



REPUBLIC OF KENYA



**Opany v Republic (Criminal Appeal E003 of 2023)
[2025] KEHC 3951 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3951 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E003 OF 2023
DK KEMEL, J
MARCH 28, 2025**

BETWEEN

BENSON OUMA OPANY APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. J.P Nandi (P.M)
in Bondo PMCRC No. E041 of 2022 delivered on 11/01/2023)*

JUDGMENT

1. The Appellant herein Benson Ouma Opany was charged at the magistrate's court with five counts. In count one, he was charged with stealing by a person employed in the public service contrary to section 280 of the *Penal Code*. The particulars were that on diverse dates between 1st July 2020 and 28th February 2021 at Bondo Technical Training Institute within Bondo Township in Bondo subcounty within Siaya County, with others not before the court,, being a person employed in the public institution as an accounts clerk in Bondo Technical Training Institute stole Kshs 30, 811,600/=(Thirty million, eight hundred and eleven thousand, six hundred) the property of Bondo Technical Training Institute which came into his possession by virtue of his employment.
2. In count two, he was charged with the offence of committing an offence of financial misconduct contrary to section 197(i)(o)(i) of the Financial management Act. Particulars were that on diverse dates between 1st July 2020 and 28th February 2021 at Bondo Technical Training Institute within Bondo Township in Bondo sub-county within Siaya County, with others not before the court, being a person employed in the public institution as an accounts clerk in Bondo Technical Training Institute, without lawful authority made improper payment of public money belonging to Bondo National Technical Institute which is a National government entity.



3. Count three was forgery contrary to section 350 of the *Penal Code*. The particulars were that on diverse dates between 1st July 2020 and 28th February 2021 at unknown place within the Republic of Kenya, with others not before the court, with intent to defraud, forged 152 cheque leaves, a sample of them which include numbers 00XX75, 00XX06, 001XX12, 001XX3, 0XX25, 001XX24 among others purporting them to be genuine cheques for payment to Bondo National Technical Training Institute.
4. Count 4: Making a document without authority contrary to section 347(A) of the *Penal Code*. Particulars: On diverse dates between 1st July 2020 and 28th February 2021 at unknown place within the Republic of Kenya, with others not before the court and with intent to defraud, made 152 cheque leaves numbers: 00XX75, 00XX06, 001XX12, 001XX3, 0XX25, and 001XX24 among others purporting them to be what in fact is not.
5. Count 5: Uttering a false document contrary to section 353 of the *Penal Code*. Particulars: On diverse dates between 1st July 2020 and 28th February 2021 at Equity Bank in Bondo Township, knowingly and fraudulently uttered 152 forged cheque leaves numbers :00XX75, 00XX06, 001XX12, 001XX3, 0XX25, 001XX24 among others to Equity Bank for payment purporting them to be genuine cheques for payment on behalf of Bondo National Technical Training Institute.
6. After a full hearing, the Appellant was found guilty as charged on counts 1, 3, 4, and 5. He was acquitted on count 2. He was sentenced in count one to five years' imprisonment, count three to three years' imprisonment, count four to five to years' imprisonment and count five to three years' imprisonment and that the sentences were to run consecutively.
7. Aggrieved, the Appellant appealed against both the conviction and sentences on the following grounds:
 - i. That the trial magistrate erred in both law and fact by convicting the appellant to 16 years' imprisonment without analyzing the evidence on record and arrived at an erroneous decision.
 - ii. That the trial magistrate erred in both law and fact by convicting and sentencing the appellant without considering that his rights to fair trial was violated as per article 50(2) of the *constitution*.
 - iii. That the trial magistrate erred in both law and fact by convicting and sentencing the Appellant without considering that the prosecution failed to bond the key witnesses in the case.
 - iv. That the trial magistrate erred in both law and fact by convicting and sentencing the Appellant herein on what can be termed as acting on wrong principles.
 - v. That the trial magistrate erred in both law and fact in failing to find that the evidence of the prosecution was contradictory.
 - vi. That the trial magistrate erred in both law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt as by law required.
8. Reasons wherefore he prayed that the appeal be allowed, conviction quashed and sentences be set aside.
9. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court to arrive at its independent finding and conclusion. (See Okeno Vs. Republic [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in Ajode V. Republic [2004] KLR 81.



11. The prosecution called eleven witnesses in support of its case.
12. PW1 Peter Omondi testified that he was the principal of Bondo Technical training Institute from January 2015 to 6/7/2021 when he was interdicted. He stated that for cash withdrawals, one must have a requisition which is signed by the Principal. That once approved, they were sent to head of finance who was the Appellant herein. That the Appellant was then to do the mini budget and then he approves it. He testified that the cash withdrawals were done by the Appellant and handed over to the cashier who by then was Beatrice Cheptoo who would give it to people who requested upon preparing payment vouchers. That they also had cash transfers when paying suppliers. That documents justifying payments must be presented and a cheque is issued. That their bank was Equity Bank which had operations account number 0750XXXXXX515 and Fee collection account number. 0750XXXXXX542. That at that time, the signatories were: 1. Peter Omondi a mandatory signatory meaning he must sign all cheques. 2. Luke Sawanda Kodera 3. Elizabeth Okul. That earlier on there were other signatories: 1) Mr. Akumu C.T. Akumu Awuor 2) Prof. Simatwa.
13. PW1 further stated that the Appellant was an employee of Bondo Technical Institute as an accounts clerk and head of finance. That he could not recall the date of employment but it was in the year 2015. That the Appellant was likewise authorized to collect bank statements, cheque books and cash and deliver mails to the bank. That the cheques were limited to Kshs 200,000/- per leaf by regulations from the ministry and state department TIVET which capped cash withdrawals to Kshs 300,000/- per week. That on 27/1/2021, he had a number of cheques to sign and wanted to know if there was enough money to cover the cheques. That he asked the Appellant to avail the statements for the last six months by noon, but by 1.00pm none had been submitted as he gave the excuse that the Bank was too busy to get the statements. That the said response from the Appellant did not sound plausible as corporate clients just walk to the branch manager and get the statements.
14. That on 28/1/2021 he went to the bank and picked the statements and established that the operation account had money that they did not intend to use and so he gave the Appellant a verbal word not to withdraw the money. He added that the account had money from NYS for their students who were on attachment but that the money had been paid in advance as the students were reporting on 15/2/2021 and start spending the money. That when he got the statements, he noted that there were about four to five cash withdrawals within a single day on various days. That there was also an abnormal cash withdrawal like on Monday when about four cheque withdrawals were made and that on Wednesday another four cheques cashed and that on Friday cheques were presented. That the amount of money which were being withdrawn was abnormally high, higher than the needs. That he realized that there were unauthorized withdrawals which also applied to the fee collection account. That during that period, the institution was closed and that the students were away.

The statement for Equity bank for the account no. 0750XXXXXX542 for period 1/7/2021 to 2/2/2021 marked PMFI -1 a) and the period between 16/12/2020 to 2/2/2021 marked PMFI-1b) and for account 0750XXXXXX515 for the period between 16/1/2021 to 2/2/2022 marked PMFI-1c); all the cash withdrawals were in the name of the Appellant.
16. He stated further that on 31/1/2021 he requested the Appellant to go to the institution to do for him a cheque for his subsistence allowance in Nairobi but instead the Appellant sent the cashier who did the cheque for him. That before he left the office, he called the Appellant and asked for the 2nd cheque book for operations account but that the Appellant informed him that it had been filled up and that there was no urgency for replacement.



He stated that further that he was going to Nairobi to see the chairman and brief him about what was happening and to inquire whether he had signed the cheques. That the chairman claimed that he did not receive any cheques without Pw1 calling him; and he did not sign any open cheques more than once.

That upon getting to Nairobi on 1/2/2021, he met with the chairman and then called the Bank manager Equity bank instructing him not to authorize any cash withdrawals. On 02/02.2021 while in Nairobi, he received a sms alert that a total of Kshs 656,600/= had been withdrawn using different cheque numbers as follows: 792, 793, 794 and 795 which were from the operations account which cheque book he had earlier been informed was actually filled up. He rushed back to the chairman and briefed him on what had just happened.

17. That on 4/2/2021, he travelled back to the college when the Appellant called him who claimed that he had to sort out some KRA issues at Kisumu but he advised him not to go since he had scheduled a meeting with an internal auditor. That he met the Appellant that day who appeared restless. That at 2.00pm when the meeting was scheduled, the Appellant did not attend as he claimed that he was not feeling well.

That on 5/02/2021, the Appellant sent him and the Board an email claiming that he had resigned and that he would come to officially hand over. That the board refused to accept it as it was unprocedural and further, the alleged letter was unsigned. That from that day, the Appellant never showed up at work. That he arranged to do a letter to the police and the PS Vocational Training to inform him about the matter. That the PS sent a team of forensic investigators. That he also invited the DCI to investigate the authenticity of the signatures.

18. That the audit revealed that Kshs 32,942,182/= had been withdrawn from the two accounts; Kshs 2,130,582/= was approved and accounted for but the rest Kshs 30, 811,600/= was not accounted for, not posted in cash books and that no payment voucher was made. That he identified the Audit report which was marked as PMFI-2.
19. That on 7/6 2021, he visited DCI in Bondo where he was given a total of 182 cheques they had retrieved from the bank archives and noted that the signature looked like his. He noted that where he places his signature just below the account name and where he puts between bank log and QS log were not authentic. That the cheques were marked as PMFI-3(1-1X2). That the two signatures were identical and it was difficult for one to make two identical signatures. That the same had been signed with one pen blue in color yet he uses different pens with different colors. That the signatures were electronically transferred to the cheques. He added further that he would not sign any cheque without accompanying documents.
20. That during that period, he had a sick child who died on 15/12/2020. That on 16/12/2020, the Appellant withdrew Kshs 174,750 using cheque No. 2XX6, Kshs 134,510/= using cheque No. 2XX7, Kshs 134,510/= vide cheque No. 2XX8 making a total of Kshs 443,770/=. That his child was buried on 23/12/2020 and on 22/12.2020 while still at the mortuary, the Appellant withdrew Kshs 159,510/= vide cheque No. 7X2, Kshs 150,000/= vide cheque No. 7X4 among others. That he used to receive sms alerts on his phone when withdrawals are made and that the bank would not call him when paying cash to the Appellant. That he did not give authority to the bank to use electronic signatures. That he did not authorize the transactions.
21. On cross examination, he stated that he is no longer the principal as he was interdicted due to negligence at work. That the Appellant was interrogated by the committee. That his deputies were also interrogated. That he did not know the recommendations of the Board of Governors report. That all the cash withdrawals were made in the name of the Appellant. That the Appellant was authorized



to withdraw cash if the same was procedural. That he delegated the keeping of the cheques to the Appellant. That he made verbal complaints to the bank manager over the withdrawals. That he had good working relationship with the Appellant. That he has never signed a cheque for his wife. That he is not aware of the Board of Governors audit report.

22. PW2 Doreen Atieno Oyugi, a secretary at Bondo Technical Institute stated that her duties were inter alia; to receive calls, correspondences and to manage the Principal's diary. That on 11/6/2021 DCI officers visited her office and asked whether she had the principal's electronic signature on her computer and that she answered in the affirmative but that it is only used in ordinary mails when the principal is not around. That she was the only one with access to the signature and her computer but that if anyone accessed her computer and used her signature it was without her knowledge and permission. That the Appellant was her colleague who worked in the finance department and who had been a colleague from 2015 to 2021.

On cross examination, she stated that she does not type Board minutes as the principal does but she can assist in sending the minutes to board members. That she did not send the minutes for the special board meeting as the chairman did. She remembers one time the Principal allowed her to use his signature.

23. PW3 Luke Odera, the Deputy Principal at Bondo Technical Training Institute since January 2020. That he was in charge of academics and other assigned duties. That he was a signatory since August 2020. He stated that the cheques were first made by authorization. That upon the authorization by the principal, they go to the accounts for processing. That the Appellant was an accounts clerk. He identified the 182 cheques (Mfi-3) some of which were genuine while others were not authorized.

On cross examination, he stated that he had pens in his office and that he could not borrow pens to sign cheques. That a cheque can be prepared on one date and signed on another date but it should not be more than one month. That he could not recall signing some of the cheques.

24. PW4 Beatrice Cheptoo testified that she was the accounts clerk at Bondo Technical since 2015. That her duties were receiving cash, bursaries on behalf of students. That the Appellant was her in charge. That the appellant used to do daily bank reconciliations and reports and was an agent to the bank and would withdraw money through cheques and that the money would be used as petty cash. That a budget was prepared by for approval by the principal after the said approval, a cheque would be prepared, signed by all parties concerned then a bank withdrawal was done by the Appellant. That in February 2021, the principal called her and informed her that he needed a cheque for his subsistence as he was going to Nairobi. That she did the cheque using the operations account/fee collection account. That the principal asked her for the other cheque books for the operations account but she couldn't find them. Later, the Appellant went and gave her the cheque books which she forwarded to the principal. Later, the police visited and that she recorded her statement.

25. PW5 Cyprian Otieno Muma testified that he works at Bondo Technical Training Institute as the principal's driver and was employed in 2020. That the DCI informed him that the Appellant had claimed that he had given him Kshs 75000/= to take to the principal when the principals daughter died.

On cross examination, he stated that the Appellant had given him only 75000/= at Equity bank – Kisumu and that he never signed anywhere.

26. PW6 Elizabeth Olewe Auma stated that she is currently a teacher at Ugenya Vocational College but was previously at Bondo Technical Training Institute from December 2015 to December 2020 as Deputy Principal in charge of administration. That in February 2021 she received a call from the principal (PW1) informing her of unusual bank withdrawals from the college bank account. That the following day she went to the college, met the principal and deputy principal in charge of academics and together they reported to Bondo police station. That the police advised that they waited for the audit report



before recording statements. That in March 2021 she received a call from DCI and that she went to the college and was interrogated by the committee. She was shown PMFI 3 –(1-182) and noted that some of the cheques bore her signatures that were not genuine.

On cross examination, she stated that at times the Appellant would take to her cheques that were not backed up and that she would refuse to sign them. That she would then call the principal and after the purpose of the money she would sign. That the principal cautioned her not to ask questions once he has appended his signature. That her work was to write minutes and hand over to the principal and that what happened thereafter she was not privy to it. If the principal asked for a document one would take it immediately.

27. PW7 Christian Akumu Owuor testified that he works at the Technical University of Kenya as director TIVET programs. That he was Chairman Board of Governors Bondo TTI from 2015 to November 2021. He chaired BOG meetings and provided governance to the institution. That PW1 had reported to him that there were some irregular withdrawals being done by the Appellant from the school accounts and that he advised him to report to the ministry, which he did. That the matter was taken over by the police and that he recorded his statement.

On cross examination, he stated that the Appellant was the accounts clerk and acting finance officer. That the principal (PW1), went to his office in Nairobi and reported the happenings to him. That the Chief Executive Officer who was at the meeting may have shared the minutes with the DCI. That the Appellant was suspended from work as his resignation had earlier been rejected.

28. PW8 Lucy Mugwe stated that she was a deputy internal auditor at the Ministry of Education. She stated that the PS asked her to carry out an audit of Bondo TTI after a report from the principal. That the principal had reported that money had been withdrawn from the accounts without his consent for the period from December 2020 to January 2021. That for the said period, she the found that a total of Kshs 32, 942,600/= had been withdrawn from the college accounts but only Kshs 2, 130, 582/= had been approved and accounted for. That they recommended that the accounts clerk should account for the Kshs 30,811,600/= failing which he should be held criminally liable for embezzlement.

On cross examination, she stated that the Appellant's duty in the institution was to withdraw money and post it into the cash book but that he did not. That the principal and his deputies were the bank signatories.

29. PW9 Javan Odera of Equity bank Kisumu Branch testified that on 24/3/2021 they were visited by the principal Bondo TTI and who informed them that they were investigating the accounts that they were suspecting dubious transactions had taken place and that he requested for a one year statement which he gave him. That they started recovering cheques and that they received a court order requesting for the same cheques. That the Appellant was the one preparing the cheques and making cash withdrawals.

On cross-examination, he stated that every time they would ask for the bank statements they would supply.

30. PW10 No. 50823 Rtd Corporal Suleiman Opondo testified that before retiring, he had been attached to Bondo DCI and was the investigating officer in the instant case. That on 8/2/2021 he was in the office when PW1 reported a case of embezzlement of funds from the college accounts. That they advised him to do an internal audit and that the audit report showed Kshs 30,811.600/= could not be accounted for from the two college accounts. That he had one accounts clerk assigned to carry out financial duties on behalf of the principal by the name Benson Ouma Opany, the Appellant herein. He produced PMFI-3(1-182) as exhibit 3(1-182). That he took the signatures of the principal and his deputies and the signatories which were produced as exhibit 4(a-f) . That he prepared an exhibit memo form dated 12/8/2021 and forwarded the cheques for forensic analysis. That he produced the



exhibit memo form as exhibit 5. He received the report dated 17/8/2021 marked as MFI 1-6. They proceeded to arrest the suspect who recorded his statement denying the allegations against him. That in the report, 30 cheques were genuine and signed by authorized signatories but 152 cheques, it was noted that all signatures were printed using a computer. That the Appellant's letter of employment dated 17/8/2015 was produced as exhibit 7.

On cross examination, he stated that 30 cheques were genuine while 152 cheques were fake. That the principal used to get sms alerts but the Appellant used to assure him that they were exaggerated. That they only dealt with the criminal part of the case. That they didn't direct the board to sit and make any decisions.

31. PW11 No. 91798 PC Samson Omala based at DCI National Forensic library. He stated that he was a qualified document examiner of more than four years and working on full time in Nairobi National Forensic Library. That he had a diploma in forensic and criminal intelligence, trade and craft from Kenya Institute of Criminal Justice College. That he has a Certificate in criminal intelligence, trade and craft from DCI Academy and has attended basic forensic document examination course at Regional forensic laboratories in Khartoum Sudan. That he is trained in the use of forensic examination machines by Forth and Freman UK and standing in for Chief Inspector Benard Cheruiyot who was attending another matter in Mombasa. That they had worked with him for two years and familiar with his handwriting and signature. That the signature on the report was his.

That he received an exhibit memo and exhibits from Cpl Suleiman. That he marked them as exhibit 1a-182 which comprised of cheque leaves and that exhibit D1-D3 were specimen signature for Sawanda Kodera. That items marked F1-F3 were specimen signatures for Elizabeth Okullu. That the exhibits were signed on 16/8/2021 and verified on 17/8/2021. The report (MFI 6) was produced as exhibit 6. That he compared the signatures on the 182 cheques and the known as well as specimen signatures of the persons authorized to sign the said cheques. That he noted that the that the signatures on the cheques has structural resemblance and which matched and which showed that they were not characteristic of a free hand or wet signature and that the same indicated a copying process. That he formed the opinion that the signatures were not true but digitally copied, positioned and printed on the cheques and thus they were fraudulent signatures.

On cross-examination, he stated inter alia; that superimposition is putting an image on another image; that the signatures were digitally transferred; that he does not know the person who did it.

32. The trial court later held that the Appellant had a case to answer and thus placed him on his defence. He tendered a sworn testimony.
32. DW1 Benson Auma Opany testified that his job offer letter dated 17/8/2015, probation later dated 1/9/2015 letter of appointment produced as DEXHIBIT 1, 2, and 3 respectively. Confirmation letter dated 23/2/2017 produced as DEXHIBIT 4. He stated that he had worked for five years without off duty. That he was made an agent in all the Complainant's six bank accounts in the various banks and that he was to make withdrawals of sums not exceeding Kshs 400, 000/ per transaction or cheque leaf. That he was also required to collect bank statements, cheque books. That he was not a signatory to any of the bank accounts. That the principal directed him to prepare a budget which he approved. That he was the one writing the cheques and supported with documents. That the principal delegated to him several roles and that he exerted a lot of influence over him. He added that the cheques were duly signed according to procedure. He finally confirmed that the Kshs 30, 000, 000/ was not accounted for as per the audit report.

On cross-examination, he stated inter alia; that he could write the cheques and was also the custodian of the cheque books; that a total of Kshs 30, 000,000/= was not accounted for; that they knew there



was something wrong and that's why they didn't post the cashflow on the system with authority from the principal.

The Appellant closed his case at that juncture.

33. The appeal was canvassed by way of written submissions. Both parties duly complied.
33. I have duly considered the record of the lower court and the submissions filed by the parties. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond any reasonable doubt.
34. The burden of proof in all criminal cases is upon the prosecution which is always beyond any reasonable doubt and does not shift to the defence. See *Woolmington Vs DPP* [1935] AC 462. It is necessary to analyze the respective charges as against the evidence tendered by both prosecution and defence so as to establish whether the said charges were proved beyond the threshold of proof.
35. As regards count one, it is noted that the Appellant was charged with an offence of stealing by a person employed in the public service contrary to section 280 of the *Penal Code* which provides that if the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years. The essential ingredients of the offence to be proved were inter alia; that the accused was employed in the public service; that some property was stolen from the Government institution and that the thing stolen came into the possession of the accused by virtue of his employment. It transpired from the evidence presented by both prosecution and defence that the Appellant was indeed an employee of Bondo Technical Training Institute and employed as an accounts clerk and head of finance. The Appellant did produce his letter of employment and thus the issue of his employment in the public service and the institution being a Government entity left no doubt about the same. Further, the theft is alleged to have taken place and that the property in the form of money came to him by virtue of his employment. The Appellant in his defence evidence confirmed that a sum of over Kshs 30,000, 000/ was stolen and that he did not account for the same. As the stolen sums came to the Appellant by virtue of his employment, I find that the charge under section 280 of the *Penal Code* was proved and that his defence evidence did not shake that of the prosecution. I find that the prosecution proved the aforesaid ingredients of the offence beyond any reasonable doubt.

This count was sufficiently proved and the sentence of 5 years imprisonment meted was likewise reasonable.

34. It is noted that the Appellant herein had been charged with an offence of financial misconduct contrary to Section 197 (i) (o) (i) of the Public Financial Management Act of 2012. The particulars were that; Benson Ouma Opany on diverse dated between 1st July 2020 and 28th July 2021 at Bondo National Technical Training Institute within Bondo Township in Bondo Sub County in Siaya County, with others not before court, being a person employed in a Public Institution as an accounts clerk in Bondo Technical College, without lawful Authority made improper payment of public money belonging to Bondo National Technical Institute which is a National Government Entity. It is noted that the particulars in that count has not indicated the amount of money involved. The particulars are not specific on how much was paid and to who. The Appellant had a right to be informed of the charges in full details before hand with sufficient details so as to enable him defend himself. That being the position, it is my view that the charge was defective for want of particulars. Consequently, I am in agreement with the finding by the learned trial magistrate that Count Two was not proved beyond reasonable doubt against the Appellant.



35. As regards Count Three, the Appellant was charged with an offence of forgery contrary to Section 350 of the [Penal Code](#) which provides as follows:

- (1) Any person who forges any will, document of title to land, judicial record, power of attorney, banknote, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life, and the court may in addition order that any such document as aforesaid shall be forfeited.
- (2) In this Section, "document of title to land" includes any deed, map, roll, register or instrument in writing being or containing evidence of the title, or of any part of the title, to any land or to any interest in or arising out of any land, or any authenticated copy thereof.

Forgery is defined in Section 345 of the [Penal Code](#) as the making of a false document with intent to defraud. In order to prove this charge, certain ingredients must be proved which are inter alia; the document must be forged; accused used the document as genuine; accused knew or had reasons to believe that it was a forged document; accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document. In short, the prosecution is under obligation to present evidence which shows that the document is in writing and that the accused used the same while purporting to be genuine and with knowledge that the same was forged or that the forgery is done by himself and further that he knows that the document is false and that the said document if acted upon will cause prejudice to the victim who would be in the belief that the same is genuine. An analysis of all the prosecution witnesses as well as the evidence of the Appellant indicates that a few of the cheques used were genuine while a huge number (152 of them) were false and not genuine since the signature of the Principal had been fraudulently used electronically and which led to the theft of over Kshs30,000,000/=. Indeed, the Appellant admitted in his evidence that he did not account for Kshs30,811,600/=. The forensic expert (PW11) gave watertight evidence that indeed the institution had lost the aforesaid sums through theft by the Appellant who was then an employee of the institution. The Appellant's evidence did not cast doubt upon that of the prosecution which was overwhelming against him. I find the prosecution proved this count beyond reasonable doubt against the Appellant.

35. In Count Four the Appellant was charged with an offence of making a document without authority contrary to Section 347 (A) of the [Penal Code](#). The particulars were that on diverse dates between 1st July 2020 and 28th February 2021 at unknown place within the Republic of Kenya, with others not before court, made 152 cheque leaves purporting them to be what in fact is not. From the said 152 cheque leaves, the forensic auditor (PW11) established that the Appellant withdrew Kshs30,811,600/= from the various bank accounts. The Appellant in his defence evidence admitted that the said cheques were abnormal since the same did not have any supporting documents. This therefore left no doubt that the said cheques were made without authority of all the signatories. The act of making, signing, and execution of the 152 cheques by the Appellant was in the sole intention to defraud the institution which was his employer. Indeed, the Appellant admitted in his evidence that he did not render an account of how the aforesaid sums were withdrawn by him. He also admitted that the said 152 cheques were abnormal as they were not supported by documents. Again, the forensic auditor (PW11) confirmed that the Appellant had fraudulently used an electronic signature of the Principal without his authority. Hence, it is my finding that the prosecution proved the fourth count beyond reasonable doubt against the Appellant.

36. In Count Five, the Appellant was charged with an offence of uttering a document without authority contrary to Section 353 of the [Penal Code](#) which provides that any person who knowingly and



fraudulent utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question. The offence is proved if a person knowingly and fraudulently utters the document. The essential ingredients to be proved is that the document is false and that the accused is aware of the said falsity. From the evidence presented by the prosecution witnesses and the Appellant, it is clear that the Appellant presented the said 152 cheques to the banks and managed to withdraw the sums mentioned in the charge sheet. It also transpired that the Appellant had fraudulently used an electronic signature belonging to the Principal without his permission. Even though the Appellant claimed in his defence that the Principal had given him authority, the same is unbelievable in view of the fact that the said Principal (PW1) confirmed in his evidence that upon noticing the anomaly in the bank statements, he alerted the Board members and thereafter alerted the police which led to the arrest of the Appellant. The said witness further added that the Appellant upon being confronted with the evidence of unauthorized withdrawals, he purported to tender a resignation letter but which was rejected by the Board. The Appellant, in order to receive the money, must have presented the said 152 cheques to the banks and thus it is clear that he uttered them to the bank. I find that the prosecution proved this ingredient beyond reasonable doubt.

37. The sum total of the foregoing observations is that the finding on conviction by the learned trial magistrate was quite sound and must be upheld. Hence, the Appellant's grounds of appeal on conviction must fail.

38. Regarding sentences, it is noted that the Appellant was ordered to serve five (5) years imprisonment on Count One, three (3) years imprisonment on Count three, five (5) years imprisonment on Count Four, and three (3) years imprisonment on Count Five and that the sentences were ordered to run consecutively. It is noted that the Appellant has appealed against the sentences imposed by the trial court. It is trite law that sentencing is always at the discretion of the trial court and that an appellate court should not interfere with the same unless it is shown that the trial court took into account irrelevant factors or failed to take into account relevant factors and therefore arrived at a sentence which is unlawful, excessive or harsh. It is also trite law that a trial court has discretion to order sentences to run consecutively or concurrently depending on the circumstances of each particular case.

On whether the sentences were to run consecutively or concurrently, it is noted that the offences were committed around the same time and therefore the sentences imposed ordinarily should run concurrently. In the premises, it is my considered view that it was erroneous the trial court to order the sentences to run consecutively. To this end, the appeal on that ground must succeed.

As regards the sentences imposed, I find that the same were neither harsh nor excessive since the same were within the law. Again, the Respondent has not requested for enhancement of those sentences. Hence, I will not interfere with the same but uphold them.

39. In the result, the Appellant's appeal on conviction lacks merit and is dismissed. However, the appeal on sentence succeeds to the extent that the trial court's order that the sentences are to run consecutively is hereby set aside and substituted with an order that the said sentences shall run concurrently.

DATED AND DELIVERED AT SIAYA THIS 28TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:

Benson Ouma Opany.....Appellant

Soita.....for Respondent



Mboya.....Court Assistant.

