



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 32 OF 2018**

**1. JAMES OBWANA**

**2. RICHARD KARUGU.....APPELLANTS**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of Hon. Richard Odenyo, Senior Principal Magistrate delivered by Hon. Evans Makori, Chief Magistrate, delivered on 24<sup>th</sup> day April 2018 in the Chief Magistrate's Court Criminal Case No. 475 of 2011).*

**J U D G M E N T**

1. James Obwana Oguta, John Mugisha and Richard Jotham Karugu Njue were jointly charged in Mombasa Chief Magistrates Court CR. Case No. 475 of 2011 with the offence of Stealing goods in transit contrary to Section 279(c) of the penal code.
2. The particulars were that James Obwana Oguta, John Mugisha & Richard Jothan Karugu Njue between the 22<sup>nd</sup> day of November 2010 and 16<sup>th</sup> December 2010 at unknown place and time within the Republic of Kenya jointly with others not before court stole one unit of motor vehicle make Mercedes Benz C – Class Chassis No. WDB202020-ZF 643317 valued at Kshs.759,271.00 the property of M/s Maruni products Company Limited while the said motor vehicle was on transit from Mombasa Port to Kampala, Uganda via Malaba Border.
3. In the alternative the appellants jointly with John Mugisha were charged with the offence of conspiracy to contravene the provisions of East African Community Customs Management Act 2004 as read with Section 203(e) of the said Act.
4. Particulars to alternative count were that the appellants on diverse dates between 22<sup>nd</sup> day of November 2010 and 16<sup>th</sup> day of December 2010 at Kilindini Port in Mombasa District within Coast Province jointly with others not before court knowingly and fraudulently conspired to evade payment of duty amounting to Kshs. 561,861/= for an imported one unit of motor vehicle make Mercedes Benz C-Class chassis number WDB 202020-2F643317 in contravention of the provisions of the said Act.
5. Accused 3 was charged in Counts II & III respectively. In Count II, the 3<sup>rd</sup> accused person faced a charge of cheating contrary to Section 315 of the Penal Code. The particulars are that on the 21<sup>st</sup> day of January, 2011 at Barclays Bank of Kenya Limited, Embakasi Branch in Nairobi District within Nairobi Province, by means of a fraudulent trick, he obtained a sum of money Kshs. 713,000.00 from Albert Timothy Mwangeka by selling him a motor vehicle registration number KAT 182 C make Mercedes Benz knowing it to have been unlawfully obtained motor vehicle.
6. In Count III, the 3<sup>rd</sup> accused person faced a charge of obtaining registration by false pretences contrary to Section 320 of the Penal Code. The particulars are that on the 19<sup>th</sup> day of November, 2010 at Kenya Revenue Authority Office's Road Transport Department in Nairobi District within Nairobi Province, he willingly procured for himself Duplicate Logbook for a motor vehicle chassis number WDB202020 – ZF 574926 which had been declared written off following a road traffic accident and the insured compensated by Phoenix of East Africa Company Limited a fact he knew to be false.
7. Eleven prosecution witnesses' testified and all accused persons placed on defence in Count I whereas A3 was also placed on defence in Counts II & III. Upon taking evidence for the defence the trial Magistrate found 1<sup>st</sup> & 2<sup>nd</sup> Appellants guilty in Count I and they were convicted and sentenced to 4 years' imprisonment each.
8. Accused 3, the 2<sup>nd</sup> appellant herein was also found guilty for the offences in Counts II & III and he was convicted and sentenced to serve one-year imprisonment in Count II and 6 months' imprisonment in Count III. The sentences were ordered to run concurrently.

9. The appellants were aggrieved by the conviction and sentence and they jointly filed petition of appeal on 3<sup>rd</sup> May 2018 with the following grounds of appeal: -

**1. That the trial Magistrate erred in facts & law in proceeding to convict and sentence the appellants herein based on a defective charge sheet.**

**2. That the learned trial Magistrate erred in facts and law in failing to acknowledge that mandatory provisions of Section 200 Criminal Procedure Code were certainly not complied with upon the demise of the preceding trial Magistrate – Hon. R. Kirui and being taken over by Hon. R. Odenyo SPM.**

**3. That the learned trial Magistrates erred in facts and law in entering pleas specifically the 1<sup>st</sup> amendment to the charges as preferred on 15/7/2012 and second amendment on 6/11/2012 in languages not indicated to have been understood by the accused person than before the court hence an unequivocal plea entered.**

**4. That the learned trial Magistrate erred in facts & law degree and standard of proof relating to the burden of proof as relates to the charges of: -**

**i. Stealing goods in transit contrary to Section 279 (c) of the penal code.**

**ii. Conspiracy to contravene the provisions of EACCMA contrary to Section 203 of the Act.**

**iii. Cheating contrary to Section 315 of the penal code.**

**iv. Obtaining registration by false pretences contrary to Section 320 of the penal code.**

**5. That the learned trial Magistrate erred in law & fact by not properly analyzing the evidence on record and made grave legal mistakes in selective analysis thereto thereby failing to form a balanced view of the evidence on record which gravely prejudiced the appellants.**

**6. That the learned trial Magistrate erred in law & fact in convicting the appellant on hearsay evidence which was excludable.**

**7. That the learned trial Magistrate erred in law & fact in arriving at a conviction of the appellants for an offence under Section 315 of the penal code whereas there was no such complainant thereof and additionally no evidence in support of such conviction.**

**8. That the learned trial Magistrate erred in law & fact in failing to take into account the defence by the appellants which defence was watertight and thereby arriving at an erroneous finding of convicting the appellants.**

**9. That the learned trial Magistrate erred in law & fact in meting out a sentence that was manifestly harsh and excessive in the circumstances and failed to take into consideration mitigating factors thereto.**

**10. That the learned trial Magistrate erred in law & fact in relying on documents and evidentiary materials that were illegally acquired, without search warrants at the residence of the appellants and no such inventory of recoveries was prepared.**

10. The appellants prayed that the conviction and sentenced in CR. Case No. 475 of 2011 be quashed/set aside and appellants be set at liberty forthwith.

11. The prosecution's case was that PW 1 called accused 2 to inquire and he gave him the number of a driver known as Jimmy. That when Jimmy was called he said he was heading to Mazaras but later his phone was off. That on 16/12/2010 when he used a different number to call Jimmy they laid a trap and had him arrested and escorted him to Urban Police Station. Accused 2, Mugisha was also arrested. That from the shipping lien they got contact which when called was received by accused 3. That accused 3 was arrested on 4/2/2011, he arranged for him to be transported to Mombasa and on 7/8/2012 at police station accused 3 agreed to avail the vehicle on condition that charges against him are dropped.

12. PW 1 said he and Nicholas Wamabwa Simuguwere Directors of the clearing company together with Nora Wanjiru PW 1, said the vehicle was handed to accused 2. That the entry was lodged by Jared Omaba PW 1's employee. PW 1 said that on 16/12/2010 he met accused 1. He said the vehicle could not have been registered in Kenya because it was sold and that if it had been registered in Kenya it would have attracted duty of Kenya shillings 561,861,000/=. He said they reported the matter on 16/12/2012 when they took accused 1 to police station.

13. PW 1 said that KRA wanted them to account for the vehicle which they cleared to be taken to the consignee in Kampala. He said the vehicle was stolen on transit. The motor vehicle was recovered on 22/10/2012 and taken to Mombasa on 24/10/2016. PW 1 went to the police station and confirmed it was the same vehicle they had cleared. He said when the vehicle was recovered, it had been registered in Kenya as KAT 182C. He said he was responsible for the vehicle until it cross into Uganda as it is his Company which cleared it. He said he knew accused 1 through accused 2 and that he was present when the vehicle was handed over to accused 2. He said he didn't see accused 3 at his offices and he didn't know him.

14. PW 2 clearing Manager to Phoenix (EA) Assurance Co. Ltd, said motor vehicle registration No. KAT 182 C was involved in a road traffic accident on 4/4/2009 and it was written off. That the insured was paid and insurance company took possession of the salvage through subrogation rights. He said salvage was sold to peseta sales & services ltd on 15/9/2020 and surrendered the documents to them. He said the salvage vehicle was at Leakey's garage and they wrote a letter dated 15/09/2010 to Leakey's to release the salvage. PW 2 produced receipt for Kshs. 140,000/= paid for salvaged vehicle, the original claim form dated 25/10/2009, police abstract – S/No. 0135377, and an Assessment report dated 1/7/2009

15. PW 2 said the vehicle shown to him in court was not the one they had insured as the one they insured was damaged badly and that it was silver in colour and not blue. He said that the chassis number of motor vehicle that was written off was WDB202020 -28574926. He said salvage was not sold to accused 3.

16. PW 3 gave history of the motor vehicle KAT 182C as shown in Exhibits 23, 24, 25 & 26. He said that KRA issued another log book for the same vehicle. He said original logbook was no. R0590764E dated 8/9/2009 whereas the next logbook is No. R0967951K. There is also logbook no. R0966281F and S1660664. He said chassis for motor vehicle they insured KAT 182 C was WDB 202020-28574926 and it is different from the one in court which is WDB202020 -2F643317.

17. PW 4 bought motor vehicle Registration No. KAT 182 C from accused 3 who had advertised it in a newspaper at Kshs. 713,000/= as per agreement dated 21/1/2011 and produced as exhibit 35. In May /June 2011 Flying Squad stopped him and questioned ownership and he gave them the documents. In September 2012, he met Police Officer Otieno Osuri in his office and he was told the vehicle he was driving had been diverted to the local market while on transit. His vehicle was confiscated by the police. He said that he called the no. 0733226974 on the advert and Mr. Njue gave him another number to call. He stated that accused 3 sold to him the vehicle. PW 4 said that motor vehicle Chassis No. WDB 202020-25643317 was not the one transferred to him. He said that his motor vehicle had a different Chassis number from the one the police were looking for. PW 5 witnessed the agreement entered into between accused 3 and PW 4.

18. PW 6, Ferizo Martin Wekesa operations Manager of Mariani Co. Ltd testified that on 19/1/2010 bills of lading were brought to them for purposes of clearing a Mercedes Benz. That he prepared an indemnity letter which authorized a clearing agent to remove vehicle from CFS. He said the bill of lading had to be accompanied by a letter of indemnity and consignment passport. He told accused 2 their logistics clerk to pay for requisite fees and he signed against delivery order using his port pass. That on 23/1/2010 he filed a gate pass for accused 2 so they could get out of the port. He said that he handed over the vehicle to accused 2 and accused 1, James. He said that bill of lading showed consignee was Bedi Kesozi. He said A2 was their regular client. He said that motor vehicle Reg. KAT 182 C resembled the one he cleared but it was not supposed to be registered in Kenya.

19. PW 6 testified that motor vehicle in question never went through the Kenya/Uganda border. He said the said motor vehicle was their company's responsibility until it crossed the border. PW 6 said he didn't know accused 3 and he has never met him.

20. PW 7 Cpl. Joseph Meputholi formerly scenes of Crime Officer was on 11/09/2012 shown motor vehicle Reg. KAT 182 C Mercedes Benz car blue in colour by PC Osuri from Urban Police for purposes of restoration of Chassis and engine nos. He took photographs, he said the motor vehicle chassis was WDD202020ZFS74926 and that he didn't see No. WDB202020ZF 643317. He concluded that the chassis engine numbers were genuine.

21. PW 8, Habil Aked Omondi a government analyst produced a report as exhibit 41. He said that he examined the said motor vehicle and established that exhibit marked A1 – paint from Chassis No. frame contained 3 layers:

- Upper layer – Navy-blue
- Middle layer – silver colour
- Bottom layer – whitish colour
- Exhibit marked A2 – paint from body part
- Boot had 2 layers – Navy blue – upper layer & whitish colour

Bottom.

22. Exhibit A3, paint from Boot had two layers; Navy blue & white on upper & bottom layers respectively. He said he extracted the exhibits form A and he didn't know if the layers were original colour by the manufacturers.

23. PW 9, P.C. Osiri Otieno, who was the investigating officer in this matter, investigated the offence of stealing motor vehicle in transit and preferred charges against the 3 suspects as per his evidence at pages 47 – 67 of the lower Court proceedings.

24. PW 10, Peter Mwangi Kariuki got a release letter from Phoenix (E.A.) Assurance Co. to go to Leakey's storage to get motor vehicle Reg. KAT 182 C which was a salvage and he sold it to Ernest Maina Mwaro at 150,000/=. He said the colour of the vehicle was silver and it was in the name of Perminus K. Githinji Logbook No. R0597646 & Chassis No. WDB20202028574926. He said he paid Kshs. 140,000/= for the salvage. He said the salvage he sold was not the one in the photos produced by scenes of crime officer.

25. He said that chassis of motor vehicle he sold was now appearing in the motor vehicle he was shown in court but which is not the same as the one he sold to Ernest Maina. He said he could not remember motor vehicle with chassis no. 2020208643317.

26. PW 11 Chief Inspector Alex Munyaka produced Document Examiners Report in respect to analysis of accused 3's known handwriting and signature and questioned handwriting and signatures. He found that handwriting & signatures were by same author, when placed on defence accused 1 gave an unsworn statement where he said he was working as Port Clerk & driver and was employed by Carign Max. He said charges against him were not true and that he was a driver in transit vehicles to Uganda for about 10years.

27. He said he knew accused 2 & not accused 3. He said that Medi Kasozi of Uganda called him & asked him to drive for him the vehicle in question to Uganda-Kampala. That consignee sent to him original bills of lading, original logbook & original invoice for purposes of clearing. He said he had delivered some vehicles earlier to the consignee. He said because his company didn't have customs Transit bond his friend took him to accused 2's office and he was introduced. That accused 2 used to work with Maruni products Co. Ltd, he accepted to clear & accused 1 paid clearing charges in full.

28. Accused 1 said the vehicle had some mechanical problems & PW 1 signed for it to be removed from CFS and it was pushed out and taken to a garage for repair and later it was handed over to him. That when he got to Gilgil the vehicle started overheating and he was assisted to push it to the nearest petrol station. That he called the consignee and reported the problem and consignee said he was sending his brother who was a clearing agent in Malaba Uganda. That he spent the night in Nakuru and the next day consignee brother arrived in Nakuru at 2.00pm. He said he had dealt with the said younger brother of the consignee before and he knew him and he handed over the car with documents. However, the consignee's brother didn't acknowledged receipt.

29. Accused 1 said he returned to Mombasa & consignee confirmed he had received the vehicle. That when he reached Mombasa he reported to accused 2 and gave him stamped copies of documents. That after one week he went to deliver another vehicle to Medi Kasozi, a Toyota Land Cruiser VX. He said on this 2<sup>nd</sup> trip he met Kasozi's brother who confirmed he had carried the Mercedes to be repaired in Nakuru. He said that he confirmed at customs office that the vehicle had crossed the border. He said the consignee had not complained that the vehicle had not reached. He said the vehicle belonged to Medi Kasozi and not company for PW 1 & PW 6.

30. Accused 1 said he didn't evade paying duty and that vehicle was on transit. That PW 1 & accused 2 called him and when they met, PW 1 asked for documents and he said he was not aware of them. That they went to Urban Police Station where he was arrested and placed in custody. He said on 7/2/2011 PW 1 asked that they record a consent instead of going to court, R7, agreement. He said he didn't sell the vehicle as it was not his. Accused 2 testified that he was working for Maruni products Co. Ltd when accused 1 went to ask if they could clear a car for him. That with authority of PW 1, he issued bond for the vehicle and took documents from accused 1 which he gave PW 1 and accused 1 was advised to pay fees of Kshs. 3,500/=. PW 6 made necessary entries. He told PW 1 that accused 1 was to deliver the vehicle to Kampala. That gate pass was signed by PW 6 and vehicle handed over to accused 1.

31. He said he spoke to accused 1 who said he was in Mazaras but the next time accused 1 told him he was in Kampala but he was suspicious. That when he inquired from Gilgil if the vehicle on transit had passed through there he was told the vehicle had not been stamped at Gilgil. That because PW 1 was giving him a lot of pressure to know where the vehicle was he got someone to call accused 1 and accused 1 told him he was at Kencot. That he accompanied PW 1 to Kencot and got accused 1 and when they asked for documents he said documents were at home. That they went to Urban Police and he was arrested and placed in cells at Central Police Station. He said accused 1 never told him what he said in his testimony in court. He said there was no evidence the vehicle crossed the border and that accused 1 never gave him evidence to show the vehicle passed through Gilgil. He said accused 1 wrote to him a text message to the effect that the vehicle was being towed to the border by another vehicle.

32. Accused 3, the 2<sup>nd</sup> Appellant herein also gave a sworn statement. He said he was a building engineer. He testified that in February 2011 he received a call and he was told to report to Kilimani police station over motor vehicle Reg. KAT 182 C. That he found PW 4 at the station with PW 9 the Investigating Officer herein. That he was told he had to come to Mombasa over the issue. That he was told that there was a similar car with the same registration which was missing. He said motor vehicle Reg. KAT 182C was his and its Chassis number ended with 28 and the one in the charge sheet ended with it.

33. He said he bought it as a salvage from an insurance company. He later stated that it was sold to him by Peter Rama in late 2010. He said he bought the salvage at Kshs. 200,000/= and that the said motor vehicle he bought had Chassis no ending with 26. He said when the vehicle was being repaired, he bought some parts. He produced receipts for parts he bought as defence exhibit 1. He said he bought a radiator at DT Dobie at Kshs. 37,917.00 and produced a receipt as defence exhibit 2. He said he advertised the vehicle for sale in the newspaper on 15/1/2011 and PW 4 bought it at Kshs. 713,000/=. He said the vehicle was previously registered in the name of Perminus K. Kithinji and it was transferred to him. He said the motor vehicle was silver in colour but he later repaired it and applied change of colour to blue and his application was allowed.

34. He said he didn't tamper with the Chassis number and that he didn't know both accused 2 and the consignee. He said he never evaded paying duty and his vehicle doesn't have chassis ending with 17. He said he bought vehicle as salvage and it already had its Registration number therefore, he didn't obtain registration. He said he didn't know Maruni Products Co. He said he had been an engineer since 2002 and he operated in Nanyuki, Nyeri & Nairobi. He said he assembles and repairs motor vehicles in his own garage as a hobby. He said he could not remember the insurance company from which he bought the salvage. He said he could not remember names of mechanics who repair motor vehicles at his backyard. He said there was an agreement for sale of salvage which he didn't have in court. He said he had no specific reason for changing from silver to blue. He denied that he changed to evade arrest. He said he changed after his co-accused had been arrested.

35. This appeal was canvassed by way of written statements. The 1<sup>st</sup> appellant's submissions were filed on 3<sup>rd</sup> June, 2021 by the firm of George Egunza & Associates Advocates, the 2<sup>nd</sup> appellant's submissions were filed on 20<sup>th</sup> November, 2020 in person while the respondent's submissions were filed on 11<sup>th</sup> March, 2021.

### **Analysis and Determination**

36. In consideration of this appeal, the duty of the 1<sup>st</sup> appellate Court is now well settled as was held in the case of **Okeno v Republic** [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”*

37. It is therefore necessary to re-evaluate the evidence and reach a conclusion bearing in mind that this court has not had the benefit of hearing or seeing the witnesses, an advantage only the trial court has.

38. Having re-evaluated the evidence in the trial Court, the judgment of the trial Magistrate, the grounds of appeal, and submissions by the appellants and the respondent, the issues for determination are: -

1. Whether the charge sheet was defective;
2. Whether the provisions of section 200 of the Criminal Procedure Code were complied with when Hon. R. Odenyo SPM took over the proceedings from the late Hon. Kirui PM;
3. Whether there was a complainant in Count II where the 2<sup>nd</sup> appellant was charged with the offence of cheating under section of the 315 of the Penal Code;
4. Whether the plea as taken on 15<sup>th</sup> of July, 2012 and 6<sup>th</sup> of November, 2012 was equivocal or unequivocal;
5. Whether the prosecution discharged the burden of proof as relates to the charges against the appellants;
6. Whether the penned solution by the 2<sup>nd</sup> appellant formed the basis of his conviction.
7. Whether the appellants' defence was considered by the trial Magistrate;
8. Whether the sentence meted out was harsh and manifestly excessive.

**Whether the charge sheet was defective.**

39. It is not specified which of the three counts is defective. Having looked at the submissions by the appellants alongside the charge sheet and the evidence, it appears what they refer to as defects are alleged inconsistencies in the evidence of the prosecution witnesses, which in their view renders the prosecution's evidence insufficient.

**Whether the provisions of section 200 of the Criminal Procedure Code were complied with when Hon. R. Odenyo SPM took over the proceedings from the late Hon. Kirui PM.**

40. Section 200 (3) of the Criminal Procedure Code provides: -

*“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”*

41. A perusal of the proceedings shows that the late Hon. Kirui SPM did not take any evidence of the prosecution witnesses, following his death, Hon. Odenyo took over the proceedings and on 16<sup>th</sup> June, 2012, the charge sheet was amended and the records show that the Court allowed the plea to be taken afresh in English to which a plea of not guilty was entered for the accused persons.

42. On 6<sup>th</sup> November, 2012, another application to amend the charge sheet was allowed by the Court and it was noted again that the plea was taken afresh in English. The accused persons who were all along represented by Advocates did not complain that they did not understand the language of the Court that was being used. As far as the record of the trial Magistrate's Court shows, the evidence of both the prosecution witnesses and the defence was taken by Hon. Odenyo who subsequently wrote a judgment that was delivered on his behalf on 24<sup>th</sup> April, 2018 by Hon. Makori Chief Magistrate.

43. The grounds that plea was not unequivocal and that provisions of section 200 (3) of the Criminal Procedure Code not having been complied with are therefore not sustainable and are dismissed.

**Whether the prosecution discharged the burden of proof as relates to the charges against the appellants.**

44. According to the evidence of PW 1, PW 6 and Accused 2, Motor Vehicle Mercedes Benz C class was cleared by Messers Maruni Products Company Limited and handed over to the 1<sup>st</sup> appellant James Obwana Oguta who was to drive it and deliver it to the consignee in the name of Meddy Kasozi of Kampala, Uganda. The Bill of Lading showed the consignees name and the telephone No. 0733269744, the Bill of Lading also provided for the party to be notified as Richard Karugu of telephone No. 0720269744.
45. In order to secure the clearance of the Motor Vehicle in question, accused 2 approached PW 1 & 6 to use their company to clear the Motor Vehicle as they had the customs bond. PW 1 authorized accused 2 to use their password to access the system and issue a customs bond for the vehicle to be cleared and delivered in Uganda. After the clearance the vehicle was handed over to accused 1 after PW 6 signed the gate pass.
46. The 1<sup>st</sup> appellant was expected to return documents proving that the vehicle reached Uganda and that it was delivered to the consignee but he failed to do that. In his defence, he claimed that the consignee sent his brother to pick the vehicle from him in Nakuru after it developed mechanical problems. He did not give the name of the said brother of the consignee neither did he provide documents to acknowledge that the vehicle in question had gone through the customs toll station at Mariakani, Gilgil and Malaba. Having failed to confirm safe delivery of the motor vehicle in question, the 1<sup>st</sup> appellant was properly found to have stolen the motor vehicle because the same was diverted into the Kenyan market without authority.
47. The 2<sup>nd</sup> appellant, on the other hand claimed that the vehicle that was found in possession of PW 4 was his and that he sold it to him after he had put it up for advertisement in a newspaper. He said that he had bought it from an insurance company as a salvage and at the same time that it was sold to him by one Peter Rama at Kshs. 200,000. He said that he bought some spare parts and repaired the vehicle and later sold it to Albert Mwangeka on 15<sup>th</sup> November, 2011 after advertising the vehicle in the Standard newspaper. He said that the motor vehicle that he sold was a Mercedes Benz 200 cc at Kshs. 713,000. That when he bought the vehicle it was initially in the name of Perminus Kithinji Kariuki but later on the same was transferred in his favor and he eventually transferred it to Albert Mwangeka. He also testified that the vehicle was initially silver in Colour but he applied for change of colour to blue and his application was allowed.
48. The 2<sup>nd</sup> appellant in his submissions said that none of the prosecution witnesses testified having seen him steal the said motor vehicle. The motor vehicle was released from the port on 22<sup>nd</sup> November, 2010 and on 21<sup>st</sup>, January, 2011, he sold it to PW 4 immediately after it had been released from the port, the fact that the particulars of the fictitious consignee bore his contacts and the fact that he processed the change of colour and had the vehicle registered in his name is proof that he stole the motor vehicle on transit. As at the time the vehicle was being diverted into the local market, PW 1 & 6 were the beneficial owners for purposes of delivering the motor vehicle in Kampala, to that extent, he stole the motor vehicle jointly with the 1<sup>st</sup> appellant.
49. He said he did not know the 2<sup>nd</sup> accused, he did not know Meddy Kasozi, he did not know Maruni products Limited or its directors and that he did not steal the said motor vehicle. According to PW 2, Phoenix EA Limited insured motor vehicle KAT 182 which was registered in the name of Perminus Kithinji their insured, the vehicle was involved in a Road Traffic Accident on 4<sup>th</sup> April, 2009 as per police abstract Exhibit 15 and following assessment the same was written off and the owner was indemnified. The insurance company sold the salvage to Earnest Maina Mwangi.
50. According to PW 2, the motor vehicle that was shown to him in Court KAT 182 C was not the same one that was written off. He said it was badly damaged and was silver in colour. He said the chassis number for the motor vehicle that had been written off was in their documents and it ended with 26. He said that they did not sell the motor vehicle to the 3<sup>rd</sup> accused who is the 2<sup>nd</sup> appellant herein.
51. In consideration of the evidence of PW 2, 8, 9 & 10, this Court finds that the 2<sup>nd</sup> appellant did not discharge the burden of proving that he bought a salvage, repaired it and sold it to PW 4. The glaring coincidence that the bill of lading contained the telephone contacts for the 2<sup>nd</sup> appellant as the party to be notified and which contact is also shown as belonging to the consignee and the fact that in applying for change of colour from silver to blue the 2<sup>nd</sup> appellant did not give the reason for such change, coupled with the fact that the said application does not give the history of the ownership of the motor vehicle in question makes this Court believe that the said change as well as registration into the 2<sup>nd</sup> appellants name was fraudulent.
52. The fact that the particulars of the consignee were the same particulars for the person to be notified, makes this Court believe that the said consignee was fictitious and was merely used in the Bill of Lading to make it possible for the 2<sup>nd</sup> appellant to divert the motor vehicle in question into the local market.
53. It is not possible that the bill of lading could have had the 2<sup>nd</sup> appellants name if he did not know the consignee and that he was not part of the plot to bring into the country an unauthorized vehicle and have it registered in his name. he must have conspired with the 1<sup>st</sup> appellant to use a fictitious name of a person purported to be in Uganda to bring in the motor vehicle.
54. In conclusion, the prosecution proved that the 1<sup>st</sup> appellant in conjunction with the 2<sup>nd</sup> appellant diverted the motor vehicle in question into the local market instead of delivering it to Kampala as shown in the bill of lading, as a consequence of that diversion, the 2<sup>nd</sup> appellant fraudulently obtained registration of the said motor vehicle after tampering with its chassis number using the chassis number of a motor vehicle that had been written off following a road traffic accident. The 2<sup>nd</sup> appellant went ahead to put up an advertisement for the sale of the said motor vehicle and sold it to PW 4 when he knew very well that the vehicle ought not to have been registered in Kenya being that it was older than 8 years at the time of arrival in the port of Mombasa.

**Whether the penned solution by the 2<sup>nd</sup> appellant formed the basis of his conviction.**

55. Looking at the judgment of the trial Court, the trial Magistrate was convinced that the 2<sup>nd</sup> appellant out of his own free will wrote the

document exhibit No. 8 dated 7<sup>th</sup> February, 2011. This document did not form the basis of convicting the 2<sup>nd</sup> appellant as is shown in the judgment, including the fact that Maruni products were special owners of the motor vehicle in question, that the motor vehicle in question was taken from the special owner with an intent to permanently deprive them of it as the 1<sup>st</sup> appellant did not account for successful delivery to the alleged consignee in Uganda.

56. The appellants were also convicted on the fact that the motor vehicle that had been released to be delivered in Kampala had its chassis number and paint work tampered with as per the evidence of PW 8 and the Court observed obvious tampering with the chassis which was welded before a coat of paint was added among other reasons.

**Whether the appellant's defence was considered by the trial Magistrate.**

57. The trial Magistrate analyzed the evidence on record for the prosecution and the defence and concluded that the prosecution had proved its case beyond reasonable doubt against the appellants. This Court has re-evaluated the appellants defence and as analyzed in paragraph 57 to 61 herein above, the defence by the appellants was a mere denial and the evidence of the prosecution witnesses overwhelmed the claims made by the appellants.

**Whether the sentence meted out was harsh and manifestly excessive.**

58. On whether the sentence was harsh and manifestly excessive, section 279 (c) for which the appellants were charged and convicted in count I provides:

***“Stealing from the person; stealing goods in transit, etc.***

***If the theft is committed under any of the circumstances following, that is to say—***

***(a) if the thing is stolen from the person of another;***

***(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;***

***(c) if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;***

***(d) if the thing stolen is attached to or forms part of a railway;***

***(e) if the thing is stolen from a vessel which is in distress or wrecked or stranded;***

***(f) if the thing is stolen from a public office in which it is deposited or kept;***

***(g) if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument,***

***the offender is liable to imprisonment for fourteen years.***

59. Section 315 of the Penal Code provides as hereunder:

***“Cheating***

***Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years”***

60. On the other hand, section 320 of the penal codes provides that:

***“Obtaining registration, etc., by false pretence***

***Any person who willfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.”***

61. Section 203 (e) of the East African Community Customs Management Act 2004 provides that:

***“A person who, in any matter relating to the Customs —***

***(a) makes any entry which is false or incorrect in any particular, or.***

*(b) makes or causes to be made any declaration, certificate, application, or other document, which is false or incorrect in any particular; or*

*(c) when required in accordance with this Act to answer any question put to him or her by an officer, refuses to answer such question or makes any false or incorrect statement in reply thereto; or*

*(d) obtains any drawback, rebate, remission, or refund, or duty which to his or her knowledge he or she is not entitled to obtain; or*

*(e) in any way is knowingly concerned in any fraudulent evasion of the payment of any duty; or*

*(f) except by authority moves, alters, or in any way interferes with any goods subject to Customs control; or*

*(g) brings into a Partner State, or has in his or her possession, without lawful excuse any blank or incomplete invoice, bill head, or other similar document, capable of being filled up and used as an invoice for imported goods; or*

*(h) counterfeits or in any way falsifies, or knowingly uses when counterfeited or in any way falsified, any documents required or issued by, or used for the purpose of, the Customs,*

**commits an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand dollars.**

62. It is important to note that the trial Magistrate found the 1<sup>st</sup> and 2<sup>nd</sup> appellants guilty for the offence in Count 1 but in conclusion of the judgment, he said that he accordingly convicted the 3<sup>rd</sup> accused with the offence of conspiracy to contravene the provisions of the East African Community Customs Management Act of 2004 and Cheating contrary to section 315 of the Penal Code as charged in counts 2 & 3. It would appear that the trial Magistrate inadvertently considered the alternative count as Count II and Count II as Count III.

63. It is not proper to find an accused person guilty in the principal charge as well as the alternative charge. In that regard therefore, this Court finds that the only counts for which the 2<sup>nd</sup> appellant is properly found guilty are the 1<sup>st</sup> count and the 2<sup>nd</sup> count in the charge sheet. The sentence of 6 months for obtaining registration by false pretences is therefore set aside for reasons that it is not clear whether the 2<sup>nd</sup> appellant was convicted for that count or not.

64. For the 1<sup>st</sup> and 2<sup>nd</sup> count, it is apparent that the sentences meted out were within the law and were therefore not harsh and excessive. Be that as it may, in the alternative to the jail terms, this Court finds that it would be fair and just to impose a fine of Kshs. 1,000,000 each for the appellants in Count I in default to serve 4 years' imprisonment. For Count, 2 the 2<sup>nd</sup> appellant will pay a fine of Kshs. 100,000 in default 1-year imprisonment.

It so ordered

Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT, THIS 29TH DAY OF JULY, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Ogwel – Court assistant

Ms. Karanja for Respondent

1<sup>st</sup> Appellant - Present in person

2<sup>nd</sup> Appellant – Present in person

**Hon. Lady Justice A. Ong'injo**

**Judge**

**2<sup>nd</sup> Appellant**

I had deposited Kshs.500,000/= as cashbail 400,000/= for CR. A. No. 32 of 2018 and Kshs.100,000/= for Mombasa CMC CR. Case No. 475 of 2011. I wish to have the cashbail to be treated as fine so I pay the balance.

**Order**

Deputy Registrar to confirm payment of cashbail by 2<sup>nd</sup> Appellant in the appeal and in lower court and apply the same as part of his fine.

The 2<sup>nd</sup> Appellant to write an official letter & attach receipts as confirmation of his application.

Upon cashbail being confirmed and converted to fine the 2<sup>nd</sup> Appellant to pay the balance of Kshs.600,000/=. Appellants remanded at Central Police Station to be availed before Deputy Registrar on 30/07/2021 to process cashbail.

***Hon. Lady Justice A. Ong'injo***

***Judge***

**29/07/2021**