REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 428 OF 2004

FROM ORIGINAL CONVICTION AND SENTENCE CRIMINAL APPEL NO. 103 OF 2003 OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI

KETAN SOMAIA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 429 OF 2004

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 1013 OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI

JASON WELLINGTON OLUGA……..APPELLANT

VERSUS

REPUBLIC…….....….....……..…….RESPONDENT

JUDGMENT

The appellants, ***KETAN SOMAIA*** **and** ***JASON WELLINGTON OLUGA,*** were convicted for the offence of STEALING contrary to Section 275 of the Penal Code, and then sentenced to two years imprisonment each. The particulars of the charge, are set out in the charge sheet, in the manner following:

> ***"1. KETAN SOMAIA***
>
> 2. ***JASON WELLINGTONE OLUGA between 27th October 1988 and 27th July 1989 in Nairobi within Nairobi Area, jointly with others not before court stole Sterling Pounds £3,500,000 equivalent to Kshs 112,875,000/= the property of National Bank of Kenya Limited."***

Following their conviction and sentencing, the appellants felt dissatisfied with the verdict, and therefore lodged their respective appeals, challenging the verdict. The two appeals were duly consolidated by this court, so as to facilitate the hearing and determination thereof.

Between the two appellants were listed a total of thirty Grounds of Appeal. However, when the appeals were being canvassed, all the grounds of appeal were dealt with collectively. In my understanding of the issues raised, I find that the following issues are an appropriate summary thereof:

> *(i) The prosecution failed to adduce evidence to prove that the appellants were guilty of theft or conversion.*
>
> (ii) The learned trial magistrate failed to appreciate and consider the principles of law governing the operation of International Letters of Credit
>
> (iii) The learned trial Magistrate erred, in law, by relying on extraneous matters, which had no relevance to the charge.

(iv) The learned trial Magistrate erred, in law, by failing to appreciate that the prosecution was an abuse of the process of the court.

(v) A reasonable doubt was established, which ought to have weighed in favour of the appellants

(vi) The sentence was harsh and excessive.

In order to better understand the submissions by the parties herein, it is important that a brief resume of the facts be set out herein. The story began in 1988, when PW3 Raphael Gitau was then Executive Chairman of National Bank of Kenya Limited, which was wholly owned by the Government. PW3 testified that the Government had decided to start a small industry by buying a fleet of taxis, to ease traffic congestion in the City of Nairobi. The said project was also intended, by the government, to create employment for young people, in taxi business.

PW3 advised the meeting, which was attended by, amongst others, the Permanent Secretary, Finance, Mr. Charles Mbindyo (PW6) and Prof George Saitoti, who was then the Minister for Finance, that the National Bank of Kenya Limited was not financially capable of carrying out the project.

Thereafter, the government asked the National Bank of Kenya Limited (hereinafter referred at as **NBK**), to establish a Letter of Credit for Kenya Overseas

Trading Limited (**KOTC**), for urgent procurement of the vehicles. The Letter of Credit was for Stg $ 8.75 million.

On 28.10.88, PW3 chaired a National Bank of Kenya Board meeting, which resolved to carry out the project. The board then passed on the authority, to the relevant branch of the bank to open the Letter of Credit. As far as PW3 was concerned, the Board of Directors gave a policy decision, which the 2nd appellant was expected to follow up, in implementing the government project.

In view of the fact that National Bank of Kenya had a weak financial standing, at the time, PW3 says that the money used to procure the ***"London-look taxis***" was obtained by the government, from the National social Security fund (NSSF).

Indeed as far as PW3 was concerned, he was not aware of any money being paid out by National Bank of Kenya. He was therefore unaware that National Bank of Kenya lost any money in the transaction.

Mr. Charles Mbindyo was the Permanent Secretary at the Treasury, Ministry of Finance at the material time. At the trial, he was PW6. He testified that the Hon. Prof. George Saitoti was then the Vice President and Minister of Finance. PW6 was told by the Hon. Saitoti that the Office of the President had taken the initiative to form a Cooperative Society of about 500 drivers, in order to increase the number of vehicles available for transport in Nairobi City. Apparently, there had been a general strike by some transporters, and it was felt that that gave rise to security concerns. At the behest of the Vice-President, PW6 called PW3 for a meeting, for the purposes of raising funds, for use in the purchase of the required vehicles.

PW6 corroborated the evidence of PW3, to the effect that **NBK** had a weak capital base, and would therefore be unable to finance the project. For that reason, the government, which was then the sole shareholder in **NBK**, authorized the bank to issue a letter of Credit to the importer of the vehicles. The authorization was in two ways. First, PW6, in his capacity as the shareholder in National Bank of Kenya, attended meetings of the bank's Board of Directors, whereat the bank agreed to go along with the project. Secondly, PW6 wrote to National Bank of Kenya, notifying it that it had been authorized to issue the Letter of Credit.

PW1, Saul Joel Mwangola, used to be the Branch Manager at **NBK's** Moi Avenue Branch, at the material time. In his testimony, he said that the 2nd appellant was then General manager at National Bank of Kenya. Shortly after PW1 assumed the position (following his transfer from National Bank's Nakuru Branch), the 2nd appellant informed him of the need to open a Letter of Credit. PW1 says that the 2nd appellant instructed him to see the 1st appellant for details of the transactions. PW1 then proceeded to the offices of City Finance, situated along Moi Avenue, where he met the 1st appellant.

Whilst PW1 was discussing with the 1st appellant, the issue of importation of taxis, there was an application form for opening a Letter of Credit, on the 1st appellant's desk. The applicant for the Letter of Credit was Kenya Overseas Trading Company Limited (**KOTC)** of P.O. Box 41708 Nairobi, while the beneficiary was **CAMPGLOBE LIMITED**, of Box St. John's Square London ECIV 4 JL.

PW1 asked the 1st appellant for details, but was told that they were still being processed. Then PW1 asked the 1st appellant to sign the application, but he declined. Instead, the 1st appellant is said to have called PW2, Isaac Githuthu, from an inner office.

It is common ground that PW2 did sign not only the application for the Letter of Credit, but also the forms for the opening of an account for **KOTC**. The said account was opened on the same day as the application for the Letter of Credit.

Both PW1 and PW3 confirmed that the sole signatory to the **KOTC** account was PW2. Furthermore, both PW1 and PW2 told the court that the only directors of KOTC were Mr. Isaac Samson Githuthu (PW2) and his wife Florence Githuthu. The particulars of the directors were verified from the Memorandum and Articles of Association of KOTC, which were adduced in evidence as Exhibit 3.

According to PW1 the first payment was made in April 1989. PW1 said:

> ***"About April 20th 1989 an advance payment of 50% of the amount in Letter of Credit was paid to CAMPGLOBE to assist in purchasing the vehicles and preparing them for shipment to Kenya. 8,750,000 was to cover importation of 500 units of London type taxis. The vehicles were consigned in lot 5 of 4 to 10 and arrived at different times. By the time the shipment stopped a total***

of 300 units had been received. Balance of 200 units were not received. I knew this from the record in the bank."

PW1 was very clear in his testimony, that in the light of the large size of the transaction, "***the whole head office was aware of the transaction."***

When National Bank of Kenya issued the Letter of Credit, it well knew that its client was **KOTC**. The said client did not pay even a cent to National Bank of Kenya before the Letter of Credit was issued. In the circumstances,

> "***Because the company did not pay a cent for the letter of credit, we undertook to refinance the purchase of the taxis to pay the debt of the Government. We gave a Letter ofCredit without any Security at all. We had to pay the debt first and any excess fund would be paid to the company.***
>
> ***If we did not recover the amount we were to go back to the importer. This arrangement was replied through discussion between our head office importer and the government."***

The foregoing was the clear understanding by PW1, of the arrangement. Money was paid out to **CAMPLOBE**, for the purchase taxis. The money was to be recovered by National Bank of Kenya, through refinancing the purchase of the taxis. If the bank recovered its money in full, and there was an excess, the same would be paid to **KOTC**.

But if **NBK** did not break even, it would look to **KOTC** for the shortfall. When he was asked whether or not the appellants were involved in the Letter of Credit, PW1 said:

> "***I see MFI-1. There is nothing in it about the accused.***
>
> ***It is in favour of the bank and on account of Kenya Overseas Trading company. It means all the transactions were to be through the bank. It is standard practice."***

The witness said that the "***irrevocable letter of Credit was in favour of CAMPGLOBE"***

After some of the vehicles were delivered to Kenya, National Bank of Kenya paid for the repairs thereto. The bank then asked members of the Kenya Taxi Association, Nairobi, to open accounts at National Bank of Kenya by paying Kshs 10,000/= each.

According to PW1, that was not a part of the bank's normal banking business. He even went further to write to the Jomo Kenyatta International Airport, asking that the taxis be allowed to operate from the airport. PW1 then assisted the vehicles to get PSV licences and other things necessary to enable the taxis operate.

All these tasks were carried out by PW1, but without National Bank of Kenya raising any charges for the same.

PW2, ***ISAAC SAMSON GITHUTHU*** said that he and his wife, were the owners of KOTC. He said that in October 1988, the 1st appellant told him that the government had decided to procure some vehicles for a Co-operative Company of taxi operators. He told the trial court that the 1st appellant wanted his company to open a Letter of Credit, because the funds would be channeled through City Finance, who would oversee the transactions. PW2 was the Managing Director of City Finance.

PW2 then went to National Bank of Kenya, where he signed the Letter of Credit, before PW1, who was the branch Manager at National Bank of Kenya . PW2 also opened an account for **KOTC**, to which he was the sole signatory. Although, PW2 confirms applying for the Letter of Credit, he says that he never got to see it until 1992, after he abruptly resigned as Managing Director at City Finance.

PW2 had been receiving debits charged to **KOTC**, which had accumulated to Kshs 132,386,237/=. He went to see PW1, seeking an explanation for the debit. PW1 told him that the debit was in relation to the taxis which had been imported by **KOTC**.

But although PW2 pleaded ignorance of the letter of Credit, he at lease concede knowledge of the fact that "**the taxis had come and had been sold. The taxis came on various dates between August and November 1992."**

On 25th November 1992, **KOTC's** advocates, M/S Waruhiu & Muite Advocates wrote to National Bank of Kenya protesting about the misuse of **KOTC's** account. They pointed out to National Bank of Kenya that the bank had, on or about 27th day of October 1988, entered into a business transaction, with a 3rd party, to finance the shipment of 500 units of London-type taxis, from the United Kingdom, to Kenya. That transaction is said to have been transacted, using **KOTC** account without that company's knowledge or authority. Subsequent to his complaint, the **KOTC** account was credited with two large amounts of Kshs 113,153,008/80, and Kshs 250,000,000/=, respectively. The debit balance on that account as at 30th September 1999, was Kshs 2,839, 928/50.

According to PW2, he was advised by PW1 to write to the beneficiary of the Stg ?8,750,000, to refund the balance of the Letter of Credit which was not covered by the 200 units. The reason why the demand was only in relation to the value of the 200 units is because PW2 and PW1 were both agreed that 300 vehicles had been delivered to Kenya. Indeed, PW2's company, **MUTUNE INSURANCE BROKERS LIMITED**, insured the 300 units.

During cross-examination by Mr. Opiyo, advocate for the 1st appellant, PW2 said:

"It is my company that brought in the taxis. I am now surprised that I have not been charged. ….It is true that I have gone to the High Court to ask for profits over the transaction. There is no documentary requests by 1st accused to use my company. I knew 1st accused. He was my friend and customer at City Finance Company and we were Co-directors at Marshall E.A.

There is no time I have gone to police to complain about 1st accused or about the transaction."

Having written to National Bank of Kenya, earlier, protesting that the bank had misused his company's account without his authority or knowledge, it is very telling that PW2 should then own up to the fact that it was the very same company (**KOTC**) which brought in the taxis. It is also interesting to note that PW2's firm (Mutune Insurance Brokers Limited) is the one which provided Insurance Cover for the 300 taxis which had been received. In these circumstances, I find that PW2 was a completely unreliable witness. When it suited him, he denied knowledge, of the transaction for the importation of the vehicles. But at the same time, he demanded profits from the same transaction.

And when he finally conceded not only being responsible for the actual importation but also for the insurance of the taxis, I hold the considered view that the evidence of PW2 ought not to have been accepted at face value. If anything, PW2's evidence ought to have been handled with a lot of caution.

PW3, Raphael Gitau, was the Executive Chairman of National Bank at the material time. In his testimony he said that:

"the Board only noted and ratified the project decision. It is true that bank was not financially stable. The bank had no funds to fund the project but the government gave the money. The money came from National Social Security Fund. National social Security Fund was to invest the money in a fixed deposit in our bank for the currency of the project. The National social Security Fund money was used to buy the taxis."

In the light of the foregoing evidence, one cannot help but wonder why the appellants were accused of stealing money which was the property of National Bank of Kenya, whereas the Executive Chairman of the bank expressly said that the money used was from National Social Security Fund. He made it clear that National Bank of Kenya did not have funds for the project. During his cross examination by Mr. Orengo advocate,

PW3 clarified the point further by saying;

"It is true a bank cannot give out what it does not have."

Two issues arise from that statement. First it is as regards the question of the bank "giving out". I say so because if the bank decided, of its own volation to give out the funds in question, it may well be that the recipient of the said funds may not be guilty of stealing. And, secondly, the fact is that whether the bank ***"gave out"*** the funds, or was forced to part with its own money, the bank could not succeed in so doing, as it did not have the funds in the first instance.

PW4, Nelson Ngaruiya Njoroge was the Manager in charge of debt recovery at National Bank of Kenya. Having studied the records at the bank, PW4 said that the applicants for the Letter of Credit was **KOTC**. In his professional opinion, as a banker,

KOTC needed a letter of authority from the Ministry of Trade and Industry, to deal in international business, by way of a Letter of Credit. But instead, it was National Bank of Kenya that applied to the Central Bank of Kenya to make remittances under the Letter of Credit.

As far as PW4 was concerned, Mr. A.H. Ali, the Financial Secretary to the Treasury did authorize the 2nd appellant to pay Stg ?3,000,000, as advance payment. This is what PW4 said, in his evidence;

"I came across letter from Ministry of Finance dated 18.4.89 addressed to the General Manager Mr. Oluga (MFI-20) saying Ministry had recieved Kshs 300,000,000/= from National Social Security Fund to import the taxis. It authorized initial payment of sterling pounds 3 million advance payment. It is signed by A. H. Ali Financial Secretary to the Treasury. Subsequently, there was approval to deal 81,500 British pounds is approved and then 50% of the balance which is 4,278,750 British pounds. Authority was granted by treasury on 20.4.89 (MFI 12)"

Following what was said by PW4, above, the payments were authorized.

Assuming, for a moment, that the money paid out was lost irrevocably, it may well be that the person who paid it out may have been negligent. But if he deemed himself to have made payment with requisite authority, whether or not the person giving the authority had real authority, would imply that one of the ingredients of the offence of stealing was not proved. That ingredient is the mens rea of the suspect.

Meanwhile, PW4 also confirmed that:

"Other than National Social Security Fund I don't know whether any money came from elsewhere. I don't know where the rest of the money came from.

I don't know if National Bank of Kenya had the balance of the funds to meet the obligations."

That would imply that apart from Kshs 300,000,000/= which was said to have come from national Social Security Fund, not even National Bank of Kenya is saying that it lost money. So why were the appellants accused of having stolen money belonging to National Bank of

Kenya when the bank is not making any such allegations?

But in any event, what happened to the money?

PW4 testified as follows:

> ***"The money went overseas. It did not go to the account of Kenya Overseas Trading Company. L.C was lending in which importer brings the goods which he sells to pay off the L.C The transactions were through Kenya Overseas Trading Company. We were reimbursingBarclays Bank PLC***

Herein lies an explanation as to what the bank deemed the Letter of Credit to have been. It was a lending, by the bank to **KOTC**, who would then pay up after selling the vehicles.

The person who "**borrowed**" was **KOTC**, which as the witnesses said, was wholly owned by PW2 and his wife, Florence. Neither of the appellants "borrowed" the money. Even PW2 conceeded that it is he who was supposed to liquidate the debt with National Bank of Kenya. This is the way he explained it:

> ***It is true I was saying I was not able to sell the vehicles because of the economic conditions. I was saying the economic position would not allow me to bring the remaining 200 taxis. I was saying the balance be paid to my company. I wanted the value of the 200 taxis to be able to pay National Bank of Kenya to liquidate my outstanding debit with the bank."***

PW5, Frank Kareithi Nguu, was working with National Bank of Kenya, at its Bills Department. He was the Foreign Trade Manager, in 1998. He said that if a Letter of Credit was to go out of the country, his department would process it.

In relation to this case, PW5 recalls that there was a project of the government of Kenya, through the Ministry of Finance, for the importation of taxi vehicles which were London-look. The importer was **KOTC**, while the supplier was **CAMPGLOBE**. The application form for the Letter of Credit was signed by **KOTC**, and was for Stg ?8,750,000. However, the commodity to be imported was not specified in the form.

But the Letter of Credit came with a proforma invoice from **CAMPGLOBE**.

Then there was a letter from Mr. Ali, the Financial Secretary, at the Treasury, authorizing the advance payment of Stg ?3,000,000.

As far as PW5 was concerned only 249 or 251 units were received. The debt, for the rest of the units was to be paid by the government, and not **KOTC.**

But at the same time, PW5 said the following, as regards the conditions of the Letter of Credit:

> ***"Unless there was evidence of exportation (shipment) the supplier could not be paid. By MFI 5 we gave instructions to our corresponding bank in London. We have said if there was money paid without condition of exportation we would not be liable. I don't know if the corresponding bank has claimed any money from us. We have not claimed any money from them. In terms of the Letter of Credit we gave authority to spend their own money and claim it from Kenya. They were going to claim only the money they spent. The bank in London did not claim the full amount under the Letter of Credit."***

From the foregoing piece of evidence, it is clear that money was only supposed to have been paid out by National Bank of Kenya's corresponding bank, after the said corresponding bank had received proof that the vehicles had been shipped by the supplier.

And as far as PW5 was concerned, the corresponding bank only paid money for the units that were shipped to Kenya. If that be the case, and the said corresponding bank did not claim the full amount under the Letter of Credit, the question that arises is how come National Bank is said to have lost money for vehicles which had not been shipped to Kenya.

Who was the corresponding bank for National Bank of Kenya? The answer is to be found in the Letter of Credit; and it is **NATIONAL WESTMINISTER BANK PLC** (hereinafter referred to as **NATWEST**). In their capacity as the corresponding bank,

NATWEST was actually an agent of National Bank of Kenya. Thus if National Bank paid any money to **NATWES**T, the said money would, stricto sensu, still be held by National Bank of Kenya, until it was paid over by **NATWEST**, to **BARCLAYS BANK**

PLC (hereinafter **BARCLAYS PLC**), who were the bankers for **CAMPGLOBE.**

As and when National Bank paid money over to **NATWEST**, the money was still being held to the order of National Bank. It cannot have been possible to consider funds to have been stolen or lost, if the same were still held by **NATWEST**, on behalf of National Bank of Kenya.

Thereafter, if **NATWEST** paid out the money to **BARCLAYS PLC** or **CAMPGLOBE** or anybody else, in violation of the terms of the Letter of Credit, **NATWEST** would have become liable to National Bank of Kenya.

In this case, there appears to be no proof that **BARCLAYS PLC** lodged claims with **NATWEST**, or that the latter then made out payments, in compliance with the terms of the Letter of Credit. **NATWEST** would then have sought reimbursement from National Bank of Kenya, of such funds as they had paid out. But instead, what seems to have happened, as testified by PW3, was that

> ***" the money was directly paid to the exporter in London."***

If that be the position, it would imply that National Bank of Kenya did not honour the terms of the Letter of Credit, and may thus have lost the opportunity of laying claim against **NATWEST**.

PW6, **CHARLES MBINDYO**, was the Permanent Secretary at the Treasury, Ministry of Finance, at the material time. By virtue of his office, PW6 was the nominee of the Government, as a shareholder in National Bank of Kenya. He was also a director of National Bank of Kenya. He was well aware that National Bank had a weak financial base, and he therefore gave authority for the Letter of Credit. PW6 then wrote a ***"letter of comfort***" to National Bank of Kenya, so that it could be comfortable in raising money for the **"government project".**

PW 7, CPL MUTUKU MUTHOKA effected the arrest of the 1st appellant on 6th April 2003, when the said appellant was already aboard a British Airways flight, bound for London. At the time when he was arresting the 1st appellant, PW 7 did not know the offence in respect of which the said appellant was being sought by law enforcement agencies. He simply carried out instructions issued by MR. MUHOYA, the officer-incharge at the National Security Intelligence Services (N.S.I.S).

PW8, GRACE NJERU TOLE, was a banker. She joined Delphis Bank in December 2002, as a Senior Operations Manager. She identified a debit voucher dated 3/2/93, for Kshs.113,153,008/80. The voucher was in favour of **NBK**, for the account of **KOTC**. Apart from that fact, PW 8 did not know any other details about those funds.**PW 9, CI JEREMIAH IKIAO**, was the Investigating Officer. He commenced his Investigations on 8th April 2003, at the behest of his boss, KAMWENDE. He went over to NBK where he met PW 4 and **a** Mr. Murigia. The two gentlemen gave him various documents, from which PW 9 noted that **KOTC** had applied for a Letter of Credit at NBK, for the importation of London – look taxis. There were also documents which showed that **KOTC** did open an account at **NBK**.

PW 9 also saw the Memorandum and Articles of Association for **KOTC**, which showed that the directors of the company were PW 2 and his wife, Florence Githuthu.PW 9 learnt from Mr. Murigia and PW4 that,

> ***"a total of sterling pounds 8,750,000 was sent to the said company (CAMPGLOBE), which was supposed to deliver 500 units of taxis, but that only 300 units were sent and delivered to Kenya leaving a balance of 200 units which have never been delivered to date. 3,500,000 sterling pounds worth of vehicles was outstanding."***

That would explain the amount of money which the appellants were said to have stolen, as specified in the charge sheet. But just why did PW9 decide to prefer charges against the appellants? The reason he gave was as follows:

> ***"2nd accused was in charge of finances at the bank and arranged for the transfer of the funds to the U.K. even before the taxis were received in Kenya. I charged both of them. I believe 1st accused is either a director of CAMPGLOBE or a nominee of the company in Kenya but are yet to confirm this."***

I have perused the record of the proceedings but have been unable to trace evidence, adduced in court, to show that the said accused arranged for the transfer of the funds to U.K. If anything, **PW1, SAUL JOEL MWANGOLA** testified as follows:

> ***"All the money in the L.C was paid to CAMPGLOBE. It was on the instructions of Kenya Overseas Trading Company Limited. Neither accused asked the bank to pay CAMPGLOBE."***

And when PW 9 blames the 2nd appellant for arranging for payment before the taxis were received in Kenya, I ask myself, if it was in any manner criminal for payment to be made at that stage. To my mind even if it had been proved, which it was not, that the 2nd appellant arranged for payment before the taxis were received in Kenya, that by itself could not constitute theft of the funds.

But it is very telling that the Executive Chairman of NBK, Mr. RAPHAEL GITAU (PW3) said that;

> ***"It is true I was surprised that matters 15 years old should be bought up. The transaction was as a result of government instructions. General Manager had no option but to comply."***

I am not suggesting that it is a defence for someone to say that he committed an offence on the basis of instructions from the government or any other authority. The fact that someone receives instructions from a "**higher authority**", and carries them out, would not exonerate the person from criminal liability, if the action carried out constituted a criminal offence.

But in this case, my understanding is that by arranging for the letter of Credit, both **NBK** and **KOTC** did actually intend that payment be made out once the vehicles were shipped from the United Kingdom and were destined for Kenya. Therefore, if the 2nd appellant did arrange for payment before the vehicles were shipped by the supplier, he would have contravened the spirit and intent of the Letter of Credit.

To that extent, he would probably be deemed to have been negligent or to have breached the terms and conditions of the Letter of Credit. But unless such negligence or breach was criminalized by statute, the 2nd appellant would not be criminally liable for such action.

As regards the 1st appellant, PW9 said that he believed him to be either the director of **CAMPGLOBE** or a nominee of the company in Kenya. Notwithstanding PW 9's belief, he readily conceded that he did not have any evidence to back his view. That being the case, PW9 was not justified to bring charges against the 1st appellant, when he did not have any tangible evidence linking him to **CAMPGLOBE**. But even if the 1st appellant had had some connection with **CAMPGLOBE**, that alone would not have been reason enough to find him criminally liable. In such circumstances, it would have been necessary for the prosecution to prove whether he was a director or a

shareholder.

Ordinarily, shareholders of a limited liability company are not held criminally liable, even if the company did commit a criminal offence. But directors of such a company may well find themselves being convicted alongside their companies.

Another conclusion arrived at by PW9, following his investigations was that;

> ***"Kenya Overseas Trading Company was used without knowledge of its directors to effect the L.C. They were used owing to influence of 1st accused."***

I must say the that I find conclusion very strange indeed. I say so, because **PW2, ISAAC SAMUEL GITHUTHU** , personally said that **KOTC** was owned by him and his wife, Florence. For good measure, he added.

> ***"I held one share and my wife one share. 1st accused had no share in the company. He has no interest in the company."***

Having established ownership of **KOTC**, to the exclusion of the 1st appellant, it was the evidence of PW2 that he is the one who signed the application for the Letter of Credit. By his own testimony, PW2 said;

> ***"It is my company that brought in the taxis. I am surprised that I have not been charged."***

In the light of that evidence, I am surprised that the Investigating Officer came to the conclusion that **KOTC** was used without the knowledge of its directors.

Furthermore, during his testimony, PW 2 did not at any time state that the 1st appellant influenced him to either sign the application for the letter of Credit, or to bring in the vehicles.

But perhaps the most significant piece of evidence by PW 9 was given during his cross-examination by Mr. Opiyo, Counsel for the 2nd appellant. This is what PW 9 said;

> ***"I have produced 68 documentary exhibits. None of them was made or signed by 1st accused. The documents relating to 1st accused are the ones we were going for in the U.K. I am not satisfied with the investigations so far. It is because I do not have documents that would link 1st accused with the offence."***

PW9 was the final prosecution witness. He was the investigating officer. And in his own words, he was not satisfied with the investigations that had been carried out, right upto the moment when he was being cross-examined. He was well aware that he did not have vital documents that could link the 1st appellant to the offence. In the said circumstances, this court must conclude that the Investigating Officer, by his own admission, had no basis in law or fact for preferring charges against the 1st appellant.

And as regards the 2nd appellant, PW9 said;

> ***"I am not comfortable so far because there is the bit from U.K. which is material which I have not got."***

He went on to explain that although the sum of Stg. £8,750,000 came from NBK, he only ascertained that Kshs.300,000,000/= (of the whole sum) came from N.S.S.F.

PW9 did not know where the rest of the money came from, nor did he find out. When he asked the NBK official, Mr. NGARUIYA (PW4), where the balance came from, PW4 gave no answer.

I pause there to ask why therefore, PW9 concluded that the money allegedly stolen by the appellants, was the property of NBK.

All the prosecution witnesses had expressly stated that **NBK** did not have the financial ability to fund the purchase of the 500 taxis. That would imply that NBK did not have the money in the first place, andthat therefore, the said money (which they did not have) could not have been stolen from them.

More interestingly, PW9 said:

> ***"the money was sent to United Kingdom to lower (sic!) the vehicles. It was paid to CAMPGLOBE. All of it. It was sent through the L.C. It was through a corresponding bank in U.K. I see exhibits 5 and 6. The entire money was sent to the corresponding bank. It was National Westminister Bank. I have no document to show the bank remitted the money to CAMPGLOBE. I have no evidence that any of the money went to either accused."***

The long and shot of what PW9 is saying is that he did not have evidence that the supplier of the vehicles, (**CAMPGLOBE**) received the money. All the money was sent to **NATWEST**, under the terms of the Letter of Credit. If that be the case, that **NBK** remitted funds to **NATWEST**, its corresponding bank, the **funds would still be deemed to be in the hands of NBK, as** NATWEST was its own agent.

NATWEST was supposed to pay **BARCLAYS PLC**, the negotiating bank, once it was satisfied that the supplier had fulfilled set conditions, such as the shipment of the vehicles. Thereafter, **NATWEST** would seek re-imbursement from **NBK**, as **NATWEST** would have first spent its own money to pay off **BARCLAYS PLC**. It is in that scenario that the prosecution was supposed to prove that the appellants stole money from **NBK**. Did PW9 understand all these? Perhaps not, but he at least understood the following, about the sum of Stg. £8,750,000.

> ***"It was released by 2nd accused to CAMPGLOBE. I see the L.C. (Exhibit 5). It was the formula used to transmit the money to the U.K. bank. The 2nd accused has not signed it. Exhibit 5 clearly shows that money was only supposed to be released by the corresponding bank upon delivery of the vehicles. After the money left Kenya the responsibility to release it to CAMPGLOBE was with Westminister Bank."***

Once money was in the hands of **NATWEST**, it was that bank's responsibility to release it to **CAMPGLOBE**, in compliance with the terms and conditions set out in the Letter of Credit. Neither of the appellants would have had any say over **NATWEST**, regarding the release of the money. I cannot therefore help but conclude that even assuming that **NBK** did remit funds to **NATWEST**, the prosecution has failed to adduce evidence to prove how the appellants then stole the money from **NATWEST**.

Did **NBK** lodge any complaint to the police that its money had been stolen?

The Investigating Officer (PW9) said that nobody had complained to the police over this matter. Meanwhile, PW1 said that he did not complain to the police, about any loss. Similarly, PW2 said that there was no time that he ever went to the police to complain about the 1st appellant or about the transaction. Instead, it was PW9 who called PW2 to record a statement.

On his part, the then Executive Chairman of **NBK**, Mr. RAPHAEL GITAU (PW3) was called by the police, in the year 2003, to record his statement,. He had not even been aware that the bank had lost any money in the transaction. As nobody had even notified him that some vehicles had not been delivered, PW3 was surprised when the issue was bought up some fifteen years after the transaction.

PW4, PW5, PW6 and PW8 also did not report to the police. But that notwithstanding, PW9 said that the complainant was **NBK**. That begs the question; How did **NBK** become the complainant in this matter?

According to PW9, **CHIEF INSPECTOR JEREMIAH IKIAO,** he and a Mr. Letting were instructed by their boss, KAMWENDE, to investigate a case which had been reported at National Bank, Harambee Avenue, Nairobi. He then proceeded to interview Mr. MURIGIA and MR. NGARUIYA (PW4). Of those two gentlemen, Mr. Murigia did not testify in court. But when PW4 testified**,** he said **that** he had had absolutely no involvement in the transactions. He had only reconstructed the evidence from records maintained at NBK. He certainly did not make any complaints to the police. So just how did NBK become the "**complainant",** as cited in the charge sheet?

By virtue of the provisions of section 2 of the Criminal Procedure Code;

> ***"complainant means a person who lodges a complaint with the police or any other lawful authority."***

Therefore, if we were to apply that meaning to this case, that would imply that there was no complainant. However, in **REPUBLIC V MWAURA IKENGE (1979) KLR 209**, the High Court held that a complainant included the public prosecutor. In order to appreciate that definition one needs to look at PART VI of the Criminal Procedure Code, which is headed, ***"PROCEDURE IN TRIALS BEFORE SUBORDINATE COURTS."*** **Section 208** (which falls within the said part VI) reads as follow;

> ***"(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant*** **www.kenyalawreports.or.ke Ketan Somaia v Republic [2005] eKLR** 25 ***and his witnesses and other evidence (if any)."***

When called upon to interpret that provision, the High Court expressed itself as follows, in **RUHI V REPUBLIC (1985) KLR 373 AT 379;**

> ***"We must state at the outset that we are satisfied that the term "Complainant" in Section 208(1) of the Criminal Procedure Code includes the prosecution as well as the person so described in the particulars of the charge. It is clear from section 26 (3)***
>
> ***(a) and (b) of the Constitution that the state through the AG is or can became the Complainant in every criminal proceeding."***

In that regard therefore, since the Investigating officer, PW 9, expressly told the court that he was dissatisfied with his own investigations into the matter, and also because there is no record of any person who actually lodged a complaint with the police this court is left with the distinct impression that the complainant in this case was the prosecutor, if the decision in ***RUHI V REPUBLIC***, (above) is correct.

Speaking for myself, I find it hard to accept that the prosecutor in a case could double-up as the ***"complainant,"*** if the latter is meant to be the person who lodged a complaint with the police, as envisaged by Section 2 of the Criminal Procedure Code. I say so because, to my mind if the person who lodged the complaint with the police, thereafter prosecuted the accused persons, he would have a very subjective outlook to the case, yet, as I understand it, the cardinal responsibility of a prosecutor was to bring to the attention of the trial court all evidence available to him, whether or not such evidence would help secure a conviction. A function of that nature is unlikely to be performed properly by the very person who lodged the complaint in the first instance.

Also if one considers the provisions of section 202 of the Criminal Procedure Code, it would suggest that the word **"Complainant**" did not include the prosecutor. In the celebrated case of **ROY RICHARD ELIREMA & ANOTHER V REPUBLIC, CRIMINAL APPEAL NO.**

67 OF 2002 (At Mombasa), the Court of Appeal expressed itself thus.

> ***"The parties named in section 202, for example, are the complainant and the accused person. If the***
>
> ***"complainant" is aware of the hearing date and is absent without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing. The "complainant" in this context has been interpreted to mean the "Republic" in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of the Republic."***

To my mind, the foregoing interpretation of the word **"complainant"** is more accurate. And having said so, that would mean that provided **"The Republic"** was the complainant, it mattered not that the victim of the crime herein did not actually lodge a complaint. However, Ie will revisit this issue later, in view of the manner in which the prosecution of the appellants was conducted.

For now, I will re-evaluate the Judgment of the Learned trial Magistrate. This court is obliged, as a first appellate court, to re-evaluate the evidence tendered before the trial court, with a view to arriving at its own decision. When doing so, the first appellate court is then required to arrive at a conclusion whether to uphold the verdict of the trial court, or alternatively to upset the same.

Having analyzed the evidence of PW1, PW2 and PW3, the learned trial magistrate said the following regarding the funding for the project:

> ***"it is obvious no consortium lending was done. The only money received was the 300 million shillings from N.S.S.F. Of course, N.S.S.F. money belongs to employees who make monthly contributions which are subsequently supposed to be returned with interest. It is not free money. One does not know if N.S.S.F. was giving the bank a loan, whether the management of National Social Security Fund were involved and how the money was to be repaid and on what terms. The government had no authority to take National social Security Fund money and apply it to import taxis for members of the public."***

It is common knowledge that the National Social Security Fund (N.S.S.F) is a body corporate, which has the mandate to receive contributions from workers every month. The said contributions are then to be invested by the Trustees to the Fund, forsubsequent repayment to members, upon their retirement. I believe that I am entitled, as I hereby do, to take judicial notice of those facts. So also the trial court was entitled to take judicial notice, as it did.

However, I find that the above-cited statement, made by the learned trial magistrate, embodies two statements which are mutually exclusive. On the one hand, the trial court said that one does not know whether the management of National Social Security Fund were involved in giving the bank a loan. That is correct, because no evidence was led on that issue.

Therefore, when the trial court then concluded that *"**The government had no authority to take National Social Security Fund money and apply it to import taxis for members of the public",*** I find that the court had no basis for arriving at that conclusion.

I say so because, as the trial court had first noted, there was no indication whether or not the National Social Security Fund management was involved in giving the bank (or the government) a loan.

Furthermore, in my considered opinion, in relation to the charges facing the appellants herein, it was irrelevant whether or not the government or National Bank of Kenya had obtained the funds irregularly from National Social Security Fund. Assuming for a moment that National Bank of Kenya (or the government) did receive money irregularly, from National Social Security Fund, that by itself would not imply the guilt or innocence of the appellants, on the charge facing them.

The next issue dealt with by the learned trial Magistrate was in relation to the evidence of PW9. He appreciated the fact that PW9 had not been able to go to the United Kingdom to find out who **CAMPGLOBE** was and whether it had any relationship with either of the accused persons. This is what the learned trial Magistrate said, in his judgment;

> ***"Evidence from the United Kingdom would for instance have shown why the corresponding bank paid all the money under the letter of credit without evidence of shipment of each taxi. But, again, one would ask why National Bank of Kenya paid all the money under the letter of credit without all vehicles having shown to have arrived. In my view the prosecution deliberately failed to pursue the United Kingdom Investigations, even after the court was asked for time and gave several months. There must have been some embarrassing evidence out there, which was being shielded from the court."***

At this point in time, I deem it necessary to set out, in detail, the reasons why the learned trial magistrate arrived at the foregoing conclusion.

The 1st appellant was arrested by PW6, on 6.4.03. He was then charged in court on 24.4.03, and the learned trial Magistrate set down the trial to commence from 16.6.03.

However, when the trial was scheduled to commence, the prosecutor sought an adjournment. His reasons for seeking an adjournment, were that the investigations were not complete, and also that the prosecution was trying to get a 3rd suspect. On that date (16.6.03) the prosecutor made it clear to the trial court that he had not succeeded in tracing all the documents, as the offence had been committed many years back. He explained that the ***"bit left to investigate is quite small."*** He also informed the court that if the prosecution failed to get the few outstanding documents, he would decide what to do.

In a well reasoned ruling, the learned trial Magistrate granted the adjournment sought by the prosecutor. However, he noted that the:

"accused were arrested on 24.4.03, about two months ago.

It was expected that by the time of the charge, investigations had been conducted and an offence disclosed. Since the charge the prosecution have had about 2 months to complete whatever investigations. It was always known that the offence was committed a long time a go and it was going to be difficult both to prosecution and defence to conduct the case."

For those reasons, the trial court adjourned the case, but only to the following day, 17th June 2003.

Thereafter, the trial seems to have proceeded fairly smoothly, with PW1, PW2, PW3 and PW4 testifying. Then, on 28th January 2004, the Director of Public Prosecutions Mr. Murgor, appeared in court, along with the prosecutor S/P Odoyo. The Director of Public Prosecution informed the court that arising out of evidence which had been so far adduced, the prosecutor had had to forward the file to the Attorney General, for directions. This is what the Director of Public Prosecution said to the court;

"Attorney General has studied the file and now matters have arisen out of cross-examination which the state wishes to cover before the case can continue. They were anticipated by the prosecution. The matters related to covering certain aspects of the case in the United Kingdom. As a result the Attorney General has addressed the competent judicial authorities in the United Kingdom to assist in the inquiries."

For those reasons, the Director of Public Prosecution sought an adjournment for a limited period of time. He suggested that if the case was adjourned, the prosecution would resume in "***30 or 40 days."***

In response to that application, the appellants advocates said that they were opposing the request for an adjournment. They, rightly, stated that if they were to concede the application, they might be construed as helping to prosecute their own clients. This is how Mr. Opiyo advocate put his client's case;

"In the cross – examination certain gaps have been exposed. It is not right that the court to be asked to give prosecution time to go and fill those gaps. Before trial it is expected investigations are complete. We now know the case we have to meet. We have no statements of witnesses in U.K.

…..

We cannot allow shopping around for other witnesses or evidence. This is not an investigating body.

…….

I refer to Section 26 of CPC. Even at this stage all the Director of Public Prosecution needs to do is to discontinue the case and then goes to investigate, then come back. Director of Public Prosecution refuses to use those powers and wants the court to help him."

First, I wish to point out that reference to section 26 of the Criminal Procedure Code seems to be an error. That section deals with the powers bestowed upon the police or other authorized persons, to detain and search aircraft, vessels, vehicles and persons.

Therefore, the said section has no application to the issue that was being addressed by the parties herein.

The power of the Attorney General to enter a ***nolle prosequi*** is enshrined in section 82 of the Criminal Procedure Code. By virtue of that power the Attorney General may, at any stage of proceedings before verdict or judgment, enter a ***nolle prosequi***, whereupon the accused persons shall be discharged. But, the discharge of an accused person under those circumstances shall not operate as a bar to subsequent proceedings against the accused, on account of the same facts.

When faced with the opposition to his application, the Director of Public Prosecution pointed out that the desire of his office was to do justices to all parties. He said:

"If the inquiries yielded nothing , then that will be the end of the matter."

When giving his ruling on the application for adjournment, the learned trial magistrate pointed out that:

"In the instant case several witnesses have testified and been cross examined, and the learned Director of Public Prosecution states that arising out of that crossexamination certain matters have arisen that require further investigations in the United Kingdom. Ideally, it is wrong to adjourn an ongoing case to allow the prosecution to, as it were, fill in the gaps that have arisen out of the cross examination."

I could not have put it any better than that, for it is wrong to adjourn a trial, so that the prosecution is accorded an opportunity to search for more witnesses or evidence, for use in filling –up gaps which have been created by the accused, through his crossexamination of the prosecution witnesses.

Nonetheless, the trial court did grant an adjournment, for almost four months, i.e from 28.1.04 upto 10.5.04.

This, as will be appreciated was the second adjournment, at the behest of the prosecution. The first adjournment having been sought and obtained on the first day that the trial was to commence. By that date, the learned trial Magistrate already emphasized the importance of carrying out full investigations prior to having a suspect charged before the court.

In other words, right from the outset, the prosecution knew that it would not have some vital documents, yet they decided to charge the appellants nonetheless. Six months after the trial had began, the prosecution sought another adjournment. The Director of Public Prosecution declined the appellant's invitation to exercise the authority vested on the Attorney

General, under Section 82 of the Criminal Procedure Code. Instead, he preferred to obtain an adjournment.

To my mind, there is no doubt that the Attorney General had every right to apply for an adjournment if he deemed it necessary. And in this case, he justified his application by saying that it was necessitated by something which arose out of the crossexamination.

But a closer scrutiny of the reasons advanced by the DPP reveals that the reasons given were not wholly attributed to issues arising out of cross-examination. I say so because the learned Director of Public Prosecution did concede that;

> ***"they were anticipated by the prosecution."***

That being the case, it must be concluded that the prosecution always anticipated the fact that it would need to obtain further documents, for use in prosecuting the appellants. Strictly speaking therefore, it is not that which came out during cross

examination which caused the Attorney General to look for the documents. In a nutshell, it appears to this court that the learned Director of Public Prosecution was not being candid with the trial court, when he said that the need for the prosecution to obtain documents from the United Kingdom arose out of the cross-examination.

Superintendent of Police, Odoyo, knew from the outset that the prosecution would need further documents. Therefore, I can only conclude that by commencing the trial, when they knew that they did not have all the necessary evidence, the prosecution was taking chances with the appellants' liberty. In my view, if the prosecution was sincere in its endeavour to pursue the documentary evidence in the United Kingdom, they would have done so either before they instituted the proceedings against the appellants, or immediately thereafter. They should not have waited until the appellants made it clear, through cross-examination, that the issues would not be glossed-over. But in this case, the prosecutor informed the trial court that the Ministry of Foreign Affairs wrote to the Kenya High Commission, London, on 5th February 2004, requesting that office to seek authority for the Kenya Police to carry out investigations in the United Kingdom.

To that letter, was attached a letter from the Attorney General of the Republic of Kenya, dated 20th January 2004.

That takes me back to the issue of the complainant, which I had partially addressed earlier. In this case, the aggrieved party was said to be National Bank of Kenya. But it had not lodged any complaint with the police. However, the appellants were arrested and charged. Indeed, the arrest of the 1st appellant was sensational, as he was plucked-off a British Airways flight which was already taxing for take off. His arrest caused the delay of the flight. Thereafter, it took another three weeks for him to be charged.

The questions that keep propping up are, why? Why were investigations being carried out, yet nobody had lodged a complaint with the police, or any other authority?

Why were the appellants being arrested, charged and prosecuted when the prosecution well knew that there were vital documents which they did not have in their hands? Why did not the learned Director of Public Prosecution opt to enter a ***nolle prosequi***, so as to be able to carry out further investigations?

In the recent case of ***REPUBLIC V KAMLESH MANSUKLAL DAMJI PATTNI*** **alias** ***PAUL PATTNI, CRIMINAL CASE NO. 229*** **OF 2003,** the Hon. Lessit J. tackled a similar issue in the manner following:

> ***"The next issue which begs some consideration is, when is a suspect a suspect? Section 72(3)(b) of the Constitution provides:***
>
> ***"A person who is arrested or detained (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence…"***
>
> ***The key words used here is "reasonable suspicion." A person becomes a suspect in relation to the commission of a crime only where there exists a clear and genuine cause for suspicion. Such genuine cause will emerge where a complaint has been raised by an aggrieved person or persons; or alternatively, where there exist openly suspicious circumstances calling for investigations by the relevant authority. In either case, where genuine cause is sought for, the passage of a long time, such as many years, without any complaint raised, or openly suspicious circumstances emerging, will negate the possibility that anyone is a suspect. In such circumstances, the police, whether acting on their own or under instructions, would have no reason or business to arrest anyone."***

In this case, PW9 who was the Investigating Officer, testified that he was not satisfied with his investigations. None of the 68 documents which he had secured were signed by the 1st appellant. He did not have vital documents which could connect the 1st appellant with the offence. He did not know the source of the bulk of the money which was allegedly stolen by the appellants; as National Bank of Kenya officials did not give him an answer. He had no evidence that the 2nd appellant released money to **CAMPGLOBE**. And he established that once money had left Kenya, it was the responsibility of **NATWEST** to release it to **CAMPGLOBE**.

That being the case, it is evident that the police did not have reason to arrest the appellants, as there were no grounds for the police to have ***"Reasonable suspicion,"*** that the appellants had committed the offence of theft.

To be fair to the learned Director of Public Prosecution, I note that when he sought an adjournment, on 28th January 2004, he told the learned trial magistrate that if the inquiries yielded nothing, that would be the end of the matter. I would therefore have expected that when the Kenya authorities failed to get the co-operation of their counter-parts in the United Kingdom,

with a view to carrying out further Investigations, the Learned Director of Public Prosecutions would then have terminated the prosecution, in line with what he had told the trial court on 28th January 2004. However, even though the Kenyan police never left the country, to go and carry out further investigations, the appellants were prosecuted to the very end. I cannot understand why.

Could the trial court have done anything, to stop the prosecution? The answer is in the negative. The trial court could only exercise its discretion to allow or deny further adjournments. To my mind, the way in which the learned trial magistrate exercised his discretion in this case, is beyond reproach. In two instances, he reluctantly granted adjournments, whilst making known the views of the court. He made it clear that the court should not be asked for adjournments, so that the prosecution could seek to fill up gaps in the case. He made it known that before a person was charged, the investigations should already have revealed a reasonable case against the said person. But when the prosecution sought a third

adjournment, some 7 months into the trial, the trial court rejected the application, as it would have been unfair to the appellants to grant an adjournment on the same reasons i.e that the prosecution needed more time to carry out further investigations in the United Kingdom. In my considered opinion, the learned trial Magistrate's decision was not only judicious, but a clear expression of its inherent jurisdiction to protect the court from any abuse of its own procedure. Enough said, on that aspect.

Reverting to the judgment, I note that after the learned trial Magistrate made the point that the prosecution had deliberately failed to pursue the investigations in the United Kingdom, the court nonetheless went on to hold as follows:

> ***"In my considered view, and I find no doubt at all, what happened in this case was outright theft of the money of the National Bank of Kenya. It was not the theft of only sterling pounds 3,500,000 (equivalent to Kshs 112, 875,000/=) but the whole of sterling pounds 8,750,000 in the letter of credit."***

I am afraid, I do not follow at all, wherefrom that conclusion is derived by the trial court, immediately after it had concluded that there was some evidence "out there" which the prosecution was shielding from the court. He went on to express himself as follows:

> ***"The scheme to steal the money was hatched in the Office of the President, given blessings by the Minister of Finance and those under him, and exempted by the bank through the board, PW3, 2nd***
>
> ***accused and PW1. I find that PW2 through the Kenya Overseas Trading Company and the 1st accused were used to steal the money and benefited from it."***

The trial court held that what transpired in the case was ***"outright theft."*** That brings us to the question, what constitutes theft, in law?

Section 268 of the Penal Code gives the following definition of ***"stealing":***

> **"(1)** ***A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any***
>
> ***property, is said to steal that thing or property.***
>
> **(2)** ***A person who takes anything capable of being stolen or who converts any property is deemed to do so*** **fraudulently if he does so with any of the following intents, that is to say –**
>
> **(a) an intent permanently to deprive the general or special owner of the thing of it;**
>
> **(b) an intent to use the thing as a pledge or security;**
>
> **(c) an intent to part with it on a condition as to its return which** ***the person taking or converting it may be unable to perform;***
>
> **(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;**
>
> (e) **in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amounts to the owner."**

In this case, the appellants were charged with the theft of money, therefore the applicable definition is the one to be found in Section 268 (2) (e) above. So, to be guilty of theft, the appellants should have been shown to have taken or converted the sum of Stg £ 3,500,000, the property of National Bank of Kenya Limited (**NBK**).

The trial court held that the 1st appellant ***"was squarely involved in this importation transaction."***

The reason for that holding was that it was the 1st appellant who came up with **CAMPGLOBE** Limited. He was also the Chairman of Marshalls, and in that capacity appointed PW2 to the board. He later introduced PW2 to the transaction. And when "***the deal went sour***", PW2 went to the 1st appellant, because National Bank of Kenya was demanding money from PW2. Suddenly, after that, Kshs 113,153,008/80 was paid by Delphis Bank, to National Bank of Kenya, to the Credit of **KOTC's** account. As the 1stAppellant was a major shareholder at Delphis Bank, the trial court was convinced that he was involved in the transaction.

For the moment, let us assume that all the foregoing statements are factually correct. Would the involvement of the 1st appellant in the importation transaction, in the manner set out by the trial court, be reason enough to find him guilty of theft?

To my mind, even assuming that the 1st appellant was involved in the transaction in the manner set out by the trial court, he would still not have been proved to have either taken or converted the money cited in the charge sheet. Therefore, the prosecution would have failed to discharge the onus of proving the case against him.

The prosecution witnesses testified that the money in issue was either paid by National Bank directly to **CAMPGLOBE** or to National Westminster Bank PLC (**NATWEST**). None of the prosecution witnesses said that the 1st appellant compelled or persuaded National Bank of Kenya to release the money. Indeed it was the testimony of PW1 that *"**Neither accused asked the bank to pay CAMPBLOBE".***

He did not take it from National Bank of Kenya, nor direct National Bank to pay out the money. And once the money left Kenya, the responsibility to release it the **CAMPGLOBE** was with **NATWEST**, as PW9 said. No evidence was procured by PW9 as to how or why **NATWEST** disbursed payment to **CAMPGLOBE**. Therefore, there was no proof that the 1st appellant converted the money.

Meanwhile, as regards the 2nd appellant, the learned trial Magistrate convicted him for the following reasons:

> ***It was the duty of 2nd accused to protect the money of the bank from any invasion and any lending, by way of letter of Credit or at all, had to be prudently analysed and secured. On this reason he threw all caution to the wind. The lending was not only illegal but was an outright theft. It matters not that he may not have personally benefited. All the funds in the letter of credit were converted to the use of other people courtesy of him. The result is that the two accused are jointly guilty of the theft of the whole of the sterling pounds 8,750,000 or its Kenya shillings equivalent. Since they were charged with the theft of a portion of it, that is sterling pounds 3,500,000 or its equivalent of Kshs 112,875,000/= I find them jointly guilty of the charge and they are jointly convicted."***

As I understand it, the learned trial Magistrate held that the 2nd appellant was guilty because he had thrown all caution to the wind. He may not have personally benefited but allowed the funds to be converted to the use of other people, courtesy of him; And that the lending was outright theft.

By saying that the 2nd appellant threw all caution to the wind, I understand the learned trial Magistrate to be saying that the 2nd appellant was either completely negligent or otherwise reckless, in the performance of his duties.

In the case of ***REX V CYRIL J. WATKINS (1945)12 EACA 81,*** the Court of Appeal for Eastern Africa held that it was not right for it to uphold a conviction which was founded more by criminal neglect than by Criminal intent. This is the way they expressed themselves;

> ***We need only say that the existence of criminal negligence, however reprehensible it may be, does not constitute theft."***

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

In the case of ***THE REPUBLIC V JONES (1976) KLR 1***, the High court, Appellate side held that:

> ***"on a charge of theft it was necessary to prove a fraudulent taking or conversion without claim of right, and a person was deemed to have taken or converted money fraudulently if he did so without a claim of right and with intent to use it at his will, even if he intended afterwards to repay the money to the owner."***

From my reading of all the evidence on record, I find nobody at all who testified that the 2nd appellant took the money or converted it. PW9 said that all the money was paid to **CAMPGLOBE**, through the corresponding bank in London. He expressly stated that he had no evidence that any of the money went to either of the accused. To my mind that piece of evidence (which re-echoes the evidence of all the other prosecution witnesses), actually exonerates the appellants from Criminal liability founded on the notion that they took the money.

Once the money was said to have gone from National Bank to either ***CAMPGLOBE or NATWEST***, the only way that the appellants could be said to have converted it is by proving the nexus between the appellants and those two companies, as well as showing exactly what happened to the funds. But the prosecution readily admitted its failure to secure any evidence from the United Kingdom. By necessary implication, the prosecution failed to prove conversion.

Indeed, I could go further and state that from the evidence on record it would appear that none of the appellants ***"took"*** the money. Further, not even **CAMPGLOBE** or **NATWEST** could be said to have ***"taken"*** the money. From the evidence it appears that National Bank of

Kenya ***"gave out"*** the money to either **CAMPGLOBE** or **NATWEST**. What is the significance of this action?

In ***WACHIRA V REPUBLIC (1983) KLR 591***, the Court of Appeal said:

> ***"The appellant has appealed to us against his conviction for stealing. Mr. Kariuki paid the money voluntarily, thus passing of his own free will not only possession but the right of the property therein, to the appellant. In stealing there is no theft in taking, however fraudulent may be the means by which delivery is obtained, if the dupe of his own free will passes not only possession, but the right of property. MWANGI NYONGAH V REPUBLIC (1965)EA 526 at 529.*** *See also* ***REPUBLIC V JONES (1976) Kenya l at 4. Nor were any fraudulent means proved on the part of the appellant by which he obtained possession of the money from Mr. Kariuki. He did not really obtain the money from Mr. Kariuki, he was given it by the incredibly gullible Mr. Kariuki. The appellant's conviction cannot be sustained."***

Insofar as the National Bank of Kenya did freely pay the money to either **CAMPGLOBE** or **NATWEST**, I hold that even if the appellants were shown to have had such relationships with those two companies that would imply that they are the ones who received the money they would still not have been guilty of the offence of theft because National Bank of Kenya had ***"given"*** the money.

Then there is the finding that the appellants converted all the funds in the Letter of Credit, amounting to sterling pounds 8,750,000 or its equivalent in Kenya shillings. Indeed, the learned trial magistrate expressly state that:

> ***"the result is that the accused are jointly guilty of the theft of the whole of the sterling pounds 8,750,000 or its Kenya shillings equivalent."***

The finding is clearly a serious misdirection of both law and fact. It is a misdirection in law because under the Kenya Laws, conviction should never be based on a theory which was not in evidence or in the submissions by counsel. This is what the Court of Appeal stated in ***OKETHI OKALE & OTHERS V REPUBLIC (1965) EA 555 at 557;***

> ***"with all due respect to the learned trial Judge, we think that this is a novel preposition, for in every criminal trial a conviction can only be based on the weight of actual evidence adduced and not any fanciful theories or attractive reasoning. We think that it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches."***

I am afraid that the learned trial magistrate ran foul of the foregoing words of wisdom. He set up the theory of a *"**scheme to steal money (that) was hatched in the Office of the President, given blessings by the Minister of Finance and those under him and exempted by the bank through the board, PW3, 2nd accused and PW1."***

The reasoning by the learned trial Magistrate is attractive. His imagination is vivid, and his narrative compelling. But, am afraid that the same is not founded upon the evidence which was tendered before him. He was therefore wrong to have allowed his sense of imagination to become so fertile.

Secondly, the learned trial magistrate misdirected himself on the facts presented before him. Whereas the charge sheet says that the appellants stole Stg £ 3,500,000, and the prosecution witnesses also talked of that figure, the trial court found the accused guilty of stealing Stg £ 8,750,000. Now, when it is recalled that Stg £ 8,750,000 was the cost of importing 500 taxis, and bearing in mind the fact that PW2 brought in 300 vehicles, it certainly defeats logic for the court to conclude that the whole sum of St £ 8,750,000 was stolen. The trial court failed to give due credit for the value of the 300 vehicles which were delivered to Kenya by PW2. If the court had taken note of that evidence, it would not have said that the appellants were guilty of stealing £ 8,750,000.

Thirdly, when the prosecutor was making submissions, after the close of the prosecution case, he clearly said to the court that, in his view;

> ***"Accused should be called to defence to say where the 200 taxis are."***

At no time did the prosecutor demand that the appellants should account for the 500 taxis or the money which was to buy them all. Therefore, it was wrong for the trial court to have come to the conclusion that the appellants were guilty of stealing Stg £ 8,750,000 when they had not ever been required to answer to such a charge, or evidence to that effect, or even to submissions in that regard.

Whilst still on this aspect of the case, I deem it necessary to address the position of PW2, in this whole saga. The learned trial magistrate said of him that;

> ***"He accepted he participated in affairs relating to these transactions and knew when the vehicles were coming in, how loans were given to each taxi operator etc. The Investigating Officer (PW9) correctly dealt with this witness as a suspect"***

I wholly agree. Furthermore, PW2 also testified as follows:

> ***"It is true I was saying I was not able to sell the vehicles because of economic conditions. I was saying that economic condition would not allow me to bring the remaining 200 taxis."***

In my understanding of that piece of evidence, PW2 would appear to hold the key to the whereabouts of the remaining 200 taxis, which were not delivered to Kenya.

Therefore, apart from agreeing with the learned trial Magistrate that PW2 was a suspect, I do actually recommend that he be further investigated, with a view to being brought to book.

The next issue that I wish to address relates to **DELAY**. The appellants have pointed out that whereas the offences are said to have been committed between October 1988 and July 1989, it was not until April 2003 that they were charged. That is a period of about 14 years.

According to the appellants, that period is so long that in itself it was tantamount to abuse of the process of the court. They cited the case of ***GITHUNGURI V REPUBLIC (1985) KLR 91***, for the preposition that if a delay was sufficiently prolonged, that by itself, could render criminal proceedings brought long after the events said to constitute the offence, both vexations and an abuse of the court process. I have no doubt at all that that is the correct legal position.

However, I also believe that the decision in the ***GITHUNGURI CASE*** (above) must be appreciated within context.

In that case, the Attorney General had reached a decision not to prosecute. A subsequent holder of that office later changed his mind, and preferred charges against the applicant, Githunguri. At that point in time, the applicant applied to the learned trial Magistrate, under Section 67(1) of the Constitution, for a reference to the High Court. The point in issue was

whether the Attorney General had correctly exercised his power under section 26 of the Constitution, in reviving charges against the applicant. The decision on that case was on a constitutional reference.

In the light of the facts in that case the court held as follows:

> ***We think the right to change the decision may be lost if as in the present case, the accused had been publicly informed that he will not be prosecuted and property has been restored to him. As a consequence of being led to believe that there would be no prosecution, the accused may have destroyed or lost evidence in his favour."***

It is in those special circumstances that the court said:

> ***"The preferment of a charge against any person nine years after the alleged commission of the offence charged six years after full inquiry in respect thereof and five years after the decision of the Attorney General not to prosecute and to close the file*** is
>
> **(a) vexations and harassing,**
>
> **(b) an abuse of the process of the court, and**
>
> **(c) contrary to public policy.**
>
> **Unless good and valid reasons exist for doing so, such as for example, the discovery of important and credible fresh evidence or the return from abroad of person concerned."**

In the light of the foregoing decision, I accept as correct, the submissions by the learned state counsel, Ms Kamau, to the effect that delay is not an absolute bar to the institution of criminal charges. There are exceptions to the rule.

The other point which must be emphasized here is to be found at page 101 of the **GITHUNGURI CASE** (above). Simpson CJ, Sachdeva & Mbaya JJs held as follows:

> ***"Mr. Chunga conceded that the High court has inherent jurisdiction and that a person charged before a subordinate court and considering himself to be the victim of oppression may seek a remedy in the High Court by way of an application for a prerogative order. We have no doubt that he is***
>
> ***correct and that Judges of the High Court have a similar discretion in respect of offences triable before them. (Connelly v DPP (1964) 2 All E R 401 cited by both counsel). It is a power to exercised very sparingly however."***

The reason why I have deemed it necessary to highlight this point is that the appellants did not apply to the learned trial magistrate for a constitutional reference under section 67 (1) of the constitution. The other alternative that would have been available to the appellants was to have framed an application to the High Court, under Section 84 of the Constitution, for redress of the infringement of a fundamental right under section 77 (1) of the Constitution.

Having not taken the requisite steps, before the learned trial court, as stated above, it is not right for the appellants to now ask this court, in its capacity as a first appellant court, to decide whatever or not the decision by the Attorney General to prosecute them, some 14 years after the events giving rise to the charges, was an abuse of the process of the court.

The appellants relied on the decision in ***REPUBLIC V KAMLESH MANSUKLAL DAMJI PATTNI alias PAUL PATTNI, CRIMINAL CASE NO. 229 of 2003***, as authority that by preferring charges against them after a period of 14 years, was vexations, harassing and an abuse of the process of the court. Clearly, it was lost on the appellants, that the said decision was by the trial Judge, who therefore had the discretion to arrive at that Judgment. The case is thus distinguishable from this one, which is before the first appellate court. Therefore, much as I am tempted to express a view on the delay before proceedings were instituted against the appellants, I resist the temptation, and decline

to engage in an academic exercise.

The next issue that I tackle is in relation to the sentence. The appellants contend that the sentence of 2 years, which was meted out to each of them, was harsh and excessive.

The sentence prescribed for the offence of theft is imprisonment for three years.

The said sentence is prescribed by section 275 of the Penal Code.

Both appellants stated, in their mitigation that they suffered from pre-existing medical conditions, which necessitated close

medical attention. They also pointed out the delay in the prosecution, as well as the fact that by failing to make available some of the evidence, the prosecution may have been protecting officials in government.

When sentencing the appellants, the learned trial Magistrate said that he had taken into account the fact that the 2nd appellant was physically challenged. He also pointed out that ***"more prominent Kenyans ought to have been charged along with the accused persons for this theft."***

But in the final analysis, the learned trial magistrate held that anybody who was criminally liable would have to be responsible for his crime, in the fullness of time. It was not a defence for any person to say that he was acting on the instructions from his superiors, he said.

In principle, the learned trial magistrate was right. However, his remarks cannot be applied to this case, neither of the appellants put forward the defence that they had acted on the instructions of their superiors. The person who said that the 2nd appellant did not have an alternative but to follow instructions, was PW3.

But that notwithstanding, I do not find any reasons, in law, to interfere with the sentence meted out herein. The fact that a person may be physically challenged or sick is not a licence to commit an offence and then seek non-custodial sentence. If a person is properly convicted, he should be aware that the courts are enjoined to dispense justice without fear on favour. I would therefore not fault the learned trial magistrate for sentencing the appellants to two years imprisonment.

Whilst still on this issue of sentencing, I feel that it is essential to make the following remarks. First, I acknowledge the fact that the sentence prescribed by law, for the offence of theft, is imprisonment for upto three years.

I also acknowledge that the courts are obliged to apply the law as it exists. However, when the sentence prescribed in section 275 is applied by the courts, we have often been perceived to have acted discriminately. What do I mean?

I will illustrate it by comparing two persons, both of whom are accused of theft. In the first case, the accused is convicted for stealing Kshs 1,000/=, whilst in the second case the accused is convicted for stealing Kshs 100,000,000/=. In both cases, the accused persons are first offenders, therefore in accordance with the practice of our courts, they ought not to be given the maximum sentence. The result will be that each of the two accused persons will probably be jailed for two years. And it is in that sentence, that lies the perception of injustice, for the person who stole very little was given the same sentence as the person who stole much more.

In order to obtiate the perception of injustice from the minds of Kenyans, it is my considered view that the legislature ought to enhance the sentence. I would suggest that the maximum sentence for the offence of theft should be enhanced to say 20 years imprisonment. If that was done, the courts would then have been accorded sufficient latitude, for imposing appropriate sentences, so that the said sentences would be more in accord with the magnitude or severity of the offence committed.

However, before concluding this Judgment, I wish to revisit one issue: The absence of evidence from the United Kingdom. In my considered view, the moment the learned trial Magistrate concluded that;

> ***"the prosecution deliberately failed to pursue the United Kingdom investigations, even after the court was asked for time and gave several months. There must have been some embarrassing evidence out there, which was being shielded from the court";***

It was incumbent upon the trial court to draw the inference that such evidence was damaging to the prosecution.

Secondly, the Investigating Officer (PW9) himself said, in his written statement;

> ***"I have not yet accomplished my investigations because I need to establish how the letter of credit was executed between the two correspondent banks in the U.K.. I also would like to know what happened to the undelivered units and the amount."***

That Statement was concluded with the words:

> ***"more investigations to follow."***

To my mind that statement is an honest reflection of the status of the evidence which was adduced at the trial. The Investigating Officer was yet to establish what happened to the undelivered 200 vehicles and the money which was supposed to used to pay for them. In the circumstances, and also for all the reasons already expressed earlier herein, I hold that the conviction of the appellants was unsound.

It cannot be sustained. I therefore quash convictions, set aside the sentences, and order that the appellants be set at liberty unless they are otherwise lawfully held.

Dated this 27th day of April 2005

FRED A. OCHIENG

JUDGE

Delivered in the presence of:

Ms Kamau For State

Owino Opiyo For 1st Appellant

Orengo For 2nd Appellant

Mr. Odero – Court Clerk