Mwarangu & another v Republic (Criminal Appeal E028 of 2020 & E029 of 2021 (Consolidated)) [2023] KEHC 21064 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21064 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E028 OF 2020 & E029 OF 2021 (CONSOLIDATED)

FROO OLEL, J

JULY 31, 2023

BETWEEN

DOUGLAS NJUGUNA MWARANGU ALIAS ELIJAH MATAARU GATHU ..... 1ST APPELLANT

STEPHEN MBURU NJANE ALIAS GEOFFREY MUTUA MUSYOKI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against judgment of the Chief Magistrate's court at Nanyuki in Criminal Case No.1235 of 2015 Republic versus Stephen Mburu Njane alias Geoffrey Mutua Musyoka and another delivered on 19th April 2021)

JUDGMENT

1. This appeal arises against the judgment of Honourable Lucy Mutai, Chief Magistrate dated and delivered on 19.04.2021 in Nanyuki CMCR No.1235 of 2015 both appellants were convicted and found guilty of committing the offence of conspiracy to defraud contrary to section 393 of the penal code, stealing motor vehicles contrary to Section 278 (A) of the penal code. Further 2nd appellant was found guilty on count 3 for personation contrary to Section 382, count 4 forgery contrary to section 349 and count 5 for uttering false documents contrary to section 353 of the penal code. The court proceeded to convict him under Section 215 of the CPC on all the above counts.

2. Further the court found the 2nd appellant also guilty of the offence of personation in count 6 contrary to section 382 of penal code, count 7 for forgery contrary to section 349 of the penal code, count 8 uttering a false document contrary to section 353 of the penal code and also convicted him under provision of section 215 of the penal code. The court proceed to sentence them as follows;Count I: Each accused in sentenced to serve five years imprisonmentCount II: Each accused sentenced to serve 6

years imprisonmentCount III: Accused 1 to serve one year imprisonmentCount IV: Accused to serve ½ year imprisonmentCount V: Accused 1 to serve 1 year imprisonmentCount VI 2nd accused to serve one year imprisonmentCount VII: 2nd accused will serve 1 ½ years' imprisonmentCount VIII: 2nd accused will serve one year imprisonment

The sentence were to run concurrently.

Background

3. In the trial before the magistrate's court the 2nd appellant herein was the 1st accused, while 1st appellant herein was the 2nd accused. After conviction and sentence, the 1st accused (2nd appellant) filed Nanyuki High Court Criminal appeal no.E029 of 2021 while the 2nd accused (1st appellant) filed Nanyuki High court Criminal Appeal no E028 of 2021. On 23rd March 2022 the state/prosecution counsel applied for consolidation of both appeals as they arose from one trial and conviction. The 1st appellants counsel Mr. Kinaro did not oppose the said application, nor did the 1st accused (2nd appellant) oppose the same. The appeals were consolidated with Nanyuki criminal appeal no. 29 of 2021 being the lead file. Douglas Njuguna Muranga was assigned be the 1st appellant and Stephen Mburu Njane assigned be the 2nd appellant.

4. PW1 Christopher Gatebi Kembo testified that he was a mechanic and owned five motor vehicles which he hired out through Amber tours company which belongs to one James Mureithi. As a routine before any motor vehicle is hired out PW1 stated that he had to see the customer and could not hire out any motor vehicle without undertaking this ritual. He had operated this business for three (3) years. On 16.09.2015 one Paul Karuri a fellow mechanic called him and told him that he had two clients who wanted two Toyota Fielder motor vehicles for hire. They wanted to use the said motor vehicles to go to Makuyu area. The clients were to come and hire the said motor vehicles the following day.

5. On 17.09.2015 at 11.00am the customer called him and introduced himself as Jeff (2nd appellant). He said he had been directed to PW1 by Paul Karuri (PW2). He found the motor vehicle being washed and explained to PW1 that he wanted two Toyota Fielder which he was to use to go to Makuyu. PW1 decided to give him motor vehicles KBN xxxD Toyota Fielder – Red in colour and motor vehicle KBT xxxK Toyota NZE. He explained that he had declined to give him the new Toyota Fielder because the 2nd appellant was young. The 2nd appellant waited for his friend who came and he introduced him as Elijah Mtaaru (1st appellant). PW1 directed his driver Muriuki (PW3) to escort them to comfort hotel where all necessary car hire paper work was signed and the parties came back to him once done. The 1st appellant claimed that the brakes of the 2nd motor vehicle were not okay and PW1 directed him to his garage where the said motor vehicle was repaired.

6. The appellants wanted the car's hired for three (3) days and said they could extend it for a day. They negotiated and agreed at a hire fee of Ksh.3000/= per day and the appellant's paid Ksh.9,000/= per car, in cash and other amount by Mpesa. Motor vehicle KBN xxxD Toyota fielder did not have a tracking device while motor vehicle KBT xxxk Toyota NZE had a tracking device. The following day after the appellant's had hired the motor vehicles, PW1 checked the tracker and saw that the motor vehicle was in Kisinguni area. He cut off the engine of the motor vehicle engine driven by the 2nd appellant, who called him and asked to unlock the engine. On 18.09.2016 again he checked on his motor vehicle and saw that it was at Boda boda area in Makuyu. After some time he checked again and found that the tracker was off and that is when he sensed that all was not right. Both appellant's phones were also off. PW1 also called PW3, who had introduced the appellants to him and informed him of the obtaining position.

7. PW1 reported the loss of his motor vehicles to the police the following day and gave the police, the appellants description as he had spent a considerable amount of time with both appellants. PW1 later went to Nairobi and reported the theft of his motor vehicles at Flying Squad headquarters. While there the 2nd appellant put on his phone and he called him but the 2nd appellant did no pick up his call. After some time he was called and informed that both suspects had been arrested. He went to Nanyuki police station after the accused were brought to Nanyuki and told to attend an identifying parade which did not occur as the appellants refused to attend the said parade.

8. PW1 identified the log books of his motor vehicles and the car hire agreement forms signed by both appellants. For motor vehicle KBN xxxD Toyota Fielder the hirer was Elijah Mbaaru Gathua while for motor vehicle KBT xxxK Toyota NZE the hirer was Geoffrey Munyoki Mutua. Both motor vehicle were to be hired for 3 days from 17.09.2015 and to be returned on 20.09.2015 at Ksh.3000/ = daily. PW1 further marked for identification the contract forms and national identification of both appellants which they used to hire the motor vehicles. The driving license of 1st appellant too was marked for identification.

9. Even though the appellants refused to participate in an identification parade, PW1 stated that he could identify them positively. He was with 2nd appellant for more than 3 hours and went with him to the car wash to have the motor vehicle duly washed. PW1 insisted that they wait for the other person to come. The 1st appellant came and they were together for about 30 minutes. Later the 1st appellant called him and complained about faulty brakes of the second car hired. He came back to the garage and spent about 10 minutes there while the brakes were being repaired. During this period, PW1 testified that he was with the 1st appellant.

10. PW1 reiterated that he saw both appellant's during the day. The 2nd appellant came at 10.0am while the 1st appellant came at 2.00pm and thus could positively identify them. Both appellants also left their phone contacts. While the 2nd appellant initially answered the PW1 phone calls, the 1st appellant did not pick his calls. PW1 further stated that he was not told why both accused persons refused to attend the identification parade and further that the stolen motor vehicles were never recovered.

11. In cross examination, PW1 stated that he had not known the appellants before they met on the material day, when they hired the car's and it was the 2nd appellant who gave him a copy of his national identity card and driving licence. The 1st appellant, had his agreement signed in the office and he left his documents there. It was the appellants who stole his motor vehicles and not his driver and he is the one who gave them the car keys. PW1 also confirmed that he was not present when the 1st appellant signed the care hire contract but he was sure that he gave his motor vehicles to both appellants.

12. PW2 Paul Karuri testified that he lived at Bulsa area and was a mechanic by profession practising within Nanyuki town. In May 2016, he received a customer who said his motor vehicle had a problem and he identified himself as Jeff. His motor vehicle was a Toyota Rav 4. PW2 carried out a diagnosis on the said motor vehicle and the said person left. He had not known him before but he was short and had a dark complexion. They were together for about an hour. On 16.09.2015, the said Jeff (2nd appellant) returned to his office and told him to assist him get a car hire. He called PW1 who agreed to hire his motor vehicles to the 2nd appellant. They agreed to meet the following day. They were together that evening for about 30 minutes and the 2nd appellant had stated the he would be going to Makuyu for a function and thus needed the said car hire.

13. While still with the 2nd appellant on the said 16.09.2015, in the evening another man came and they said they needed two Toyota fielder motor vehicles. PW2 told them that the motor vehicle was available. PW2 could not recall how the other man looked like. On 17.09.2015, the 2nd appellant called and

asked for directions to PW1 garage. He gave the 2nd appellant PW1 phone number and later PW 1 confirmed to him that they had met and he hired out his motor vehicles to the 2nd appellant. Later PW1 complained to him about the conduct of the persons who had hired his motor vehicles. He had tracked the motor vehicle to be within Nanyuki town, although the appellants were saying they were at the airstrip.

14. PW2 further stated that he talked to PW1 after 3 days and was told that the hired motor vehicles had not been returned and that the 2nd appellant's phone was off. He had known PW1 for over five years and had referred several clients to him. On 03.11.2015, he was called by the CID and told to attend an identification parade but the appellants refused to participate in the same. He identified the 2nd appellant on the dock and said he did not know the 1st appellant. Both appellants did not have any question for the witness.

15. PW3 James Munuki Kinyua stated that he was a taxi driver and was employed by PW1. On 17.09.2015 he was at Kungu Maitu hotel with one taxi when PW1 called him and told him to take motor vehicle KBT xxxK to the garage. He had used the said motor vehicle for 1 year. He went to the garage and found PW1 with a client and PW1 told him that the said client wanted to hire the car. PW1 asked him to take the client to the office situated at Comfort hotel and they proceeded to the said office where the client left a copy of his national Identity card and driving licence. The client also paid car hire fee agreed upon and signed the hire form. PW3 then took him back to the car wash where he left him.

16. After 1 hour PW1 again called him and told him that there was a 2nd customer who also wanted to hire a motor vehicle. He again went to PW1 and found him with the new client and the previous client who then hired the motor vehicle KBT xxxK Toyota NZE. He took the 2nd client in motor vehicle KBN xxxD Toyota fielder up to the office. The 2nd client similarly gave a copy of his national Identity card, driving licence and paid car hire fee. The client said they would be going to Makuyu. The 2nd client insisted on the brakes of his motor vehicle be repaired and they went back to PW1's garage where he left him. Later PW3 heard that both motor vehicles were stolen and could not be traced. He identified the 2nd appellant as the person who hired motor vehicle KBT xxxK Toyota NZE and the 1st appellant as the person who came later and hired motor vehicle KBN xxxD Toyota Fielder. Both appellants did not ask the witness any question.

17. PW4 was Cpl Hamilton Kisake attached to Flying Squad Nairobi area. On 23.09.2015, he was asked to investigate this case from Nanyuki police station. He met PW1 who narrated to him what had transpired. PW1 further told him that the person who hired his motor vehicle was one Elijah Gathu of 0723xxxxxx and Geoffrey Mutua of 0716xxxxxx. He did investigate this matter and asked Safaricom for three months of cell data which they used to get the names of the person who frequently communicated with the said persons. They got hold of them and it lead to the arrest of both appellants. At the time of arrest both the appellants phones were off and a time would occasionally be put on for a short while and then be put off again. They arrested the 2nd appellant at Kahawa Sukari and he led them to the 1st appellant who was also arrested. When they effected the arrest, they came to know that both appellants had other names.

18. The 1st appellant was known as Douglas Njuguna Mwarangu while the 2nd appellant was known as Stephen Mburu Njane. He identified both their national identity cards and further stated that the 2nd appellant told him that one Mwaura took the motor vehicles to Tanzania. The said Mwaura was still at large. In cross examination, PW4 confirmed that they arrested the 2nd appellant before arresting the 1st appellant and according to investigations it was the appellants who used different names to hire the motor vehicles from the PW1 and at the time of his arrest the 2nd appellant was using mobile no.0727xxxxxx. It was also the 2nd appellant who told him that the hired motor vehicles had been driven

to Oloitoktok. PW4 also confirmed that the 1st appellant was rightfully apprehended and he too had used false names to hire the said motor vehicle.

19. At this point of the proceedings the 2nd appellant skipped court proceedings and was later arrested. His bond was cancelled. Before further proceedings were taken, both appellants prayed that PW1 – PW3 be recalled top enable them cross examine them. This application was allowed.

20. PW1 was recalled for cross examination and stated he knew the 2nd appellant on the day he gave him the car hire. The Identification card left by the said appellant indicated that his name was Geoffrey Musyoka Mutua of Identity card no 258xxxxx and his phone number was 0716333873. The 2nd appellant had filled the car hire form and he was the one who took one of the hired motor vehicles. The 1st appellant too cross examined PW1 and he clarified that he had not known the 1st appellant before but described him as tall and fat. He was with him for over 30 minutes and could recognize him. When they were arrested they declined to take part in the identification parade. PW1 further clarified that he was not present when the appellants signed the car hire agreements. The last time he checked the car tracker the motor vehicle was in Muranga before the tracker was switched off. In re-examination PW1 clarified that the 2nd appellant took motor vehicle KBT xxxK Toyota NZE while the 1st appellant took motor vehicle KBN xxxD Toyota Fielder.

21. PW2 in cross examination also clarified that he had not known the 2nd appellant before and it was the 2nd appellant who had come to his garage and wanted his Rav 4 repaired. They had communicated through the 2nd appellant's phone no.0716xxxxxx and after introducing him to PW1 they never met again. As regards the 1st appellant, PW2 stated that he had not met him before and they had not spoken. PW3 too was recalled and was cross examined by the 1st appellant. He confirmed that PW1 was his employer and he had taken the 1st appellant to the office where he filled in the car hire agreement after which he took him back to the garage. PW3 further stated that he was with the 1st appellant for 3 hours thus could properly identify him though they refused to attend an identification parade.

22. PW5 was Millicent Muthoni Munene. She stated that previously she worked at Aber Travellers as a secretary and was employed by one James Mureithi. Her work involved hiring motor vehicles and filling in the contract forms using details given to her by the clients (picked from prospective client national identity card and driving license). On 17.09.2015, she was at work when she received a call from PW1 who informed her that two customers would be brought by PW3 and they wanted to hire his cars for 3 days. After 10 minutes PW3 came with the 1st client who wanted to hire one of the motor vehicle.

23. PW5 stated that she asked the client for his nation identity card and driving license. His name was Geoffrey Musyoki Mutua. She photocopied both documents and they took approximately 10 – 15 minutes filling the documents/forms and she identified both as MFI 14 and 15. The 2nd appellant had hired motor vehicle KBT xxxB Toyota NZE for 3 days at Ksh.3,000/- daily. He paid Ksh.4,000/- in cash and Ksh.5,000/- through Mpesa. while still at Aber travellers office the 2nd appellant stated that he would bring the other client who would come for the 2nd motor vehicle. After some time, the 2nd appellant came with brother known as Elijah Mataaru Gathu. She repeated the same process and took his identity card and driving license and photocopied the same. The 1st appellant also had his details filed in the care hire contract and paid Ksh.9,000/=. She was with the 1st appellant for approximately 10 – 15 minutes before they left with PW3. She had not known them before but stated that they were going for a function in Makuyu.

24. PW3 stated that after 3 days she was called by PW1 who informed her that they motor vehicles had been stolen and the last time the car trucker had placed one of the motor vehicle at Kabati. On 04.11.2015 she was informed that the persons who had hired the motor vehicles were arrested in Nairobi and was

called to Nanyuki police station to go identify them. She identified them inside the police cell and they were the same persons on the dock. Prior to the day when they hired the motor vehicles, she had not known them or seen them.

25. In cross examination by the 2nd appellant, PW5 stated that she filled the contract form as Geoffrey Mutua using Identity card no.22xxxxx and signed the contract. His driving license was no.15xxxxx. The 2nd appellant had paid Ksh.4000/= in cash and Ksh.5,000/= by Mpesa. She had known the 2nd appellant as Geoffrey Mutua Musyoki and it was PW1 who gave their company, the motor vehicles to hire out, but it was her boss who confirmed that the documentation was in order. According to her, the documentation used to hire the said motor vehicle were in order and she dealt with the 2nd appellant who wanted to hire one of the motor vehicles and he is the one who signed the contract. Further there was no need to take a photograph as the same was on the identity card and driving license. PW5 insisted she could properly identify the 2nd appellant because she had dealt with him and seen him earlier and also did not know if it was necessary to give his description to the police.

26. PW5 was also further cross examined by the 1st appellant and she stated that she did not give his description to the police and when she saw them at the police station they were in a separate cells. She did not see who drove the other hired motor vehicle but one was driven by the 2nd appellant and she was told to collect Ksh.9,000/= by PW1 for each car. Her responsibility was to hire out the motor vehicles and fill in the contract forms. It was the 1st appellant who filled his identity card number on MFI 6 and she did not make any mistake with the entries made.

27. PW6 was C I Jacob Mureithi of Laikipia East DCI office. He stated that he was the investigating officer of this case and was in the office on 24.09.2015 when PW1 reported that two men/clients came and hired his motor vehicle KBT xxxK Toyota NZE and KBN xxxD Toyota fielder. They had alleged that they are going for a burial in Mukuyu and hired the said motor vehicles for 3 days at a cost of Ksh.9,000/= each. Car hire contracts were drawn on the said date 17.09.2015 (contract no 493) and was signed by Geoffrey Mutua Musyoki for motor vehicle KBT xxxK Toyota NZE. The said Geoffrey Mutua had presented his Identity card number 238xxxxx and driving licence no.154xxxx. There was the 2nd contract no.494 signed by Elijah Mataaru Gathu on 17.09.2015 for motor vehicle KBN xxxD Toyota fielder. The said Elijah Mataaru Gathu too had produced his ID card number 2511xxxx and driving licence number 141xxxx and signed the contract after which both clients were given the motor vehicles and left with them.

28. After a few days PW1 tried to track down the motor vehicle but realized the tracker placed on motor vehicle KBT xxxK Toyota NZE had been tampered with and the said motor vehicle could not be traced. He obtained the log book of both motor vehicles which he produced as exhibit 1 and 2. He commenced investigation and circulated the details of the two motor vehicles but did not get any feedback. Later in November the two appellants were arrested by flying squad officers in Nairobi and he re-arrested them and took them to Nanyuki police station. He requested chief inspector Isaac Njogu to conduct an identification parade but the 2nd appellant refused to take part as he had been photographed while at Muthiaga police station. Similarly, he asked police officer Patrick Mueni to conduct an identification parade for the 1st appellant and he too refused to participate as his photograph had been published and circulated on social media. PW6 produced the identification forms as exhibit 9 and 12.

29. Further investigations had revealed that both appellants used false identification cards. Identification card number 258xxxxx used by the 2nd appellant belonged to Geoffrey Musyoki Mutua while Identification number 2511xxxxx for the 1st appellant belonged to a lady known as Eunice Nyadzua Ngele both identification cards used were fake. Both driving license too were confirmed as fake as they were not part of the record at NTSA. PW6 further produced P-exhibit 14 (c) being a letter to NTSA

and P-exhibit 14(b) their response. He further produced the motor vehicle contracts and identity cards (fake) used by the appellants.

30. In cross examination PW6 stated that they used intelligence to have both appellants arrested and as part of the investigations had widely circulated registration numbers of the stolen motor vehicles but they were never recovered. The appellants had used fake documents to hire the motor vehicles. The first information report is usually made in the OB and it was not detailed and that the complainant made a report both to Nanyuki DCI and Nairobi Flying squad and his statement was recorded with the police. The contract number 493 was signed by the 2nd appellant though disguised as Geoffrey Musyoki, which was the fake name he used. PW6 further stated that he did not investigate the sim card used to pay money and the 2nd appellant was not issued with a receipt for payment of the car hire. The phone number 07163xxxxx was unknown to him and NTSA too had confirmed that the driving licence which they used was fake.

31. The 1st appellant too cross examined PW6, who reiterated that he too used a fake national identification card to hire the stolen motor vehicle. To attend or not to attend an identification parade was optional and the 1st appellant had refused to participate in one which was being organised. The appellant had been positively identified by PW1 and he did not know where they had obtained the fake identities nor as he aware if were they previously photographed. After their arrest one CP Kinyangi had collected them from Nairobi and brought them to Nanyuki.

32. PW7 Joseph Kungu who was a registrar of persons and had worked in the said department for 20 years. He had been trained on finger prints and the other roles he played included getting information of people and monitoring registration and extracting information from the portal. On 06.11.2015 DCI Laikipia East wrote and asked for information regarding Identity card no.258xxxx and 2511xxxx. On 18.11.2015 he replied and found that ID no 2584xxxx belonged to Geoffrey Musyoki Mutua who hailed from Kibwezi while ID no.2511xxxx belonged to Eunice Nyadzua Ngele an adult from Kilifi county. PW7 stated that he extracted this information from the electronic data base accessible only to authorized persons. The photographed of the two persons were different from the person in court. Both appellants were unknown to him. He produced his report as P-exhibit 15(a) and (b) and P-exhibit 16 (a) and (b).

33. In cross examination by the appellants the witness stated that each person had unique finger prints and the 2nd appellants was not Geoffrey Musyoka. Further their office only responded to a request by the police and it was not his duty to search for legal owner of the identification cards. Every identification card too had its own serial number and two identity cards could not share the same number and one could not search for Identity card number unless authorised.

34. The appellants were placed on their defence and the 2nd appellant gave sworn testimony. He stated that he was Stephen Mburu from Kahawa in Nairobi and was a hawker in Nairobi city. On 03.11.2015 he was arrested at Kahawa and taken to Muthaiga police station. He was not told reason for his arrest. On 04.11.2015 he was photographed and brought to a place he did not know. He refused to attend an identification parade as he had been exposed at Muthaiga police station. He denied any involvement in the theft of the motor vehicles and denied all allegations pertaining thereto. He produced his identification card D-exhibit 1. Further the 2nd appellant disassociated himself from exhibit 15 and stated it does not contain his details. The evidence presented was half baked and did not implicate him as the identification card belonged to a Kamba and he was a kikuyu. It was also unclear whether the two motor vehicles got lost. In cross examination he stated the on 16.09.2015 he was in Nairobi hawking, though he could not prove it.

35. The 1st appellant stated that he was Douglas Njuguna from Kiambu County and owned a hardware shop since 2014. He worked with his parents and other workers. On 16.09.2015 to 18.09.2015 he was at work and never left. His workers saw him. He had never used his documents anywhere in Nanyuki nor had he visited Nanyuki on the material day thus was not at the scene of crime which was unknown to him. He had his national identity card with him at all time and the police took it when he was arrested. Phone number 07278xxxxx did not belong to him and the service provider could verify the same.

36. The police who arrested him searched his house and recovered his driving license and old phones which the prosecution never relied on. Identification byPW5 was faulted as it was dock identification and most likely had used photographs earlier taken. He denied the allegations made against him. In cross examination the 1st appellant stated that his workers could prove that he was at work on the material day. The 1st appellant produced a receipt book for the year 2014 – 2015 as D-exhibit 1. On 16.09. 2015 it indicated that he was at work. On cross examination he confirmed the book did not indicate he was on duty.

37. After considering the evidence tendered and submission made, the honourable trial magistrate did convict both appellants and found them guilty of committing the offence of conspiracy to defraud contrary to section 393 of the penal code, stealing motor vehicles contrary to Section 278 (A) of the penal code. Further 2nd appellant was found guilty on count 3 for personation contrary to Section 382, count 4 forgery contrary to section 349 and count 5 for uttering false documents contrary to section 353 of the penal code. The court proceeded to convict him under Section 215 of the CPC on all the above counts.

38. Further the court found the 2nd appellant also guilty of the offence of personation in count 6 contrary to section 382 of penal code, count 7 for forgery contrary to section 349 of the penal code, count 8 uttering a false document contrary to section 353 of the penal code and also convicted him under provision of section 215 of the penal code. The court proceed to sentence them as follows;Count I: Each accused in sentenced to serve five years imprisonmentCount II: Each accused sentenced to serve 6 years imprisonmentCount III: Accused 1 to serve one year imprisonmentCount IV: Accused to serve ½ year imprisonmentCount V: Accused 1 to serve 1 year imprisonmentCount VI 2nd accused to serve one year imprisonmentCount VII: 2nd accused will serve 1 ½ years' imprisonmentCount VIII: 2nd accused will serve one year imprisonment

    The sentence were to run concurrently.

39. Both appellants being dissatisfied with the conviction and sentence filed their appeals,

40. The 1st appellant raised the following grounds of appeal. In his petition of appeal filed on 10.08.2021;

    a. That the learned trial magistrate erred in law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt, thereby occasioning a miscarriage of justice to the detriment of the appellant.

    b. The trial magistrate erred in law and fact in convicting the appellant on a defective charge sheet.

    c. The trial magistrate erred in fact and in law by proceeding to hear and convicted the appellant where it's clear that there was duplicity of charges against the appellant occasioning miscarriage of justice.

d. The learned magistrate erred in law and fact in allowing the prosecution to rely on documents not furnished to the accused thus infringing on the accused rights as guaranteed under Article 50(2) (j).

e. That the learned trial magistrate erred in law and fact by issuing the accused person a sentence that was manifesting excessive.

f. That the learned trial magistrate erred in law and fact by failing to note that the alleged stolen motor vehicle was not produced before court as an exhibit.

g. Considering all the evidence on record and the circumstances of the case, this was not a proper case for conviction and the trial magistrate erred in law by refusing to resolve the apparent doubts in favour of the appellants.

41. The 2nd appellant too did file his petition of appeal on 26.04.2021 and there in raised nine (9) grounds of appeal namely that;

a. That the trial magistrate erred in matter of law and fact by failing to note that the evidence adduced by the prosecution was not watertight to warrant a conviction

b. That the trial magistrate erred in the matters of law and fact by not noting that the prosecution did not prove its case beyond reasonable doubt.

c. The learned trail magistrate erred in mattes law and fact by failing to note that the prosecution evidence was contradicting, uncorroborated and inconsistent.

d. That I am a first offender

e. That the sentence be ordered to run form the day of the arrest, while considering the time spent in remand custody.

f. That learned trial magistrate failed to note that there were no mobile date from Safaricom to prove the allegations of the arrested officer of three months communication between him and myself.

g. The learned trial magistrate erred in matters of law and fact by failing to note that the alleged stolen motor vehicle was not produced before court as an exhibit.

h. The learned trial magistrate erred in matters of law and fact by failing to note that the alleged uttered documents were proved by the document examination expert and certified to be originals and the owners were not presented in court.

i. That I pray for non-custodial sentence to enable me provide for my young family.

42. That 1st appellant, through counsel did file written submissions on 27.09.22 while the state (ODPP) too filed their submission on 25th 10. 2022. When this matter was mention in court on 26.01.2023. The 2nd appellant stated that he would not file submissions and requested the court to relook into the issue of his sentencing.

1st Appellant Submissions

43. The 1st appellant filed his submission on 27.09. 2022 and stated that the prosecution failed to produce strong culpatory evidence establishing the 1st appellant's guilt and thus the court erred by convicting him on doubtful evidence that was not proved beyond reasonable doubt. The 1st appellant was known as Douglas Njuguna from Kiambu County and did not visit Nanyuki at any time. The prosecution

failed to place him at the scene of the incident and/or the evidence of PW1, PW2, PW3 PW5 was doubtful and they were not able to clearly identify the 1st appellant. The trial court thus relied on vague identification of prosecution witness to wrongly convict the 1st appellant yet no identification parade was conducted to positively identify him.

44. The 1st appellant further submitted that the prosecution relied heavily on fake identity cards to establish his guilt on count 8 yet no attempt was made to prove that it was the appellant who actually forged the said identity card. No handwriting expert was called to testify and the registrar of person only testified and said that the Identification card allegedly used by the 1st appellant belonged to Eunice Nyadzua Ngale who was not the accused person. The registrar of persons failed to avail the owners of the identity card to ascertain who they belonged to and if it had been stolen. Similarly, the offence of conspiracy was not proved as the prosecutor failed to established that there was a pre-meditated agreement between two or more persons enough to establish an agreement to commit an unlawful act plus the intent to achieve the agreed motive.

45. While the prosecution relied on constant communication as between the appellants to conclude that there was a premeditated plan, no report from Safaricom was produced by the arresting officer to confirm the said allegations. The court's conclusion upholding the prosecutions allegations was thus unfair and prejudiced.

46. The 1st appellant second ground of appeal was that the charge sheet was defective for duplicity. The prosecution alleged stealing of a motor vehicle and conspiracy to defraud contrary to section 393 of the penal code. Both charges were placed in a single charge sheet. The charge sheet was duplex for the simple reason the 1st appellant was alleged to have conspired to commit an offence which was complete (offence committed) and as such the 1st appellant ought to have been charged with committed offence and not one of conspiracy. Reliance was placed on HCC Misc Application Criminal Application no.52 of 2014 Joseph Ngungura Wanjohi versus Republic and Republic versus cooper and Campton (2ALL ER 1947) 701.

47. The 1st appellant thus urged this court to find that the charge sheet was defective for duplicity and that the court erred in convicting the 1st appellant for the offence of stealing a motor vehicle and conspiracy to defraud and that lead to a double penalty.

48. The other issue raised by the 1st appellant was that the sentence imposed was manifestly harsh and excessive considering the circumstances of this case. The trial magistrate did not take into account provisions of Section 333(2) of the Criminal Procedure Code and other relevant factors such as proportionality, rehabilitation, mitigating circumstances and /or factors. The trial magistrate also failed to consider the period of 2 ½ years the 1st appellant had spent in custody which period should have formed part of the 1st appellant's sentence. Further the magistrate should have considered that the 1st appellant was a 1st offender and treated him as such. Reliance was placed on the case of Ahamad Abolfathi Mohammed and another versus Republic (2018)eKLR.

49. The final issue raised by the 1st appellant in his appeal was that the he was not provided with witness statement during trial yet all witnesses testified and the trial magistrate did not address this issue. On 29.03.2016, he brought this issue to the court's attention but he was never supplied with the same. This was in contravention of Article 50(2)(j) of *the Constitution* of Kenya and this act vitiated the entire trial. Reliance was on Joseph Ndungu Kagiri versus Republic (2016)eKLR.

50. The 1st appellant prayer was that his appeal be allowed and both the conviction and sentence be quashed and set aside.

2nd Appellant submissions

51. When this matter was mention in court on 11.06. 2022 and on 26.01.2023 the 2nd appellant stated that he would not file submissions and requested the court to relook into the issue of his sentencing.

Respondent's Submissions

52. The Respondent did file their submission opposing this consolidated appeal on 25th October 2022. They stated that the 1st appellant filed his petition of appeal on 10th August 2021, while the 2nd appellant field his petition of appeal on 26th April 2022. On 11th July 2022, the 2nd appellant informed court that he was only challenging sentencing. From the onset, the appeal filed by the 1st appellant is statutory time barred and filed without leave of court, the same thus ought to be struck out in limine, as it was filed outside the 14 days statutory provided for. The last date of filing an appeal ought to have been on or before 3rd May 2021. The 1st appellants appeal as filed on 10th August 2021 and thus was time barred.

53. If the court was minded to determine the merits of the appeal, it was the Respondent contention that on appeal the appellant court could only interfere with the conclusion of fact and evidence if it was shown that there was an apparent misdirection. Reliance was placed on MK versus Republic (2020)eKLR.

54. The Respondent did submit that the charge sheet was not defective and this was an issue not brought up at trial but on this appeal stage. It was a fresh issue, and it was not open for the 1st appellant to raise it at this stage. Reliance was placed on Japheth Mwambira Mbitha versus Republic (2019)eKLR.

55. There was no duplicity or any defect of the charge sheet and that issue was never raised before the trial magistrate and nothing on the impugned judgment turned on the said issue. Further if Section 134 of the CPC was applied it would be seen that the charge sheet contained all relevant information as to the nature of offence charged. It was therefore erroneous to state the offence of stealing and conspiracy could not be applied on the said charge sheet. Both offences disclosed two separate offences and thus the charge sheet was properly drawn. Reliance was placed on Hassan Jilo Bwanamaka and another versus Republic (2018)eKLR.

56. The respondent further submitted that the 1st appellant's submission that he could not be charged with conspiracy to commit a felony and also commission of the substantive offence, was also not correct as the appellant was charged with the offence of conspiracy to defraud and not conspiracy to commit a felony. There was no double indictment. Reliance was placed on HCC CR appeal no.52 of 2014 Joseph Ngunguru Wanjohi versus Republic.

57. On not being supplied with witness statement the respondent stated that all the appellants were supplied with witness statement and on various dates (10/11/2015, 11/7/2016 and 3/10/2016). And were also given ample opportunities to cross examine witnesses and recall them. The entire record looked at in totality showed that none of the appellant's rights were infringed and they were estopped from alleging otherwise.

58. The Respondent also submitted that without doubt, looking at the entire evidence presented and after analysing the evidence of the prosecution witnesses, it was sufficiently proved that both the appellant committed the offence's and were positively identified by PW1 – PW3 and PW5. The appellants knew each other, were together on the material day and acted together and both presented fake documents to hire motor vehicle's which subsequently were stolen and never recovered. This showed that there was an apparent unlawful purpose which they were out to commit hence the offence of conspiracy to defraud.

59. Investigation by PW4 the arresting officer also showed that the two were in frequent communication. PW7 the registrar of person also established the both appellants used fake national identity cards, this also proved the personation aspect. Based on the above it was clear that the charges were clearly proven as against both the appellants.

60. It was also absurd for the appellants to insist on production of the two stolen motor vehicles, when the same were not recovered. The appellants also both admitted that they declined to participate in the identification parade. Having waived their rights, they cannot turn around and poke holes on the case against them based on the absence of the identification parade.

61. Finally on the defence raised, the appellants did not bring witnesses to confirm their alibi. The defence raised was an afterthought and without witnesses to corroborate the same the said defence remained just an unproved allegation. And alibi also ought to have been raised /introduced at an early stage so that it could be tested especially during cross examination of the witnesses at trial. The defence raised by both appellants therefore did nothing to create a reasonable doubt and as a result the charges remained proved beyond reasonable doubt.

62. On sentencing the Respondent stated that the sentence handed down as proper and considerate. The trial court considered all circumstances of the case and imposed proper and proportional sentence, well below the prescribed sentence in the penal code. The same was to run consecutively.

63. Sentence was discretional and the appellate court could not interfere with the same unless it was shown that there are factors to show the court exercise its discretion injudiciously. In this appeal that was not the case. Reliance was placed on MMI versus Republic (2022)eKLR, Mokela versus the state (135)(ii) (2011) 2ASCA 166 and Republic versus Shershowsky (1912) CCA 28TLR 263.

64. Finally on Section 333(2) of the CPC, the Section was self-sufficient and hence even in the absence of an express pronouncement by the court to that effect, sentence takes into account the time spent in custody/remand.

65. The Respondent prayed that this court finds that this consolidated appeal to lack merit and the same dismissed.

Analysis and Determination

66. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See Okeno-Vrs- Republic (1972) EA 32 & Pandya Vs. Republic (1975) EA 366.

67. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala-Vrs-R (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, 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 made the advantage of hearing and seeing the witnesses.

68. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

69. The 1st appellant filed seven (7) grounds of Appeal, on 10.08 2021, while the 2nd appellant filed nine (9) grounds of Appeal on 26.04.2021. The 2nd appellant did inform court on the 11.07.2022 and on 26.01.2023 that he only wanted the court to reconsider the issue of his sentencing only and had abandoned the other grounds of appeal. The issues brought forth by the 1st appellants grounds of appeal, his submissions as filed and the respondents submissions can be can be summarised as follows;

a. Whether the 1st appellants appeal was filed out of time and without leave of court.

b. Whether the prosecution effectively discharged the burden of proof.

c. Whether the 1st appellant was convicted on a defective charge sheet, which had duplicity of charges.

d. Whether the 1st appellants rights of fair trial as guaranteed by Article 50 (2), (j) of *the constitution* of Kenya was breached during the trial.

e. Whether the sentence melted on both appellant's was harsh and excessive in the circumstance.

Whether the 1st appellants appeal was filed out of time and without leave of court.

70. A person who has been convicted and sentenced and is desirous of appealing to the high court has to do so within 14 days following the delivery of the judgment and sentence sought to be appealed against. However, the high court may for good reason cause extend time within which the convicted person may appeal. See Section 349 of the criminal procedure code (Cap 75).

71. The judgment in this appeal was delivered on 19th April 2021 and the last date for filing an appeal should have been on 3rd May 2021. The 2nd appellant filed his petition of appeal on 10th August 2021, which obviously was way out of time and without leave of the court. This appeal thus on the face of it is a nonstarter, time barred and should be struck out suo moto. But for the reason that this issue has been raised on submissions by the respondent and the 2nd appellant has not been given a chance to explain whether or not he sought leave to file this appeal out of time, and in the interest of fair hearing as espoused by Article 50 (2) of *the constitution* of Kenya 2010 this court will proceed to analysis and make a determination as to merits of the issues raised in the 2nd appellants grounds of appeal.

Whether the prosecution effectively discharged the burden of proof

72. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows;

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of

a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

73. The conceptual framework for burden of proof to be discharged by the prosecutor is beyond reasonable doubt. In Viscount Sankey LC in the case of H.L Woolmington Vs DPP {1935} A.C. 462 pp 481 did describe burden of proof in criminal matters as;

> " 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 prisoners guilt subject to what I have already said as to the defendant's insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is 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 be acquittal. No matter what the charge or where the trial, the principal 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.

74. The 1st appellant had been charged with the offence of conspiracy to defraud contrary to section 393 of the penal code, stealing a motor vehicle contrary to section 278(A) of the penal code, personation contrary to section 382 of the penal code, forgery contrary to provisions of 349 of the penal code and uttering a false document contrary to section 353 of the penal code.

75. The evidence adduced was that on 17.09.2015, PW1 leased out his motor vehicle KBN xxxD Toyota Fielder to the 1st appellant who presented himself as Elijah Mataaru Gathu. PW3, who was PW1 driver picked the 1st appellant and took him to Aber Travellers office situated at Comfort Hotel, where they meet PW5 who processed the car hire details by ensuring that the car hire forms were filed. She further took photocopy of the 1st appellant's national identity card and driving licence and retained the same under usual business process. The 1st appellant paid her Ksh 9,000/= for 3 days car hire. After the 1st appellant took possession of the said car, he did indicate to PW1 that the car he had hired had faulty breaks and he went back to PW1 garage and had it repaired.

76. Thereafter the 1st appellant, drove off with the hired car Motor vehicle KBN xxxD Toyota Fielder, and never answered PW1 phone calls nor did he return the said motor vehicle, which was eventually reported stolen and never recovered. PW1 reported this incident to the Nanyuki DCI and later to flying squad at DCI headquarters in Nairobi. The 1st appellant was eventually tracked down and arrested by the PW4 and other officers attached to the flying squad unit. On arrest and search it was discovered that the 1st appellants real names were Douglas Njuguna Mwarangu and not Elijah Mataaru Gathu as he held out to be.

77. The 1st appellant refused to take part in the proposed identification parade and stated that his photograph has been widely circulated in the media and thus the said identification parade would not be fair. PW6, the investigating officer did write to NTSC to confirm if the driving licence (No 141xxxx) used by the 1st appellant was genuine and in response the same was confirmed to be fake. The letter by NTSA was produced as Exhibit 14(b).PW7, the registrar of persons did testify and confirmed that the national identity card used by the 1st appellant identity card Number 2511xxxx belonged to Eunice Nyaduzua Ngele a female adult from Kilifi. The photographs were also different. He produced his report as Exhibit 16 (a) and (b).

78. The 1st issue is whether the 1st appellant was properly identified. In Kariuki Njiru & 7 others v Republic the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

79. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

80. Further in evaluating the accuracy of identification testimony, the court should also consider such factors as: -

    a. What were the lighting conditions under which the witness made his/her observation?

    b. What was the distance between the witness and the perpetrator?

    c. Did the witness have an unobstructed view of the perpetrator?

    d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

    e. For what period of time did the witness actually observe the perpetrator?

    f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

    g. Did the witness have a particular reason to look at and remember the perpetrator?

    h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

    i. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

    j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

    k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator? (R Vs Turnbull & others (1976) 3 ALL ER 549)

81. The 1st appellant was positively identified by three witness, who all saw him on 17.09.2015. PW1, pw3 and PW5 spent considerable time with the 1st appellant. PW1 stated that he was with the 1st appellant for more than 30 minutes and he later came to his garage to have the car breaks repaired, where he spent some considerable time. PW3 was the driver who took the 1st appellant to the office and drove with him back to where PW1 was, while PW5 was the secretary of Aber travellers where the car hire contracts were signed. All the witness saw the 1st appellant during daytime when visibility was clear, over along period of time, at close proximity without any obstruction to their view or uncertain circumstance's

and without doubt the 1st appellant was positively identified by way of recognition as the person who hired the 2nd motor vehicle KBN 118D Toyota Fielder.

82. Further it was not a coincidence that the end result of PW4 investigation using the Safaricom three month data , the result's lead to the arrest of the 2nd appellant , who lead the investigation team to where the 1st appellant was. PW1 had described the 1st appellant as heavy set and dark, and when arrested the three witnesses confirmed that he is the person who posed as Elijah Mataaru Gathu and hired motor vehicle KBN xxxD Toyota fielder, which he was placed in his possession and he never returned the same. The 1st appellant was thus positively identified and the trial court rightly concluded that he was one of the persons who stole PW1 car.

83. The elements to prove in a conspiracy to defraud are that there must be an agreement by two or more people, by dishonesty, to deprive a person of something which is theirs or which they are or would be entitled to. The prosecution must further show a meeting of minds, a consensus to effect an unlawful purpose, it is not however necessary that each conspirator was in communication with each other. See Halsbury's laws of England Vol 25 criminal law at para 73.

84. It was sufficiently proved that the 1st appellant committed the offence and were positively identified by PW1 – PW3 and PW5. The appellants knew each other, were together on the material day and acted together. Both presented fake documents to hire motor vehicles from PW1, which motor vehicles were subsequently were stolen and never recovered.

85. The 2nd appellant told PW2 that he wanted to hire two motor vehicles' and on the following day while with the 1st appellant they acted jointly and enacted a common deceitful script to steal the motor vehicles and proceeded to remove the car tracker and switched off their phone numbers. This showed that there was an apparent unlawful purpose which they were out to commit hence the offence of conspiracy to defraud and were properly convicted of the said offence.

86. Similarly, with regard to the other offences of stealing a motor vehicle, personation, forgery and uttering false document. It was proven beyond any reasonably doubt that both appellants hired and proceeded to steal Motor vehicles registration Numbers KBN xxxD Toyota fielder and KBT xxxK Toyota NZE which the took possession of never to return, they presented themselves to PW1 -PW3 and PW5 and held themselves out as Geoffrey Mutua Musyoki and Elijah Mtaaru Gathua, and after arrest it was sufficiently proved that they were not the persons they presented themselves to be.

87. On forgery and uttering false documents, both appellant's without doubt were in possession of forged national identity cards and driving licence which they presented to PW5 purporting that they were genuine documents. The said documents were proved to be forgeries by PW 6 the investigating officer who produced Exhibit 14 and 16 from NTSA to show that both the driving licences were forgeries and PW7 who was registrar of persons and produced Exhibits 15 and 16 which confirmed the fake national identity cards.

88. PW6 the investigating officer did produce as Exhibits various documents and items;

    a. Exhibits 1 & 2 were logbooks for the stolen motor vehicles

    b. Exhibits 3 & 7 were contracts signed by the appellants as they took the motor vehicles, signed using the false names.

    c. Exhibit 4 was the fake identity card of the 2nd appellant bearing the names Geoffrey Mutua.

    d. Exhibit 5 & 8 were the fake driving licence used by the appellants.

    e. Exhibits 9 & 10 were the genuine national identity cards of both appellants.

f. Exhibits 14 (a & b) were letters to NTSA to confirm the driving licence and response confirming that the said driving licences were fake.

g. Exhibit 13 was the DCI letter to Registrar of persons with details on Id numbers they wanted investigated.

89. PW7, the Registrar of persons also testified as to his findings on the national identity cards sent to him for verification and confirmed that the identification cards used by the appellants being Id/No 2584xxxx and Id/No 2511xxxx belonged to other parties, who were not the appellants. The said report was produced as Exhibit 14(a & b). He further his report as Exhibit 15 (a & b) with regard to the appellants national identification cards.

90. The prosecution thus adequately discharged the burden of proof as was required of them and the appellant grounds of appeal on this score have no merit.

Whether the 1st appellant was convicted on a defective charge sheet, which had duplicity of charges

91. The 1st appellant submitted that he was charged with the offence of conspiring to commit a felony contrary to section 393 of the penal code and stealing a motor vehicle contrary to section 278(A) of the penal code. These were two offences in a single charge sheet and thus the charges were duplex as the offence the 1st appellant is alleged to have conspired to commit was complete and thus he should have been charged with the committed offence and not one of conspiracy.

92. He further submitted that given the duplex nature of the charge, it rendered the conviction manifestly unsafe as the charge sheet was defective and it was thus in the interest of justice to acquit the 1st appellant.

93. The respondent submitted that the said charge sheet was not defective and duplicity could only arise on the "count" and not on the "charge". The particulars of all the offences were clearly stated and conformed with provisions of Section 134 of the criminal procedure code. Count 1 and count 2 brought out clear and distinctive charges and no objection was raised by the 1st appellant during trial and no finding on the same was made. The 1st appellant thus could not be heard to complain about the said issue at this stage.

94. Further the 1st appellant was charged with the offence of conspiracy to defraud and not conspiracy to commit a felony, which were distinct and separate charge's and therefore the arguments put forth and legal submissions did not apply herein.

95. In Joseph Ngunguru wanjohi Vs Republic (2017) eklr , Justice Ngenje J discussed the issue of duplicity and stated thus;

> " On whether the charge was duplex, the appellant submitted that the same applied because once the offence the appellant was alleged to have conspired to commit was complete, then he ought to have been charged with the committed offence and not one of conspiracy. A ruling by Hon Mbogholi .J. in H.C Misc . Cr APPL. No 52 of 2014 Joseph Ngunguru wanjohi Vs Republic (2014) eKLR was cited. In the ruling, the judge delivered himself as follows;
>
> "My first observation relates to the framing of the charge. whereas the applicant (Appellant) is charged with the conspiracy to commit a felony, it would appear, the alleged felony was complete in the particulars of the charge alluded to the offence of robbery .....where an offence is complete, it no longer remains a conspiracy unless the two are charged separately. The charge therefore maybe faulted for duplicity"

It is then important to attempt to define what duplicity is. The same concerns the count as opposed to the charge. A charge is said to be bad for duplicity when it contains more than one offence in a single count. Therefore, the test in determining if a charge is duplex is not the evidence but the draftmanship of the charge itself. It is defined in Archbold criminal pleadings, Evidence and practice, 2010 at page 9 as;

" The indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences..... The question of whether a count breeches the general rule against duplicity is a question relating to the form of the count, not the underlying evidence..... thus, if particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity"

In the present case, the appellant was charged with a single offence which is that of conspiracy to commit an offence. The particulars of the offence clearly spelt out and they constituted a single transaction comprising the offence. Therefore, whether or not the robbery was committed is a matter of evidence, more so, with respect to the appellant, all the prosecution needed to prove was whether the appellant in cohort with others conspired to commit the offence of robbery. Therefore, the fact that the offence was complete does not offend the rule of duplicity. (Emphasis applied)

96. It is clear that from the charge sheet used herein that there is no charge which was drafted that had two or more separate offences included therein (there was more than one offence on each count). The issue of Duplicity therefore did not arise. The said charge sheet fully complied with provisions of Section 134 of the criminal procedure code and gave all the relevant information therein. The appellant did not object to how the charge sheet was drafted nor did they claim not to have understood any of the particulars as specified therein. This ground of appeal thus has no merit too

Whether the 1st appellants rights of fair trial as guaranteed by Article 50 (2), (j) of *the constitution* of Kenya was breached during the trial.

97. The 1st appellant alleged that his rights were breached for the reason that he was never supplied with a witness statements during trial and this breached his rights as provided for under provisions of Article 50(2)(j) of *the constitution* of Kenya 2010. The proceeding bear a different story. On 10th November 2015 the 1st appellant confirmed that he had been supplied with witness statement. Subsequently on 3rd October 2016 the appellants counsel requested for an adjournment and asked for time to go through the prosecution documents and witness statements.

98. The matter was adjourned to 7th October 2016 when the 1st appellant stated that "we wish to refresh our minds on the witness statements because we gave the statement to our advocate". The file was placed aside and the matter proceeded at 11.10 a.m., when the 1st appellant testified. The appellant earlier had applied through their counsel to recall PW1 to PW3 and the said witnesses were duly recalled and cross examined.

99. The entire record read in totality clearly show that the 1st appellant right's was not violated in any manner and the issue of not being supplied with the witness statement is an afterthought and made without any basis.

Whether the sentence melted on both appellant's was harsh and excessive in the circumstance.

100. Both the appellants were found guilty of committing the offence of conspiracy to defraud contrary to section 393 of the penal code, stealing motor vehicles contrary to Section 278 (A) of the penal code.

Further 2nd appellant was found guilty on count 3 for personation contrary to Section 382, count 4 forgery contrary to section 349 and count 5 for uttering false documents contrary to section 353 of the penal code. The court proceeded to convict him under Section 215 of the CPC on all the above counts.

101. Further the court found the 1st appellant also guilty of the offence of personation in count 6 contrary to section 382 of penal code, count 7 for forgery contrary to section 349 of the penal code, count 8 uttering a false document contrary to section 353 of the penal code and also convicted him under provision of section 215 of the penal code. The court proceed to sentence them as follows;Count I: Each accused in sentenced to serve five years imprisonmentCount II: Each accused sentenced to serve 6 years imprisonmentCount III: Accused 1 (2nd appellant) to serve one year imprisonmentCount IV: Accused 1 (2nd appellant) to serve ½ year imprisonmentCount V: Accused 1 (2nd appellant) to serve 1 year imprisonmentCount VI 2nd accused (1st appellant) to serve one-year imprisonmentCount VII: 2nd accused (1stappellant) will serve 1 ½ years' imprisonmentCount VIII: 2nd accused (1st appellant) will serve one year imprisonment

The sentence were to run concurrently.

102. The appellants stated that the trial magistrate did not take into account provisions of section 333(2) of the penal code to consider the time the spent in custody/ remand. The court should also have considered factors such as proportionality, rehabilitation and mitigating factors. The 1st appellant spent two years and six months in custody and the same ought to have been considered by the trial court. The 2nd appellant also orally submitted that the court should relook at the sentence passed.

103. The Court of Appeal in the case of Benard Kimani Gacheru Vs Republic (2002) eKLR stated;

> " It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

104. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirely so as to arrive at appropriate sentence. The Court of Appeal Thomas Mwambu Wenyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71 where the court held the following on sentencing:

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence

in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

105. In MMI Vs Republic (2022) eKLR the court referred to the case of S Vs Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that;

> " A court exercising appellate jurisdiction cannot, in absence of material misdirection by the trial court , approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court..... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

106. The sentences imposed were well below the prescribes sentences provided for by the penal code. The imputation of this is that the trial court did consider the mitigating factors and all circumstances of the case before arriving at this sentence. There is no error or misdirection pointed at, which would warrant this court to interfere with the same.

107. With regard to the section 333(2) of the criminal procedure code, it is the 2nd appellant who spent two and half years in custody and not the 1st appellant as he alleges in his filed submissions. Secondly even for the 1st appellant who appealed only on the issue sentence, by law he should have benefited from the provisions of section 333(2) of the criminal procedure code which expressly provided that the court should consider the period spent in custody, while sentencing any accused person.

108. Be that as it may the trial court while sentencing the appellants expressly considered this and clearly stated that; "Each accused is a first offender. I note that the 1st accused has been in remand for not less than two and half years but this is after absconding thus cancellation of his bond/bail.

> " I have considered the offences committed and I note that they are indeed very serious. The offences were well thought of and orchestrated by the two accused. The complainant as a result lost two motor vehicles which today has not been recovered..... in the foregoing, I find that a deterrent punishment is called for, which will serve as a lesson to the accused person."

109. The trial court having considered the period spent in custody did sentence both accused to less severe sentences than, what was the prescribed sentence. This court cannot again give the appellants benefit of the same provisions of law.

Disposition

110. Having considered all grounds of appeal as presented in this appeal I do find that all the grounds of appeal raised both on conviction and sentence are without merit.

111. The appeal as against conviction and sentence by both appellants is there for dismissed

112. Right of Appeal 14 days.

113. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JULY 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of July 2023

In the presence of;

Appellant

.....For O.D.P.P

.....Court Assistant