



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Appeal 244 of 2001**

**(From original conviction and sentence in Criminal Case No. 2696 of 1998 of the  
Principal Magistrate's Court at NYAHURURU –W. N. NYARIMA)**

**SAMUEL NGTIA WACHIRA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged and convicted of stealing by agent contrary to Section 283 of the Penal Code. The particulars were that between 20th May and 27th July 1998 at Sangwa Motors Dealers office in Laikipia District of the Rift Valley Province, stole Kshs.350,000/- which had been received by him for and on account of Margaret Njoki Githaka. He was sentenced to imprisonment for a period of two and a half years. He was aggrieved by the conviction and sentence and appealed against the same. By the time this appeal was being heard, the appellant had served the full sentence but he wanted to proceed with the appeal so as to set the record straight as he believed he was wrongly convicted. Mr. Gumo, the Assistant Deputy Public Prosecutor did not wish to support the conviction because he was of the view that the complainant's complaint against the appellant was a civil one rather than criminal.

Mr. Gumo also doubted whether the complainant had capacity to represent the deceased person in whose name the motor vehicle in question was registered. However, this court is under an obligation to subject the evidence that was tendered before the trial court to fresh examination and re-evaluation and reach its own conclusion irrespective of whatever views the respondent may hold.

The prosecution case can be summarised as follows:-

The late Joseph Githaka was the owner of a motor vehicle registration number KAA 219T Toyota Hiace by make. He died on 5/8/94. He had three wives, Margaret Njoki Githaka, Pauline Waceke Githaka and Dorcas Wairimu Githaka. Sometimes in April, 1998, the aforesaid widows of the deceased agreed to sell the said motor vehicle and divide the sale proceeds amongst themselves. They took the motor vehicle to Sangwa Motor Dealers, a firm that was owned by the appellant who used to sell motor vehicles on commission. He was to sell the motor vehicle at a price of Kshs.420,000/- and his commission was to be Kshs.7,000/-. The reserve price was agreed at Kshs.350,000/-. An agreement was drawn to that effect (P. Exh.12) and the motor vehicle was handed over to the appellant. In May 1998, PW4 (Margaret Njoki Githaka) and the other widows went to collect the sale proceeds of the motor vehicle as it had already been sold. The appellant told them that a deposit of Kshs.200,000/- had been paid but he did not give them that money. Later on he told them that a further sum of Kshs.90,000/- had been paid and again he did not give them the money. In June 1998 the widows went back to the appellant's office but he asked them

to go back sometimes in July. When they went in July he admitted that he had received the entire sum of Kshs.350,000/- but he asked the ladies to go and collect it on 15/8/98 but on that day he claimed that the bank workers were on strike and so he could not pay. On 28/8/98 the widows went yet again to collect the money but the appellant did not turn up in his place of business. They decided to report the matter to the police. The appellant found them at the police station and he promised to pay them the money on 2/9/98 but again he failed. He was not even in his office when the ladies went there. They made a further attempt on 7/9/98 but they again did not find him. The appellant was then arrested and he promised to pay the money by 24/12/2000 but he did not keep his promise and the police charged him with the said offence.

The purchaser of the motor vehicle, **PW2** testified that on 20/5/98 he paid a deposit of Kshs.90,000/- and on 26/5/98 he paid a further Kshs.200,000/- then paid the balance of Kshs.60,000/- on 27/7/98. All the above payments were made to the appellant. He said that he had not been given the log book and the transfer forms as they had remained with the complainant who obviously could not release them before the money was paid out.

**PW6, Pauline Waceke**, one of the other widows also testified and confirmed that she had the original log book for the motor vehicle. She further confirmed that the three widows had agreed to sell the said motor vehicle and divide the sale proceeds amongst themselves and that it was PW4, Margaret Njoki and some other family members who took the vehicle to the appellant's yard. She said that PW4 signed the contract to sell the motor vehicle on behalf of the other two widows, herself and Dorcas Wairimu. She told the court that the appellant had not given them the money despite several promises to do so and they panicked and sued PW4 in a civil suit but they established that PW4 had not been given any money and they instructed their advocate to withdraw the case.

The appellant gave a sworn statement of defence and admitted having sold the motor vehicle at a price of Kshs.350,000/-. He said that he had not handed over the money because the complainants had involved the police wanting the vehicle back and because they had not handed over the log book. He also said that Pauline Githaka and Dorcas Githaka had sued him and his firm, PW4 and the buyer of the motor vehicle for the return of the same or in the alternative payment of the current value of the motor vehicle and general damages. The appellant further stated that the three widows were the joint administrators of the estate of their late husband and that Margaret Njoki, (PW4) had no legal capacity to sell the vehicle. He stated that he had not refused to pay the money and he had no intentions of stealing from the complainants. In a well reasoned judgment, the trial magistrate found that the appellant had fraudulently received the sum of Kshs.350,000/- and failed to remit the same to Margaret Njoki and that amounted to theft as defined in Section 267(1) of the Penal Code. The trial magistrate stated as follows:-

***“I entertain no reasonable doubt on the guilt of the accused person and accordingly enter a conviction against him...”***

After conviction, in his mitigation, he said that he did not intend to defraud the complainant and said he was willing to refund the money. He asked for a few days to enable him repay the money and the trial court deferred sentencing him for a period of ten days to give him time to pay the money. However, upon expiry of the said period of ten days he was still unable to repay the money.

I find that the appellant actually committed the offence as charged with. His conviction by the trial court was proper and unquestionable. If he had any intention of repaying the sum of Kshs.350,000/- he should have done so after he was convicted when he asked for a grace period of ten days. His defence that PW4 had no capacity to sell the motor vehicle is simply ludicrous and untenable because she had consent of the coadministrators of her husband's estate. PW4 was the special owner of the motor vehicle in question as defined under Section 268(1) of the Penal Code. She would have received the money and shared it out with the other two widows. It cannot be said that the civil suits that were filed could have prevented the appellant from paying out the money. He never tendered the same to the complainants or offered to deposit the same in court in exchange for the log book and transfer forms. The appellant was an unmitigated liar who kept on giving the poor widows several empty promises and the police were perfectly entitled to charge him with the offence of stealing by agent because that is exactly what he had done.

The appeal has absolutely no merit and I dismiss the same.

DATED, SIGNED & DELIVERED at Nakuru this 12th day of July, 2005.

**D. MUSINGA**

**JUDGE**

**12/7/2005**