Republic v Ronoh & 4 others (Criminal Appeal E147 of 2021)
[2024] KEHC 7892 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7892 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL E147 OF 2021

GL NZIOKA, J

JUNE 24, 2024

BETWEEN

REPUBLIC ..... APPELLANT

AND

DAVID RONOH ..... 1ST RESPONDENT

TITUS BULUMA NAMUYE ..... 2ND RESPONDENT

REOBERT KIPROTICH BETT ..... 3RD RESPONDENT

JUDY NYAMBURA NDICHU ..... 4TH RESPONDENT

JOEL MBITH WANDA ..... 5TH RESPONDENT

(Being an appeal against the decision of Hon. William Lopokoiyit, Resident Magistrate (RM) delivered on 30th November 2021 vide Criminal Case No. 3827 of 2017 at the Chief Magistrate's Court at Kibera)

JUDGMENT

1. The respondents were arraigned before the Chief Magistrate's Court at Kibera, Nairobi charged vide Criminal Case No. 3827 of 2017, with the offence of stealing a motor vehicle contrary to section 278 A of the Penal Code in count (1).

2. The particulars of the offence are that on the 3rd of September, 2016 at an unknown place within the Republic of Kenya, jointly stole a motor vehicle registration number KCJ 879D make Toyota Fielder value at KShs. 1,250,000. the property of Nicholas Cheruiyot Rotich.

3. In count (2) they were charged with the offence of conspiracy to commit a felony contrary to section 393 of the penal code. The particulars of the offence are that on the night of 3rd of September, 2016 at an unknown place within the Republic of Kenya, jointly conspired to commit a felony namely stealing

a motor vehicle registration number KCJ 879D make Toyota Fielder valued at Kshs. 1,250,000. the property of Nicholas Cheruiyot Rotich.

4. The charges were read out and each accused pleaded not guilty to both charges. The case proceeded to full hearing with the prosecution calling a total of fifteen (15) witnesses.

5. The prosecution case was led by the evidence of the complainant Nicholas Cheruiyot Rotich (PW1). He testified that he imported a Fielder Toyota Corolla motor vehicle, black in colour from Japan.

6. That when the motor vehicle in Kenya, he instructed the 1st respondent a clearing agent to clear the vehicle from the port. That, he paid for all the dues including customs duty and all associated expenses as evidenced by the receipts produced in court.

7. That indeed the vehicle was cleared by the 1st respondent and the complainant send a driver by the name of; John Kimutai Chebii to pick up the vehicle and bring to Nairobi. It is in evidence that the driver picked the up the vehicle from Mombasa.

8. However, the vehicle did not reach the complainant as the driver reported at Lang'ata Police Station that he had been robbed of the same along southern by pass, but the complainant was not convinced that his vehicle had been genuinely stolen, as he argued that the 1st respondent did not inform him of the departure of the driver from Mombasa and neither did he request for money to fuel the vehicle, therefore he lodged a complaint with the police.

9. Pursuant to that report investigations commenced and the respondents were arrested. However, they were released on cash bail pending investigations, but their release on cash bail did not go well with the complainant who held the view that the investigators at Lang'ata Police Station were biased and/or disinterested in proper investigation.

10. As a result, the complainant lodged a complaint with Criminal Investigation Office Headquarters and investigation of the matter was taken over by the Flying Squad. The respondents were re-arrested and charged accordingly. However, the driver Mr Chebii was not charged as he had allegedly passed on.

11. According to the investigators, the 1st respondent who cleared the vehicle did not inform the owner of the departure of the vehicle nor sought for fuel money before releasing the vehicle. That, the 2nd respondent was seen driving the stolen vehicle when he visited his girlfriend at Imara Daima.

12. Further the 3rd respondent is the one who introduced the driver Mr. Chebii to the complainant while the 4th and 5th respondent lied as to what the 2nd respondent was driving when he was allegedly seen driving the stolen vehicle and/or that the 2nd respondent's motor vehicle, which was driven from Mombasa by the 5th respondent had KG number plate when it actually its registered number plates KCJ 878D.

13. Be that as it were, at the close of the prosecution case, the trial court ruled that each accused had a case to answer and placed each on their defence. In their respective defence each respondent denied committing both charges on the ground that they were not at the scene where the allegedly theft took place and that they did not conspire to steal the complainant's case as the prosecution failed to adduced evidence of text communication between them to support the alleged conspiracy.

14. At the conclusion of the trial the learned trial Magistrate delivered a judgment dated; 21st November, 2021 stated that the prosecution's case was weak unconvincing and poorly investigated and that the prosecution had failed to prove its case to the required standard. The trial court consequently, acquitted all the accused person on both charges.

15. However, the appellant is aggrieved by the trial court's decision, and appealed against the same vide the memorandum of appeal which states that: -

    a. That the learned Honourable Trial Magistrate erred in both law and facts in holding that the prosecution had not proved its case which is against the weight of the evidence.

    b. That the learned Honourable Trial Magistrate erred both in law and facts in holding that the prosecution had not proved its case which is against the weight of the evidence.

    c. That the learned Honourable Trial Magistrate erred in fact in holding that one John Kimutai Chebii, the person who drove motor vehicle registration number KCJ 879D from Mombasa to Nairobi on 3rd September, 2021, carried with him for delivery to Titus Buluma Namuye, the 2nd respondent, number plates for motor vehicle registration number KCJ 878D a finding not obtainable from the evidence on record.

    d. That the learned Honourable Trial Magistrate erred in facts in finding credence in John Kimutai Chebii's narrative on how the motor vehicle registration number KCJ 879D was stolen a finding not obtainable from the evidence on record.

    e. That the learned Honourable Trial Magistrate erred in law and fact in holding that conversation transcripts or radio recordings are essential to prove a conspiracy actuated through phone calls.

16. However, the appeal was opposed vide replying affidavits dated 24th May 2022 sworn by each respondent. The respondents averred that the trial Magistrate considered the evidence of all prosecution the witnesses and defence and found that their evidence corroborated by the defence witnesses evidence that the motor vehicle Audi A6 did not have its original number plates when it arrived in Nairobi but had KG number plates.

17. Further, the prosecution witnesses gave contradicting evidence which went against the prosecution's narrative. That, the learned trial Magistrate held that the prosecution failed to prove the offence of stealing contrary to section 268(1) of the Penal Code on the grounds that; none of the respondents were at the alleged scene of crime.

18. Furthermore, the evidence by both prosecution and defence revealed that no theft of complainant's vehicle occurred on the date and area of the alleged crime. That there was no direct evidence to prove the elements of the offences in that the prosecution relied on speculation and uncorroborated evidence.

19. That the respondents averred that, the prosecution failed to call Wesonga a crucial witness who was in the stolen car on the day of the crime allegedly took place and who would have shed light on the alleged theft and therefore the failure to call that witness should be interpreted to the detriment of the prosecution.

20. That the charge sheet was defective as it failed to disclose an offence against them and the grounds of appeal are irrelevant and out of touch with the substratum of the offence of stealing and conspiracy.

21. Further, the complainant has been malicious and acted in bad faith against the respondents as he directly and indirectly usurped the role of the prosecution and police in investigation. That, PW6

testified that the complainant instructed the police to use force against them and was directing the manner the police officers were to conduct their investigations.

22. Further, PW5 testified that the complainant attempted to forced witnesses to give false testimony and the police officers to arrest and threaten witnesses. Furthermore, the complainant caused publications in a newspaper to malign the respondents.

23. That the actions of the complainant were a clear indication that the prosecution case was weak, factually and evidentially unfounded, aimed at wasting the court's time and to defeat substantive justice.

24. Lastly, the respondents averred that telecommunication between them was in the usual course of their engagement and was not prima facie evidence of conspiracy and in the absence of transcripts audio recordings or text messages they were insufficient evidence.

25. That in the circumstances the appeal lacks merit and should be summarily dismissed and acquittal orders affirmed.

26. The appeal was disposed of vide filing of submissions. The appellant's submissions are dated 22nd June, 2022 while the respondents' submissions are dated 4th July, 2022.

27. The appellant submitted that the learned trial Magistrate erred in holding that the prosecution failed to prove its case which was contrary to the weight of the evidence that proved that the 1st respondent David Ronoh released the subject vehicle registration No. KCJ 879D to the driver without the knowledge of the complainant.

28. Further, the complainant's driver refused to pick the complainant's calls but was in constant communication with the 2nd respondent Titus Buluma throughout the trip.

29. Furthermore, the claim by the 2nd respondent Titus Buluma that he was collecting a number plate from the driver was disapproved as it was established that the said vehicle left Mombasa with a number plate.

30. That, the trial Magistrate erred in holding that the 2nd respondent's Titus Buluma's motor vehicle black Audi A6 was driven from Mombasa to Nairobi using KG plates. That, the prosecution proved that the vehicle left Mombasa with the number plate KCJ 878D already fitted.

31. That no number plates were delivered to the 2nd respondent and the purpose of the driver of the complainant's driver and the 2nd respondent communicating was for the sole purpose of stealing the complainant's motor vehicle.

32. In addition, the evidence of PW2 Alex Simiyu Wafula a guard at Daytona Flats was that the 2nd Respondent, Titus Buluma visited the premises with a Black Toyota Fielder without number plates. That the said evidence was sufficient proof that the respondents were involved in a calculated scheme with to steal the complainant's vehicle.

33. The appellant faulted the trial Magistrate for believing the driver's narrative of how the subject vehicle was stolen despite the fact that the said driver passed away before testifying. Further, the trial Magistrate erred in holding that conversation transcripts or recordings are essential to prove conspiracy actuated through for calls.

34. That, the evidence of communication between the 2nd respondent Titus Buluma and the driver Chebii was never disputed and was sufficient to inform the court of the involvement of both the 2nd respondent and driver.

35. The appellant submitted that the evidence was consistent, watertight and well corroborated and proved all the ingredients for the offence and they urged the court to set aside the acquittal, substitute it with a finding of conviction and sentence the respondents as prescribed in the law.

36. The respondents in their submission. reiterated their averments in the replying affidavits. However, they further argued that, the evidence of the prosecution witnesses was full of contradictions. That, the evidence of PW2 (name) to the effect that the 2nd respondent Titus Buluma visited the Daytona Flats with a black Toyota Fielder was contradicted by the evidence of PW11 Monica Mbowowho was visited by the 2nd respondent at Daytona Flats and who testified that on 3rd September, 2016 the 2nd respondent had a black Audi A6, fitted with KG plates and they used the said vehicle to go to the stage and collect the vehicle's number plates.

37. Furthermore, the 2nd respondent controverted the evidence of PW2 (name) in his evidence to the effect that he only dealt with German motor vehicles and not Japan motor vehicles.

38. Furthermore, the failure of the prosecution to call crucial witnesses should be interpreted its detriment. The respondents relied on the case of; Bukenya & Others vs Uganda [1972] EA 549 where the court stated that the prosecution must available all witness necessary to establish the truth even if their evidence may be inconsistent. That, where the evidence is barely adequate the court may infer that the evidence of the uncalled witness would have been adverse to the prosecution's case.

39. Further, interpretation of section 143 of the *Evidence Act* (Cap 80) Laws of Kenya is to the effect that in criminal cases the prosecution is required to avail all relevant evidence to enable the court make an informed decision. The respondents reiterated that, their prosecution was actuated by malice and bad faith on the complainant.

40. That the learned trial Magistrate held that the charge sheet in respect to the charge of stealing was defective ab intio for failing to disclose any offence against them. Further, the prosecution failed to prove its case beyond reasonable doubt and therefore there is no reason for the court to overturn the decision of the trial court to acquit them but it in their submission. should be affirmed.

41. At the conclusion of the arguments and submissions of the respective parties, I note that the role of the first appellate court is to re-evaluate the evidence adduced before the trial court afresh and arrive at its own conclusion taking into account the fact that, it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32.

42. The court in the afore case stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) 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"

43. In the instant matter the appellants were charged with an offence under section 287A of the penal code. The provisions thereof states that: -

> " If the thing stolen is a motor vehicle within the meaning of the *Traffic Act* (Cap. 403), the offender is liable to imprisonment for seven years."

44. Be that as it may the offence of stealing is defined under section 268 of the Penal Code as follows: -

> "(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
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> (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
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> (a) an intent permanently to deprive the general or special owner of the thing of it;
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> (b) an intent to use the thing as a pledge or security;
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> (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
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> (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
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> (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
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> (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
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> (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
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> (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

45. In the dealing with the ingredients of the offence of stealing, the Court of Appeal case of, John Muiruri Kagunyi v Republic [1982] eKLR stated that:

> " Stealing consists of taking anything "fraudulently and without claim of right (section 268(1) of the Penal Code)."

46. In the case of; Ketan Somaia & another v Republic [2005] eKLR the High court stated that: -

> " The reason for that holding is simple. It is to be found in the definition of the term "stealing" as set out in section 268 of the Penal Code. For a person to be convicted for the offence of stealing, he must take or convert the thing, fraudulently. In other words, the prosecution must prove not only the act of taking or conversion, but also that the person had a fraudulent intent. It is therefore not sufficient for the prosecution to prove that the accused person was negligent or reckless.

47. Thus in a charge of stealing two crucial elements must be established; conversion and fraudulent intent. To prove fraud, the prosecution is required to prove that the accused persons formed the mens rea to deprive the owner of ownership of the thing stolen.

48. In James Mwenja v Republic [2020] eKLR the High court held that: -

> " To Prove that the appellant had converted the vehicle, the prosecution had to prove that he intended to deprive the owner of it. I do agree with the appellant's submissions that the prosecution had the duty to prove mens rea. In Philip Muiruri Ndarunga v Republic (2016) eKLR, the court stated:
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> "It is a cardinal principle of criminal jurisprudence that mens rea of the accused person is very much essential ingredient to prove the guilt against the accused. The essence of criminal law has been said to lie in the 'maxim lactus non facitreum nisi mes sit rea'. There can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is every other, that the essence of an offence is the wrongful intent, without which the offence cannot exist."

49. Similarly, in the case of, James Rioba Makara v Republic [2015] eKLR the High court held that: -

> " In order to prove the offence of stealing the prosecution had to prove that there was intent to deprive the complainant permanently of the motorcycle."

50. Further the Court of Appeal in the case of; Simon Ndirangu Kiraguri & another vs Republic [2013] eKLR that the conduct of the appellants in carrying out a search with the Registrar of Motor Vehicles and paying the purchase price thus coming into possession of the stolen vehicle was inconsistent with having mens rea to steal the vehicle and acquitted them of the charge of stealing a motor vehicle.

51. In the instant matter, the prosecution called several witneses to support its case. An analysis of their evidence reveals that some gave inconsistent evidence as to whether the complainant's motor vehicle was stolen or not and/or simply exonerated the respondents from blame.

52. In that regard, PW6 No. 236210 Inspector Kenneth Bowen who was part of the investigators of the case testified (as stated at page 89 of the record of appeal), that he was furious in that, although the complainant had information from Safaricom (K) Limited which could assist in the investigation and

which the Police did not have, he was "elusive and economical" with that information. Therefore, it was difficult to establish whether the vehicle was stolen or not.

53. PW7 Robuk Kiptoo Rotich was categorical in his evidence (as indicated at page 94 of the record of appeal) that none of the respondents was involved in the theft of the complainant's motor vehicle. That, he had worked with the 1st respondent since 1998 and he had cleared around 500 motor vehicles without incident. Further, the 2nd respondent called him and informed him that he had seen the driver of the motor vehicle with a "drug looking like person" in the vehicle. Furthermore, he was with the 3rd respondent playing darts. Therefore, he exonerated these respondents from blame.

54. In addition, the other prosecution witness simply testified that they knew nothing about the theft of the vehicle, this includes; PW5 Joakim Ouma Ogutu who testified that he used to work for the complainant and knew the respondents, PW9 Dickson Kahuto Karanja and, PW10 Duncan Gakuri Kua who assisted the driver of the vehicle to go to Lang'ata Police station to report theft of the vehicle.

55. PW8 No. 71458 Corporal Ronald Nyachae testified that he received and recorded the report of the theft of the vehicle in the occurrence Book (OB). That the driver was injured thus corroborating the evidence of PW9 and PW10 and that he released him to go to hospital for treatment.

56. The evidence the prosecution relied on to prove the report of the driver of the motor vehicle was false was of PW2, Alex Simiyu Wafula who testified that on 3rd September 2016 at about 10:30pm the 2nd appellant went to his place of work Daytona apartments with a black Toyota fielder with no registration plates. However, his evidence was contradicted by the evidence of PW11, who testified that the 2nd respondent was his husband and that on the material date he had a black Audi vehicle that had KG number plates.

57. Furthermore, PW2 confirmed that 2nd respondent did not enter the apartments with the vehicle instead he parked it outside the Daytona apartments and that he did not record the details of the vehicle opting to record the same as; "xxx". The evidence of this witness is not helpful as it fails to confirm beyond reasonable doubt the identity of the vehicle the 2nd respondent had on the material date.

58. The other evidence relied on by the prosecution to nail the respondents was that of PW4 Joseph Ndambuki Maingi who stated he was working at Carnivore restaurant at China gate and on the night of 3rd September 2016 and he did not witness any incident of robbery or theft of a motor vehicle and neither did he get any report of any incident along southern bypass.

59. However, the evidence revealed that the incident allegedly occurred around Ole Seren hotel which was far from where the witness was and the witness confirmed in cross examination that he could not have known of the incident if it was at the hotel. Even then apparently the investigating officer interviewed more watchmen but did not avail them to corroborate the evidence of this witness. In any case the evidence of the watchman could only be used against Mr Chebii who was never charged.

60. Furthermore, the prosecution relied on the evidence of the complainant but he was not at the alleged scene of crime and merely suspected that the respondents committed the offence due to their involvement with the vehicle in one way or another.

61. Finally, the prosecution relied on call data of the respondents' phones provided by the service provider. First and foremost, the manner in which the witness PW14 Sergeant Daniel Khamisi gave the evidence was so unclear and difficult to follow. Further, he confirmed that the call data confirmed none of the respondent was along southern bypass when the offence was allegedly committed. That the 1st respondent was in Mombasa, 2nd respondent at Imara Daima and Mlolongo, 3rd respondent at

Langata and Nairobi West, 4th respondent at Mlolongo and 5th respondent at Mombasa, Mlolongo and Mombasa.

62. Furthermore, he was not able to tell the contents of the call conversation. At page 150 of the record of appeal, he states that:

> " I am not able to tell the contents of the call data. It is not in the Safaricom. I am not able t tell what one was telling the other.
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> I am only here to tell that there was communication. There were sms. The contents of the text messages is not retained. Police cannot get that from Safaricom.
>
> However, Cyber team from DCI can get that content of sms from reports"

63. The question is why didn't the investigators get the cybercrime team to assist? The surprising evidence was given by PW15 Reuben Onyiego who repeatedly testified that the case was poorly investigated.

64. In my considered opinion the involvement of the complainant in active investigation of the matter off the police and CID lying Squad investigations compromised the investigation rendering a fatal blow to the prosecution case.

65. As regard the offence of conspiracy to commit a felony, the provisions of section 393 of the Penal Code that: -

> " Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment."

66. The elements of the offence were discussed in the case of; Evans Waweru Maina vs Republic [2020] eKLR where the Court of Appeal stated:

> "
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> " 17. In Mulama v Republic [1975] KLR 24, it was held that if on a charge of conspiracy all the accused but one is acquitted, that one has to be acquitted as well, unless it is charged and proved that someone else not named in the charge has been part of the conspiracy. In Archibold: Writing on Criminal Pleadings, Evidence and Practice, pages 2589 and 2590, the learned authors state as follows:
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> "The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable; there must be agreement... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."
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> 18. In the circumstances, since the prosecution did not demonstrate the involvement of any other person, we find and hold that the learned judge erred in law in affirming the appellant's conviction for the offence of conspiracy. Consequently, we allow that ground of appeal."

67. In the instant matter, the prosecution evidence did not reveal any agreement or consent between the respondents to commit the offence of conspiracy. The evidence by the prosecution reveal that each respondent was arrested for playing a different role in the matter. There is no evidence of mens rea or consensus ad idem among the respondents

68. It is noteworthy for instance, the 3rd to the 5th respondent did not deal with the subject motor vehicle at all and in fact as already stated herein the 4th and 5th respondent are alleged to have given false information regarding a different vehicle altogether. So where did they conspire with the others? Does the fact that they had telephone conversation with any of the other respondent constitute the consent or agreement or conspiracy to steal the complainant's motor vehicle?

69. It suffices to note that throughout his evidence in chief and cross examination the complainant did not give any evidence of direct or indirect involvement of the 4th and 5th respondent with his motor vehicle and if they cannot be found guilty of conspiracy then the other respondents cannot be found guilty thereof. The ingredients of charge of conspiracy were not proved.

70. However, before I conclude the judgment, I note that the respondents did raise the issue of a defective charge sheet and it is the trial court that addressed it in the judgment. It cannot even be an issue herein as no new issues can be available for determination at an appellant stage and in any case the respondents were acquitted of the charges and have no cross appeal.

71. The upshot of the aforesaid is that the appeal herein has no merit and I consequently dismiss it in its entirety and confirm the decision of the trial court.

72. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF JUNE, 2024.

GRACE. L NZIOKA

JUDGE

In the presence of:

Mr. Mutuma for the appellant

MS. Khafafa for the respondent

Ms. Ogutu: Court Assistant