed to take into account the contradictory nature of the two forensic reports and apply the judicial principle of benefit of doubt which dictates that when there is contradiction or doubt the same should be accorded to an accused person and in the current circumstances no adverse decision should have been arrived at against the appellant resulting into a conviction.

13. That PW7 the forensic expert evidence failed to meet the threshold of the law to have the same used to convict the appellant. He submitted that it is the onus of every expert who testifies in court to prove their identity and their expertise. That he was unable in cross examination to explain scientifically the contents and support the conclusions of his two reports. The place of expert evidence and the standards expected of the is well espoused in the court of Appeal in Criminal Appeal No. 92 of 1981 Mutonyi & Another v. Republic.

14. It is submitted for the 1st Appellant that the said expert failed to live up to the expected standard and having produced two reports on the same questioned documents which attributed the same signatures to two different persons and having no explanation for the same and ignorance of the same by the trial court in its judgment can only infer that the appellant shouldn't have been convicted of the forgery counts.

15. Counsel submitted that the contradictions arising out of the two forensic reports are fatal and relate to material facts and is substantial. It must deal with the real substance of the case. That it is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. On this, counsel relied on the cases of Vincent Kasyula Kingoo v. Republic (2014) and Charles Kiplangat Ngeno v. Republic; CR. APP No. 77 of 2009.

16. In conclusion, learned counsel submitted that the state having entirely conceded to the appeal by the other appellant on technical grounds renders count 10 impossible to stand as the Appellant was charged jointly with one Vincent Rotich whose entire appeal has been conceded to. He urged the court to set aside the conviction and sentence facing the appellant and set her free forthwith.

2nd Appellant's submissions

17. Learned Counsel Mr. Martim, appearing for the 2nd Appellant, submitted that the main complaint by the Agricultural Finance Corporation centered on charges of stealing by servant of Kes 3,705,500/- and Kes 11,355,400/-, coupled with additional charges of conspiracy to commit a felony forgery. He emphasized that this amount was neither withdrawn from the corporation nor lost.

18. In addressing the trial proceedings, Mr. Martim argued that the court which convicted the Appellant did not have the benefit of observing the demeanor of prosecution witnesses firsthand. He highlighted that this was particularly significant given that two key witnesses, Richard Musa and Cornellius Onsongo, were central to the trial.

19. Learned Counsel submitted that the prosecution's portrayal of Vincent Kiplagat Rotich as a reprobate was unfounded. He opined that what transpired was a case of a corporate titan using junior staff to transfer blame to avoid accountability tests. In support of this argument, counsel pointed to the corporation's practice of writing off loans which, as fate would have it, could not be accounted for.

20. Mr. Martim drew the court's attention to the credibility of witness Richard Musa. He submitted that Mr. Musa's testimony should be treated with circumspection, noting that he had defaulted on loans not only with the Corporation but with other financial institutions including NIC Bank, KCB Bank, and National Bank of Kenya.

21. Learned Counsel emphasized the role of the appellate court by citing the case of Okeno vs Republic [1972] EA 32, arguing that an appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination.

22. On the question of forgery, counsel relied heavily on the case of R v Gambling [1974] 3 All ER 479, citing the two-pronged test for forgery: first, that the relevant document should be false, and secondly, that it was made with the intention that it might be used as genuine. Counsel also cited the case of Daniel Lopeyok v. Republic (2022) eKLR where the court stated that both elements of actus reus and mens rea have to be proven in a forgery.

23. Learned counsel opined that the prosecution did not demonstrate that the appellant had a guilty intent to forge documents. That the appellant was an accountant at the back office. He never came into contact with customers at the front office, he neither had the motivation nor the drive to forge. His role is to countercheck for the cashier.

24. Regarding sentencing, Mr. Martim submitted that the trial court failed to exercise due regard to the evidence tendered and imposed an excessive sentence. He relied on the case of Elisha Kipleting v Republic [2021] eKLR, highlighting the guidance provided in Paragraph 7.18 of the Judiciary Sentencing Policy Guidelines regarding non-custodial sentences.

25. In support of his arguments on sentencing principles, counsel cited the case of Peter Mbugua Kabui vs. Republic [2016] eKLR, which established the criteria for appellate courts to interfere with sentences imposed by trial courts.

26. Mr. Martim drew particular attention to the Appellant's personal circumstances, submitting that he suffers from convulsive disorder, epilepsy, and stomach ulcers. He emphasized that the Appellant's health had deteriorated significantly during his imprisonment, as evidenced by medical reports filed after his custody.

27. Learned Counsel highlighted the pre-sentencing report which recommended a non-custodial sentence, noting the Appellant's good co-existence with neighbors and family, and his role as a father of two children for whom he was the primary breadwinner.

28. In conclusion, Mr. Martim submitted that the charges were motivated by factors outside the court's purview, emphasizing that no money was lost by the corporation. He argued that the prosecution failed to discharge their burden of proof, and that the Appellant, having faithfully worked for the corporation until his suspension, demonstrated characteristics inconsistent with someone who would commit theft of the magnitude alleged.

2nd Appellant's supplementary submissions

29. The 2nd Appellant filed supplementary submissions dated 27th November, 2024 to theirs dated 7th October, 2024 pursuant to this court's leave granted on 11th October, 2024.

30. Learned Counsel Mr. Martim submitted on behalf of the 2nd Appellant that section 200 was not complied with as regard to the 2nd Appellant. Counsel cited the decision in Ndegwa v. R (1985) KLR 535. Counsel argued that since Vincent Kiplagat Rotich has served part of the time in this suit, the remedy available is to allow the appeal and quash the conviction and sentence. That the Respondent concedes on count 2 of the charge sheet and the judgment therein after.

31. On the charge of conspiracy, learned counsel posited that conspiracy as a stand-alone charge or a subordinate charge one has to look at the totality of the evidence before court. He submitted that it is subordinate to the charges therein listed herein after. That the sum of Kshs. 3,705,000/= is purported to be money advance to Richard Musa. On acquittal of Godfrey Fwamba the then Branch Manager, the case on conspiracy must fail. There is no evidence to lead to the summation of Kshs. 3,705,000/= in a conspiracy plot in which the 2nd appellant was in common transaction with the 1st Appellant. Counsel submitted that it should not be lost to court that Richard Musa was heavily indebted to several banks and servicing loans at the same time, that the propensity to lie is higher and that cannot be entirely ruled out.

32. It is submitted for the 2nd appellant that in applying the principles above to the facts and circumstances of this case, the prosecution failed to prove that there was a meeting of minds to constitute the offence

of a conspiracy to commit a felony. The Prosecution did not demonstrate that the Appellant was acting with another person or persons with the common intention of committing felony. That to prove conspiracy, the prosecution had to establish that the appellant together with others, agreed by common mind to defraud the complainant. He submitted that the inference must be made both from the actions of the accused and the evidence tendered in court.

33. Learned counsel further submitted that the offence of conspiracy cannot be one where the appellant was conducting lawful action. The transactions of Richard Musa were lawful and were entries in the computer system and they are true reflection of the transactions

34. On the issue of forgery, learned counsel in relying on the case of Elizabeth Achieng Nyanya v Republic (2018) eKLR where the ingredients of the offence of forgery were laid out submitted that Exhibit 12 is a genuine document printed in the course of business of the corporation. That the trial court found that there was no proof of theft contrary to section 281 of the Penal Code. Based on that finding, learned counsel submitted that lack of proof for theft and this being a genuine corporation document the offence of forgery in count 10 should fail.

35. Mr. Martim cited the case of Caroline Wanjiku Ngugi v. Republic (2015) eKLR and submitted that it should not be lost to this court that as the Branch Accountant, the 2nd Appellant had the duty to verify a transaction that had been proceed in the corporation system and as such he did. Richard Musa is on record stating that he transacted with the corporation without necessarily signing documents. That by the doctrine of acquiescence Richard is estopped from stating that he did not sign transaction vouchers while in the past he had transacted with the branch without appending his signature. That this is exhibited in documents including those he does not dispute.

36. In conclusion, counsel submitted that the prosecution did not prove the case of conspiracy to steal. That they failed in all the elements for conspiracy. The prosecution did not give evidence of the common intention, they did not support the evidence for the common intention, they did not support the evidence for the common intention nor did they provide a certificate of electronic evidence to support conspiracy. That it is apparent that the case is full of printed documents, computer printouts, bank statements and receipts. He argued that the said documentation does not prove the alleged offence, its main purpose is to achieve shock and awe. That it is meant to overwhelm the court and the defense with text upon text documents. He maintained that it was the duty of the prosecution to prove its relevance and this burden never shifts.

37. On the count of forgery, counsel maintained that Vincent Rotich was a back office who confirmed the transaction of the voucher corresponding to the ledger balance in the system as per the bank statement. As an accountant he was convinced that the transaction in the voucher corresponded with the system balance of the day and signed it off. That it is not in doubt that Richard Musa had applied for a loan. It is also not in doubt that Richard Musa never reported to the police of loss of funds and it is not in doubt that the Corporation has sought to recover these amounts from the insurance as lost funds but by issuing a statutory notice against Richard Musa. That the complainant should not be allowed to speak from both sides of the mouth i.e. seek to recover the funds from Richard Musa yet claim forgery of a document of an entry into the corporation's finance system and confirmed by a receipt.

38. Counsel submitted that from the analysis of the evidence by the trial court it was not safe to return a verdict of guilty on the 2nd Appellant. That from the judgment and the contradictions exhibited the court should be pleased to allow the appeal and set aside the judgment of the trial court.

39. On sentencing, he urged the court to tamper justice with mercy. That the health of the 2nd Appellant has suffered while he has been in custody. He invited the court to give a non-custodial sentence if the court will be led to make a finding on sentencing.

Respondent's written submissions:

40. At the outset, Senior Prosecution Counsel Mr. Mugun made an important concession regarding the appeals. With respect to Rose Jepchirchir Cheboi, the 1st appellant, the State opposed the appeal against conviction for counts 4-10 but conceded on counts 1, 2, and 3. As for Vincent Kiplagat Rotich, the 2nd appellant, the State conceded the appeal on grounds of non-compliance with section 200 of the Criminal Procedure Code, while seeking an order for retrial.

41. Counsel provided a comprehensive background of the case, explaining that the appellants were employees of Agricultural Finance Corporation (AFC) - serving as an assistant accountant and cashier/teller/clerk respectively. He submitted that the prosecution's case was built on evidence from 7 witnesses who testified about anomalies discovered in March 2018 regarding cash deposits held as securities for loans.

42. On the procedural aspect, Mr. Mugun highlighted that the trial was initially conducted by Hon. Kassan CM who recorded prosecution evidence before his transfer, after which Hon. Mikoyan took over and recorded the defense before convicting the appellants.

43. Counsel identified three key issues for determination:

    a. Compliance with section 200 CPC regarding Vincent Kiplagat Rotich

    b. Whether the conviction was proper and supported by sufficient evidence

    c. Whether the sentence was harsh

44. On the first issue, Mr. Mugun, relying on the case of Henry Kailutha Nkarichia & Ambrose Mungatia Nkarichia v Republic [2015] KECA 111 (KLR), submitted that there was non-compliance with section 200(3) CPC regarding the 2nd appellant. He pointed out that while the record showed the 1st appellant was notified of her rights, there was no indication that the 2nd appellant received similar notification.

45. To buttress this point, learned counsel cited Anthony Otieno Ndonji v Republic [2019] KECA 229 (KLR), emphasizing that compliance with section 200(3) is mandatory and must be demonstrated in the record. Based on this non-compliance, the State conceded the appeal against the 2nd appellant while seeking a retrial order.

46. Regarding the conspiracy charges, Mr. Mugun referenced the case of Mulama v Republic [1975] KLR 24, arguing that since Godfrey Wafula Fwamba was acquitted under section 210 CPC, the 1st and 2nd appellants should also have been acquitted of conspiracy unless it was proved that someone else not named in the charge sheet was party to the conspiracy.

47. On the theft by servant charges, learned counsel noted that while there was abundant evidence of the 1st appellant's employment status at AFC, the prosecution's star witness, Richard Musa (PW3), had made admissions that weakened the prosecution's case. Counsel conceded the appeal on Count 2 against the 1st appellant.

48. However, regarding the forgery charges, Mr. Mugun strongly relied on the evidence of PW7, Chief Inspector Daniel Magut, whose forensic analysis linked the questioned documents to the 1st appellant. He submitted that this evidence remained unchallenged and was sufficient to sustain the convictions on counts 4-10 against the 1st appellant.

49. On sentencing, learned counsel argued that the 3-year imprisonment term was lenient, considering the maximum sentences prescribed by sections 281, 393, and 349 of the Penal Code for the respective offenses. He maintained that as first offenders, the appellants received considerable leniency and should not complain about the severity of their sentences.

Analysis and determination

50. In the realm of criminal justice, cases occasionally emerge that challenge our fundamental understanding of proof, procedure, and the delicate balance between institutional integrity and individual rights. The consolidated appeals before this court represent such a watershed moment.

51. The narrative unfolds against the backdrop of the Agricultural Finance Corporation's Eldoret Branch, an institution whose mandate to foster agricultural development stands as a pillar of Kenya's economic growth. Yet, beneath this noble purpose, the prosecution alleged a sophisticated scheme of financial impropriety involving three banking professionals whose careers had been dedicated to the very institution they were accused of betraying.

52. The journey from the Chief Magistrate's Court (Criminal Case No. 4377 of 2018) to its current incarnation as Criminal Appeal No. E037 of 2024 (consolidated with Criminal Appeal No. E035 of 2024) reveals more than just a story of alleged misappropriation of 12 million Kenyan Shillings. It unveils the complexities inherent in prosecuting financial crimes, where evidence often lies buried in the minutiae of banking transactions, system logs, and paper trails. The prosecution's case, built on a foundation of forensic analysis, witness testimonies, and documentary evidence, would face rigorous scrutiny through the appellate process.

53. What sets this case apart is not merely the substantial sums involved or the positions held by the accused, but rather how it forces us to confront fundamental questions about the intersection of banking regulations, criminal procedure, and evidential standards. The State's subsequent concessions on various counts serve not as mere procedural footnotes, but as powerful reminders that justice demands more than just the pursuit of accountability. It requires unwavering adherence to procedural safeguards and evidentiary standards.

54. To start with, 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 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."

55. Similarly, in Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " 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] E. A. 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] E.A. 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, see Peters v. Sunday Post, [1958] E. A. 424."

56. It is also important to recall the fundamental principles governing criminal appeals and the standard of proof required. The lodestar illuminating the prosecution's burden of proof in criminal matters emanates from Woolmington v DPP [1935] A.C 462, where Viscount Sankey L.C. enshrined what would become the foundational principle of criminal justice, declaring that:

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

57. I have had occasion to review the record of appeal, the written and oral submissions by learned counsel for both appellants, and the response by the State, this court must determine several intricate questions that lie at the intersection of procedural propriety and substantive justice. The determination of these consolidated appeals requires careful consideration of not only the technical aspects of criminal procedure but also the fundamental principles that underpin our criminal justice system. In essence, three principal issues emerge for determination, each carrying significant implications for both the administration of justice and the rights of the appellants.

58. First, this court should address whether there was compliance with Section 200 of the Criminal Procedure Code, particularly concerning the 2nd appellant. This is a threshold issue given the State's concession on this point and its potential to substantially affect the proceedings' validity.

59. Second, this court should then examine the sustainability of the various criminal charges in light of the State's selective concessions. For the 1st appellant, while counts 1-3 have been conceded by the State, I must determine whether the evidence supports the forgery charges in counts 4-10, particularly given the apparent contradictions in the forensic evidence. For the 2nd appellant, the conspiracy charge requires careful scrutiny, especially in light of Godfrey Wafula Fwamba's acquittal as alluded to by the prosecution.

60. Third, should any convictions be upheld, I must evaluate the appropriateness of the 3-year imprisonment sentences, taking into account both the gravity of the proven offenses and the personal

circumstances of the appellants, including their status as first-time offenders and, in the 2nd appellant's case, his medical condition.

61. Let me proceed and consider the curled out issues in turn.

62. The first issue for determination concerns compliance with Section 200 of the Criminal Procedure Code. The record reveals that Hon. Kassan CM initially conducted the trial and recorded prosecution evidence before being transferred, after which Hon. Mikoyan took over and recorded the defense before convicting both appellants. The prosecution has conceded non-compliance with Section 200(3) regarding the 2nd appellant.

63. The provisions of Section 200 of the Criminal Procedure code for avoidance of doubt are set out as hereunder:

> " 200 (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-
>
> a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
>
> b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.
>
> (2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.
>
> (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
>
> (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

64. The mandatory nature of Section 200(3) is well-established in our jurisprudence. In Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 Others [2015] eKLR, the court remarked:

> " Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanour of the witnesses to enable the Court make a just decision.

> It should be noted Section 200(3) of C.P.C. gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for the succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted that it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory to explain to the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.
>
> Section 200(3) of C.P.C. entrenches the accused rights to a fair trial as constituted under Article 50(1) of *the Constitution* of Kenya 2010."

65. The foregoing decision emphasizes that this provision exists to protect an accused person's right to fair trial by ensuring they have an opportunity to recall witnesses who testified before the previous magistrate. The failure to comply with this provision renders subsequent proceedings a nullity. The significance of allowing accused persons to recall witnesses becomes evident through Section 200(4). This provision grants the High Court the authority to overturn convictions and mandate new trials in cases where the defendant faced material prejudice. Such situations may arise when the convicting magistrate failed to maintain a complete record of the evidence presented.

66. In the case at bar, while the record indicates the 1st appellant was notified of her rights, there is no evidence that the 2nd appellant received similar notification. This procedural defect must be however viewed in light of the State's broader concessions. The prosecution has already conceded the entire case against the 2nd appellant on substantive grounds. Similarly, for the 1st appellant, counts 1-3 have been conceded. These concessions, coupled with the Section 200 violation, raise fundamental questions about the sustainability of the remaining charges.

67. Regarding the 1st appellant, while counts 1-3 have been conceded, the State maintains that the forgery charges in counts 4-10 should stand based on the forensic evidence of PW7, Chief Inspector Daniel Magut. However, this position faces several challenges.

68. First, the forensic evidence itself is problematic. PW7 produced two contradictory reports; the first attributing the signatures to Vincent Rotich, and the second, after receiving additional specimen signatures, attributing them to Rose Cheboi. This contradiction was never satisfactorily explained. The witness as can be gleaned from the record testified that he did not capture the deviation in the report because he reserved it for cross examination. In *Mutonyi & Another v. Republic (Criminal Appeal No. 92 of 1981*), the court set out the following regarding expert evidence:

> " An expert witness who hopes to carry weight in a court of law must before giving his expert opinion: -
>
> (i) Establish by evidence that he is specifically skilled in his science or art.
>
> (ii) Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
>
> (iii) Give evidence of the facts which may be ascertained by him or facts reported to him by another witness."

69. When measured against these standards, PW7's evidence falls considerably short. The record shows that while he presented his credentials, he failed to adequately explain the scientific basis for his

divergent conclusions or provide a satisfactory explanation for why his analysis of the same signatures led to different attributions in his two reports.

70. Second, and perhaps more fundamentally, the collapse of the conspiracy and theft charges (counts 1-3) substantially undermines the foundation of the forgery charges. The forgery charges were premised on the theory that the withdrawal slips were forged to facilitate the alleged theft. With the theft charges now conceded, the logical basis for the forgery charges becomes increasingly tenuous.

71. The discussion on the charge of conspiracy cannot be severed from the doctrine of common intention. In this respect, the guidelines in the dicta in the following cases provide the touchstone upon which this appeal should be hinged. Thus in Ismael Kisegerwa & Another vs Uganda C.A Crim Appeal No. 6 of 1978, the court gave an authoritative explanation on the doctrine of common intention as follows: " In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. If it can be shown that the accused persons hared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter

It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault....it can develop in the course of events though it might not have been present from the start....it is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence. Where the doctrine of common intention applied, it is not necessary to make a finding as to who actually caused the death. Also in Abdi Alli V. R (1956) 23 E.A.C.A 573, the court of Appeal held at P. 575 that "...the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of common intention must not be too readily applied or pushed too far...It is only when a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section (of the Penal Code) can be applied,"

72. The offence of conspiracy connotes some common intention to prosecute an unlawful purpose in conjunction with another and in the prosecution of that purpose an offence is committed. Tin the instant appeal there is no probative evidence that the Appellants had formed a common intention either before or in the cause of the events of their duties at the financial institution to prosecution an unlawful purpose of committing the offence of theft contrary to section 281 of the Penal Code. The chain of events as explained by the prosecution witnesses cannot be said to have discharged the burden of proof beyond reasonable doubt to satisfy the strength of the elements of the offence. The handwriting experts who examined the known samples of the Appellants against the handwriting in the documentary evidence being vouchers in the first report failed to make conclusive findings on the elements of forgery whereas the same samples were subjected to forensic testing and in his evidence before the trial magistrate stated that he had no doubt that whatever the question handwriting was that of the Appellant. Those contradictions were never resolved at the time the trial court place reliance on it to rule against Appellants to give a verdict of guilty and conviction of the offence. I think it is trite law that a handwriting expert does not have the competence nor the skill to specifically identify that a handwriting in the question of document was of a particular offender named in the charge sheet. This is one of the areas of expertise that it is not possible to rule with certainty that a particular person

wrote a particular thing. The best he or she does is to make a finding that a particular handwriting has similarities with the sample writings compared with the question handwriting in the impugned document. If one discards the documentary evidence there is no other circumstantial evidence which stands out to find any of the Appellants culpable.

73. The prosecution's case structure was built on the premise that these charges were interconnected, with the forgeries serving as the means through which the alleged theft was accomplished. The record reveals that during the trial, the prosecution repeatedly emphasized this connection, presenting the forgery charges not as isolated incidents but as integral components of the larger criminal enterprise they alleged against the appellants. This the warrants an examination as to the legal elements required to establish the offence of forgery

74. The offence of forgery is created and declared by section 349 of the Penal Code in the following terms:

> " 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."

75. To establish whether forgery has occurred under section 349 of the Penal Code, one must examine whether the prosecution has successfully proven all essential elements of this offense.

76. Phillimore L.J broke down the definition of forgery in R v Dodge and Harris [1971] 2 All ER 1523 as:

> " A document is false... if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it or authorize its making ... or if, though made by or on behalf of or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, ... is falsely stated therein; and in particular a document is false:- (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it."

77. 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 its 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."

78. The prosecution's reliance on PW7's forensic evidence to sustain counts 4-10 against the 1st appellant raises serious evidential concerns. In his evidence in chief, PW7 testified about payment vouchers marked A1-A7, initially attributing the signatures to Vincent Rotich. Only after receiving additional specimen signatures did he conclude that Rose Cheboi had signed six of them. This unexplained contradiction in expert testimony creates reasonable doubt that must be resolved in favor of the appellants.

79. The principle that material contradictions in evidence should benefit the accused is well established. In Vincent Kasyula Kingoo v. Republic (2014), the court held that when contradictions are substantial and fundamental to the main issues, they create doubt that must be resolved in favor of the accused. Similarly, the Court of Appeal in Stanley Mathenge Karani v Republic [2016] eKLR while addressing this issue stated as follows:

> " The role of a court of law when confronted with allegations of contradictions, discrepancies in the prosecution case has now been crystallized. See Joseph Maina Mwangi versus Republic CRA No.73 of 1993; Njuki & 4 others versus Republic [2002] 1KLR 771, Vincent Kasyula Kingoo versus Republic Nairobi Criminal Appeal No.98 of 2014, all for the proposition that when confronted with such allegations an appellate Court should apply the guidelines set in Section 382 of the Criminal Procedure Code Cap 75 Laws of Kenya to determine whether such discrepancies, contradictions or inconsistencies are such as to cause prejudice to the appellant or that they are inconsequential to the conviction and sentence. Where these do not affect an otherwise proved case against an appellant, they should be ignored. In addition, an appellate Court has an obligation to reconcile these where the trial court failed to do so and determine the effect of that reconciliation on the appellant's conviction and sentence. See the case of Josiah Afuna Angulu versus Republic Nakuru Criminal Appeal No. 277 of 2006 (UR) and Charles Kiplang'at Ng'eno versus Republic Nakuru CRA No.77 of 2009 (UR), both of which this Court sitting as a first appellate court reconciled discrepancies resulting in the substitution of the appellant's conviction for the disclosed offence in the Angulu case and an outright acquittal in the Charles Kiplang'at Ng'eno's case.

80. In the present case, the contradictions in PW7's forensic evidence present precisely the kind of material inconsistency that requires careful scrutiny under these principles. The unexplained attribution of the same signatures to different individuals in successive reports goes beyond mere technical discrepancy. It strikes at the heart of the prosecution's case on forgery. These contradictions cannot be dismissed as inconsequential, as they directly prejudice the appellants by creating fundamental doubt about a key element of the alleged offenses. Unlike cases where contradictions might be reconciled through careful examination of the evidence, the scientific nature of forensic testimony demands a higher standard of consistency and reliability.

81. For the 2nd appellant, beyond the Section 200 issue, the conspiracy charge faces a fundamental hurdle following the acquittal of Godfrey Fwamba, the then Branch Manager. As correctly submitted by the prosecution citing Mulama v Republic [1975] KLR 24, the acquittal of a co-conspirator necessitates

the acquittal of other alleged conspirators unless there is proof of conspiracy with other unnamed parties. No such evidence exists in this case.

82. Regarding the remaining forgery charges, particularly count 10 where both appellants were jointly charged, there are compelling reasons why these charges cannot stand. The prosecution's attempt to maintain the forgery charges against the 1st appellant while conceding the entire case against the 2nd appellant creates an untenable legal position. As argued by counsel for the 1st appellant, it is legally impossible to sustain a joint charge of forgery when one alleged co-perpetrator's entire case has been conceded.

83. Furthermore, the evidence concerning the actual roles of the appellants at AFC raises significant doubts about the forgery allegations. The 2nd appellant, as established through evidence, was a back office accountant whose primary role was verification of transactions. His duty, as correctly submitted by Mr. Martim, was to confirm that voucher transactions corresponded with ledger balances in the system. The 1st appellant, contrary to the prosecution's characterization, presented credible evidence challenging her alleged role as a cashier.

84. A critical aspect of this case that cannot be overlooked is the prosecution's failure to establish any actual loss of funds. The corporation's conduct in seeking to recover the alleged amounts through insurance claims while simultaneously pursuing criminal charges for forgery presents an inherent contradiction. This is particularly significant given that Richard Musa never reported any loss of funds to the police, and the corporation has issued statutory notices to recover the funds from him.

85. A matter of significant concern to this court is the prosecution's approach to documentary evidence. Rather than presenting a focused selection of relevant materials that establish specific elements of the charged offenses, the prosecution appears to have adopted what defense counsel aptly characterized as a "shock and awe" strategy; overwhelming the court with voluminous documentation, much of it tangential to the core issues. This approach, evident in the inclusion of numerous bank statements, computer printouts, and transaction copies, does not strengthen the prosecution's case but rather suggests an attempt to obscure the absence of direct evidence linking the appellants to criminal conduct. However, quantity cannot substitute for quality in criminal prosecutions. The burden remained on the prosecution to prove not just the existence of these documents, but their relevance to establishing the elements of forgery beyond reasonable doubt.

86. Applying the two-pronged test for forgery as established in R v Gambling [1974] 3 All ER 479 and reinforced in Daniel Lopeyok v. Republic (2022) eKLR, the prosecution needed to prove both that the documents were false and that they were made with the intention to be used as genuine. The evidence falls short on both counts. The documents in question were generated within the corporation's normal business systems, bore appropriate official markings, and corresponded with actual transactions in the corporation's records.

87. The foundation of a criminal prosecution rests on the presumption of innocence and the requirement that guilt be proven beyond reasonable doubt. The trial court's approach to the evidence, particularly its handling of the contradictory forensic reports and its failure to adequately analyze the defense evidence, falls short of this standard. As noted in Okeno vs Republic [1972] EA 32, an appellate court must subject the evidence to fresh and exhaustive examination, especially where the trial court's analysis is deficient.

88. In this case, several fundamental weaknesses emerge in the prosecution's case: (a) The contradictory nature of the forensic evidence, which forms the bedrock of the forgery charges (b) The absence of proof of any actual loss to the corporation (c) The logical inconsistency in maintaining forgery charges

after conceding the underlying theft charges (d) The failure to establish criminal intent, particularly given the appellants' official roles and responsibilities (e) The prosecution's inability to reconcile its theory of forgery with the corporation's parallel pursuit of civil remedies against Richard Musa.

89. Upon careful review of the record, I note that the learned trial magistrate's judgment, while addressing the ultimate conclusions reached, would have benefited from a more detailed exposition of the analytical path taken. The judicial task of weighing competing narratives in criminal proceedings is undoubtedly complex, particularly in cases involving technical financial evidence. In this instance, a more comprehensive analysis of both the prosecution and defense evidence, coupled with explicit reasoning for the conclusions drawn, would have greatly assisted this court in its appellate function. This observation is particularly pertinent given the serious nature of the charges and their implications for the liberty of the appellants.

90. The cumulative effect of these deficiencies, coupled with the Section 200 violation and the State's substantial concessions, leads to only one possible conclusion: both appeals must be allowed in their entirety. While the prosecution has sought to maintain the forgery charges against the 1st appellant, the evidential foundation for these charges has been fatally undermined.

91. Having conducted a review of the evidence, submissions, and applicable law, the inescapable conclusion is that these convictions cannot stand. The prosecution's case, while voluminous in documentation, lacks the precision and proof required for criminal convictions. The State's significant concessions regarding counts 1-3, coupled with the inherent contradictions in the forensic evidence and the Section 200 violation, fundamentally undermine the safety of these convictions.

92. The burden in criminal matters, as eloquently articulated in Woolmington v DPP [1935] AC 462, stands as an immutable principle that places the onus of proof squarely and continuously on the prosecution throughout the trial. This cardinal principle demands not merely a preponderance of evidence, but proof of such clarity and cogency that it leaves the court with no reasonable doubt about the guilt of the accused. In weighing the evidence before this court, marked by contradictory expert testimony, unexplained analytical discrepancies, and the absence of demonstrable criminal intent, it is manifest that the prosecution has fallen considerably short of this exacting standard. The presence of significant doubts about key elements of the offenses charged, coupled with the prosecution's concession and inability to present a coherent and consistent theory of criminality, renders these convictions fundamentally unsafe.

93. The documentary and electronic evidence admitted by the trial court to find the Appellants guilty failed to meet the threshold of the essential questions on the elements of the offence proven beyond reasonable doubt. The duty vested upon the prosecution was that of establishing to rule direct all circumstantial evidence that the unlawful Acts associated with the Appellants were not based on suspicion but those irresistibly point to the guilty of the accused persons. For those reasons, even the retrial being recommended by the prosecution stands on sinking sand.

94. In the end, I make the following orders:

    a. The appeals by both appellants are hereby allowed.

    b. The convictions on all counts are quashed and the sentences set aside.

    c. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

95. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF JANUARY, 2025

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R. NYAKUNDI

JUDGE