



REPUBLIC OF KENYA



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**Mabu v Republic (Criminal Appeal E018 of 2021)  
[2023] KEHC 20332 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20332 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E018 OF 2021  
SM MOHOCHI, J  
JULY 17, 2023**

**BETWEEN**

**ROBERT NYAMBANE MABU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against Conviction and Sentence by Hon. A. Towett Principal Magistrate delivered on 9th June 2021 and sentence delivered on 6th July 2021. in ELDAMA-RAVINE CM's Court Criminal Case No.2119 of 2012)*

**JUDGMENT**

**Introduction**

1. The Appellant, was charged at Eldama-Ravine Magistrates' Court on October 16, 2019 with stealing a motor vehicle contrary to Section 278A of the *Penal Code*.
2. The particulars of the offence were that, on the October 11, 2019 at Tabare Village, in Koibatek Sub-location within Baringo County, the Appellant stole a tractor make Mersey Ferguson registration number KSU 361 valued at Kshs 800,000/= the property of Justin Kimutai Bartenge.
3. He was also charged with an alternative count of handling stolen properties contrary to section 322(1) (2) of the *Penal Code*.
4. The Appellant pleaded not guilty to both counts and after, the Trial Court found the Appellant guilty and convicted him on the 9th June 2021 and a sentenced on July 6, 2021.



5. Aggrieved of the conviction and sentence of 3 years' imprisonment for the offence of Stealing Motor Vehicle contrary to section 278(A) of the Penal Code, the Appellant appeals on the following five (5) grounds;
- i. That the learned trial magistrate erred in law and fact, in accepting and relying on evidence from the prosecution which ought not to have been received and/or admitted on record.
  - ii. That the learned magistrate erred in law and fact by, failing to appreciate that the testimony of the Appellant and his witnesses which was cogent truthful and justified.
  - iii. That the learned magistrate erred in law and fact, by expressing personal opinions rather than being guided by the facts and evidence tendered.
  - iv. That the learned magistrate erred in law and fact, by failing to determine the issues involved and evaluating the evidence on merits.
  - v. That learned trial magistrate demonstrated serious bias against the Appellant.

### **Analysis and Determination**

6. It is now the duty of this Court, as the Appellate Court of first instance to reconsider and evaluate the evidence afresh with a view to making its own decision in the matter. This duty of the first Appellate Court has been stressed by the Higher Courts in such cases as Okeno -vs- Republic [1972] EA 32.
7. This Court has set out the entire evidence that was placed before the Trial Court, reconsidered and evaluated that evidence afresh together with the five (5) grounds of appeal raised by the Appellant against the judgment of the Trial Court.

### **Prosecution's Case**

8. PW1 Justine Bartenge testified that, on October 10, 2019 he received a call from one Wesley, who told him that he was interested in purchasing his tractor Massey Ferguson 390 registration number KZU 361. He told him they would meet later and discuss. The next day on October 11, 2019, the former visited PW1's home while accompanied by two others.
8. He instructed his driver to show Wesley the tractor. The said Wesley then told PW1, that he had instructed his mechanic who was due to arrive in a short while. Wesley and the other two including the mechanic inspected the tractor to their satisfaction and then reverted back to PW1 for purpose of negotiating the price, which they discussed and seemingly agreed on.
9. When he woke up on 12<sup>th</sup> October, 2019, during morning hours, he realized that his tractor was missing then inquired from his workers where it had gone. They replied that the people who came previous day to purchase it informed them that were in agreement with PW1 and that they had paid for it. However, this happened not to be the case. PW1 went straight away to the police and reported the same.
10. Upon due investigations the Appellant was arrested with the tractor and was duly identified as one among those who previously went to PW1's house to purchase the tractor. PW1 identified the tractor and identified the sale agreement between himself and Charles Chepkwony in proof of his ownership of it.



### **In Cross examination**

11. The witness stated that he recorded his statement and that he never knew Wesley prior to the offence, that he got home on the 10<sup>th</sup> October 2019, that he bought the tractor from his brother in law, that it was Wesley who wanted to purchase the tractor, that he only discovered the tractor missing on the October 12, 2019 and that his caretaker informed him the Appellant left with the tractor, that he never bothered to look at the sale agreement that showed the sellers name as Kibet Lagat and purchaser as the Appellant, the consideration of Kshs 580,000/-.
12. That he never knew the seller and that the Deputy OCS Matunda Police Station told the Appellant that he had been conned, that he never involved the Appellant on the October 11, 2019.

### **In Re-Examination**

13. Reaffirmed that he saw the Appellant at his home on October 11, 2019 at 7:00 am, that the sellers name was not indicated in the purported sale agreement and only had the purchaser as the Appellant, that he saw a cash deposit slip from equity bank, that he was not in Eldoret.
14. PW2 John Kiplagat Koima testified that on 11<sup>th</sup> October, 2019 as a Boda Boda motorcycle operator, was linked to the Appellant by his colleague for purpose of transporting the Appellant to PW1's home to collect a tractor he had bought from PW1 and when they arrived there, they met PW1's workers and convinced them that they had paid for it and were at liberty to take away the same.
15. The workers were convinced hence allowed the Appellant to take away the tractor in absence and confirmation of PW1. That the reason why he was called as a witness was to confirm that he ferried the Appellant on his Boda Boda motorcycle to PW1's home and actually witnessed the Appellant take away the tractor. He also heard what the Appellant told the workers concerning the tractor.

### **In Cross-Examination**

16. The Appellant stated that he was shown the photo of the tractor by the Appellant and that PW1's driver is PW3.
17. PW3 Nickson Kiplagat Chepsergon testified that as PW1's Driver he received a call from PW1 on October 11, 2019 at 7:00 am with instructions to come over and show the tractor to the Appellant, who was desirous to purchase it. He ignited it for them so that they could observe its condition. At that point in time he obtained a mobile phone number of one Arap Korir who was in company of the Appellant.
18. The said Arap Korir told him they could call him back to inform him when they could come back to collect the tractor. He was not privy to the conversation between PW1 and the Appellant. As he was heading home from Kabiyet he saw Appellant driving off the tractor. It was led in front by a Boda Boda motor cycle. Appellant stopped and informed him that he had completed the sale transaction with PW1. He was later called by PW1 and asked about the tractor and he replied that the Appellant had taken it away. He later recorded his statements over the same.

### **In Cross Examination**

19. The witness stated that, he lives 100m from PW1 and the Tractor was always parked at the front of the gate, that he saw the Appellant for the very first time on the date of the offence that the Appellant met PW1 in the House alone and that the other 3 including Arap Korir remained outside.



20. That he was told by PW4, that the Appellant had come to pick the tractor and he deduced that the sale transaction had been concluded.

#### **In Re-examination**

21. The witness clarified that PW4 called him with the information that the Appellant had come to pick the Tractor.
22. PW4 Daniel Kipkoech, the witness was a herdsman working for the PW1 who testified witnessing on the 11<sup>th</sup> October 2019 at 7.00am a group of four person came and the tractor driver PW3 told him that PW1 was selling and that the visitors were interested in the purchase and they went into a conversation with PW1 before leaving.
23. That on the same day at 7.00pm the Appellant came back indicating he had sealed the deal with PW1 and was back to collect the tractor, he called PW3 who confirmed the tractor had been sold allowed the Appellant to leave and he closed the gate.
24. That PW1 was in the house when the tractor was driven away and he did not see it being driven away and, on the 12th October 2019, PW1 inquired where the tractor was and he responded that it had been taken away the previous evening and PW1 told the witness that no deal on the sale of the tractor had concluded.

#### **In Cross-Examination**

25. The witness stated seeing the Appellant driving away, opening the gate, not being sure if PW1 could hear the tractor leaving, reaffirming recording his statement that the four visitors to his employee PW1 with an intention to purchase the tractor and that in statement he recorded that two visitors entered the compound. that he saw the Appellant for the 1<sup>st</sup> time on this occasion, asserting the presence of PW1 in the house when the tractor was driven away and that he could clearly identify the Appellant who was led away by a Boda Boda motor cycle, as the tractor never had head lights.

#### **In Re-Examination**

26. The witness clarified that it was four visitors who came to PW's home on the material day and only one of them came back for the tractor, that his statement was written for him and that he assisted in pushing and jumpstarting the tractor while being driven away and that he ceased from working for the PW1 three months earlier.
27. PW5 PC Jackson Letipile: The witness was the investigating officer and was at the station on the October 12, 2019 when PW1 reported that his tractor registration number KZU 361 red in color had been stolen, he visited the scene at Tabare Village within Kabiyet met PW3 and PW4, interviewed them and established that on October 11, 2019, at about 7.00 a.m., PW4 was at the dairy when 2 persons visited them. After a while 2 other persons joined them with an intention of purchase of the tractor.
28. That the purported mechanic was the Appellant before Court. After the tractor was started Appellant tested the tractor condition.
29. The role of the mechanic was to ascertain whether the tractor was in a good working condition; arrived at Complainant's homestead. When the Appellant left with tractor, he told everyone that he had purchased the tractor.
30. The witness established the identity of the boda boda rider PW2 within Eldama Ravine who informed him that he escorted the Appellant whilst driving away. The Appellant had the intention of driving



the tractor overnight to Western Region but he could not owing to the fact that the tractor did not have headlights. The Appellant decided to spend in a guest house withdrew Ksh.200/= in town to pay the boda boda rider.

31. The Appellant's phone number was listed in the mpesa transaction for withdrawal and number is registered in the Appellant names, he retrieved the Appellant's phone number from the Mpesa shop and traced the Appellant by tracking device and found out that he was on his way to Eldoret. He moved to Eldoret near the highway. However, later the phone number was switched off. We moved with speed and alighted at Ainapkoi junction towards Kapsabet. We interrogated members of the public who told us that they had seen the tractor being driven at very high speed.
32. They proceeded up to Eldoret town. After a while the Appellant's phone number was switched on. We tracked it to Khayoya area. The following day October 13, 2019 we established the location to be at Kongoni, Lukuyani, Kakamega County, they pursued the tractor to Kongoni, he sought the assistance of administration (chief) to be shown the Appellant's home, we arrived at the homestead. They later found the tractor in a farm carrying some Maize. The Appellant was the one driving the tractor. There was a trailer connected to the tractor they stopped the Appellant. The owner of the maize plantation disconnected his trailer. The tractor had its rear number plate. The one in front was missing. They took the Appellant to Matunda Police Station where he was booked. His father came and alleged that the Appellant had purchased the tractor. They spent the night at Matunda and later transferred the Appellant and the tractor to Eldama Ravine.
33. On investigation neither the Appellant nor his father could supply him with the Sale Agreement and banking slip to indeed confirm they had bought the tractor and paid for the same.
34. The witness produced Exhibits 1,2,2(b) and 3 which comprised of an Agreement made on 4 April, 2015 between Charles Chepkwony and PW1 and agreed price of Ksh.800,000/=, a police abstract form for the loss of the log book, verification of chassis number and the Tractor registration number KZU 361 recovered he was satisfied that the tractor belonged to PW1. He could not trace or establish the identity of the other 3 suspects.

### **In Cross-Examination**

35. In his investigation he unsuccessfully attempted to obtain from the Appellant any proof of payment for the tractor
36. That it was Elvis who informed PW1 that some people were interested in purchasing his tractor. That he did not arrest Arap Korir and Leonard Kipkurui who according to his investigations are non-existent.
37. He arrested the Appellant for stealing the tractor. I arrested the Appellant on the October 13, 2019 and arraigned the Appellant on October 16, 2019. Leonard had earlier called PW1, the Appellant parked the tractor on 12 October, 2019 when he was sleeping.
38. He was not aware that someone else has been arraigned for stealing the said tractor.

### **Re-examination:**

39. That the Appellant was arrested on October 13, 2019, it was on a Sunday it was around 8.00 p.m. at night. He was arraigned in Court on October 16, 2019. The Appellant stole the tractor from PW1's homestead. We found the Appellant driving the tractor in Likuyani. He did not produce any agreement and bank slips to show that he purchased the tractor.



40. The Trial Court, convicted and sentenced the Appellant to three year's imprisonment sentences without an option of fine.
41. The Appellant having been dissatisfied with both the conviction and sentence, on the July 15, 2021 filed his appeal to this Honorable Court.

### **Appellant's Case**

42. The Appellant commenced his submissions urging the Court to undertake an exhaustive evaluation of the evidence placed before the Trial Court, the reasoning of the Trial Court and the case law as the first Appellate Court.
43. The Appellant submission on the grounds of Appeal was for clarity and precision clustered and presented in the order herein below: -
  - a) Ground 3
  - b) Grounds 1, 2, 5 and 7
  - c) Grounds 4, 6 and 9
  - (a) (Ground 3] Standard of proof in criminal law
44. That the prosecution at the Trial Court, failed to prove their case against the Appellant to the required standard, that is beyond reasonable doubt as is required, to warrant a conviction. That whereas Section 278A of the Penal Code as contained in the charge sheet provides for the penal sanction for the offence of stealing a motor vehicle, the section that defines the offence of Stealing generally was omitted in the framing the charge sheet is 268 (1) of the Penal Code. This section defines the offense of stealing as follows: -
  - 1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or Special owner thereof, any property, is said to steal that thing or property.
45. From the above definition the following are the ingredients for the offence which the prosecution was required to established before the Trial Court to sustain a conviction: -
  - a. The taking away anything capable of being stolen from the general or special owner.
  - b. That taking away from the owner anything capable must be fraudulently and without claim of right.
46. The prosecution case was that on October 10, 2019 the Complainant, Justin Bartenge a farmer and an employee USA Embassy, received a call from a Mr. Wesley who informed him that he wanted to purchase his motor tractor, Massey Fergusson 390 registration KZU361. The two agreed to meet.
47. It is the prosecution case that on the following day that is, on the October 11, 2019 the said Wesley and three other persons went to the home of the Complainant and then held a discussion and then inspected the tractor after which, Wesley and his team left the home of the Complainant.
48. That later on the same day, at the evening, that the Appellant went back to the home of the Complainant and met PW4 Kipkoech, an employee to the Complainant. That the Appellant informed the witness that he had purchased the motor tractor. PW4, then contacted PW3 Nickson Kiplagat



who confirmed to him that the motor tractor had been sold. On that information then this witness allowed the Appellant to drive off the motor tractor the subject matter of this appeal.

49. It is further the prosecution case that, the Complainant came to discover that his motor tractor was missing the following day. On inquiring from his employees, he was informed that the buyers had collected it.
50. The Complainant then reported the incident at Eldama-Ravine Police Station and then investigations commenced which led to the arrest of the Appellant and his motor tractor was recovered. After the investigations, the Appellant was charged.
51. On the other hand, the Appellant placed before the Trial Court, evidence that his family paid KES 580,000/= towards the purchasing of the said motor tractor. That payment raised a claim for the subject matter in this case and thus the above ingredients were not proved before the Trial Court to warrant a conviction.
52. That, the Trial Court got a wrong footing in his case from the definition of stealing. The Court relied on a definition from *Black Law Dictionary* 8<sup>th</sup> Edition for the offence instead of the definition from the *Penal Code* which has an appropriate definition for the offence. The Trial Court therefore missed to appreciate the ingredients for the offence as defined in the *Penal Code*. Of course, that misdirection by the Trial Court arose from the defect on the charge sheet which did not contain the section defining the offence.
53. Secondly, from the evidence that was placed before the Trial Court, it is not in dispute that Appellant in this matter, met the Complainant through an arrangement by one Mr. Wesley. It is also not in dispute that the meeting that was held, was in respect to the purchase of motor tractor the subject matter of this case, However, the Complainant was economical in his evidence-in-chief, on the details of that discussion. This is what the Complainant in his evidence-in-chief told the Trial Court at page 11 from line 7 of the Record of Appeal;

“.....my driver proceeded to show Wesley, his mechanic and two other persons. I went into the house. After one hour, Wesley came to my house, He negotiated I gave him the sale price. Wesley and his people left.....”
54. The prosecution case before the Trial Court raises these very serious doubts amongst others that would have warranted the Trial Court to acquit the Appellant: -
  - i. Since the said Mr. Wesley had presented himself to the Complainant PW1 as buyer of the motor tractor, where the Appellant was in his company allegedly stole, why was Wesley and the others with him not jointly charged with the Appellant and or called as prosecution witnesses? Mr. Wesley was the prime mover of the offence if any.
  - ii. In case, the rest of the persons that were with the Appellant could not be traced to be charged; then the charge sheet should at least have been framed in such a manner to read the name of the Appellant and others not before Court;
  - iii. What was the price that the Complainant gives to Wesley and his team?
  - iv. What did they agree or fail to agree on?
  - v. How Mr. Wesley came to know that the Complainant was selling his motor tractor to advertise it at the OLX online selling platform?



55. From the evidence of PW4 Kipkoech, on cross examination, stated that the Complainant was present when the Appellant went back to pick the tractor, then one wonders why the witness never informed the Complainant that someone had gone back to collect the tractor before opening the gate for the Appellant to drive away the tractor. However, this witness informed the Court that before he allowed the Appellant to drive away the tractor, he called PW3 on phone who confirmed to him that the tractor had been sold.
56. PW3 in his evidence in chief, just like the Complainant, he was very economical with his words. For instance, he informed the Trial Court that he gathered that PW1 had completed the sale of motor tractor, but stopped short of revealing the source. He was also not clear on the evidence by his colleague PW4 that he confirmed to him that the tractor had been sold. He however confirmed to the Trial Court that, that evening he met the Appellant drive away the motor tractor. He also confirmed that the Appellant stopped and they talked before he proceeded. Was that a conduct by the Appellant a conduct of a thief?
57. That what is however clear from the above, is that PW1 was selling his motor tractor, the subject matter of this appeal. The Appellant informed the Trial Court that he saw the advert of the sale of the tractor on the OLX online selling platform.
58. That, the Appellant in his defence before the Trial Court on oath, although he was not under any duty to prove his innocence, informed the Court that the family paid a total of KES: 580,000/= for the purchase of the motor tractor.
59. He further informed the Trial Court that the discussion at the home of the Complainant PW1 were done in a language that he (Appellant) was unable to follow, then this state of affairs raises serious questions whether the Complainant and the team that was with Wesley had a scheme to defraud unsuspecting buyer his money.
60. The Appellant informed the Trial Court that he learned of this motor tractor through an online selling company known as OLX and that the contact person was a Mr. Wesley. From the evidence of PW1 before the Trial Court at page 11 from paragraph 1 Wesley was a person familiar or known to the Complainant, that is PW1.

**Case law on burden and standard of proof in criminal cases:**

61. Hon EC Mwita, J in Criminal Appeal No 42 of 2019 (2022) KLR appreciated the law on the burden of proof and standard of proof in criminal from the following earlier decided case law as follows; -

In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find conviction in a Criminal Case, the Trial Court has to be satisfied of the Appellant person's guilt is beyond reasonable doubt. On proof beyond reasonable doubt, the Court stated in Stephen Nquli Mulili v Republic [2014] eKLR held:

"It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V Woolmington, (1935) UKHL 1 where the Court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa Vs R, [2013] eKLR."



61. In the famous case of *v Minister-of-Pensions Miller v Ministry of Pensions*, [1947] 2 All E R 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

62. And in *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person Appellant is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (emphasis)

63. The Appellant urges the Court to find that, the Trial Court erred in law and fact, in reaching a finding that, the prosecution had discharged its burden proof to the required standard in criminal law which is beyond reasonable doubt and quash the conviction and acquit the Appellant.

#### **Grounds under [b] above**

64. That first and foremost under this group of grounds of appeal, it is the Appellant’s submission that the case was poorly investigated. That the Appellant confirmed to the Investigating Officer that the family paid a big sum of money over half a million for the purchase of the said motor tractor but that was not investigated.

65. The Appellant supplied to both the Investigating officer and the Court a sale agreement and a banking in-slip of KES: 580,000 and that did not matter to both the Investigating officer and the Court.

66. Secondly that, PW 1 informed the Court that the Appellant was not alone when he visited him over the negotiations for purchase of the motor tractor, yet the charge sheet or evidence does not cover that. It will appear that both the Investigating Officer and the Court dismissed the Appellant’s defence even though it was not his duty to prove his innocence. This is what the Trial Court observed in her judgment on the defence evidence; -

“.....the Appellant has informed the Court on oath that his father(Francis Moreka) had purchased the motor tractor KZU361 from a person named Langat Kibet that indeed had transferred Kshs 580,000/= to the account of the said Kibet. The defence is clearly an afterthought on the part of the Appellant.....”

the Trial Court in its judgment stated as follows;



".....it is not in dispute that though the Appellant person had earlier in the day on 11th October 2019 met PW1 in his house, he later in the cover of darkness went back to PW1 compound and without informing him drove off motor tractor....."

67. That the above observation by the Trial Court is nowhere in the evidence. It is abundantly clear from the prosecution case that the Appellant went back PW1's home in the evening and not night or under cover of darkness. When he arrived at the home of PW 1 he met PW 4, This witness allowed the Appellant to drive off the motor tractor after confirming from PW3 that the Complainant had sold the motor tractor.
68. The Appellant urges the Court to be persuaded by of Cr. Appeal No 56 of 2015 [2022] Dulu J held; -
- “.....the success of this appeal has largely come about due to poor investigations and poor prosecution of the case. However, as the burden in a criminal case is on the prosecution to prove their case against an Appellant person beyond any reasonable doubt, I have a legal duty to find the Appellant innocent if the prosecution fails to discharge it burden.....”

#### **Grounds under [c] above**

69. It is the Appellant's submission that the Trial Court exhibited very serious bias against the Appellant.
70. The Appellant, placed before the Trial Court, a defence that they had purchased the motor tractor the subject matter of this case. The Appellant actually visited the Complainant for viewing the motor tractor. When the Trial Court wrote her judgment, she contended that that piece of evidence by the defence was an afterthought. On the other hand, even the Complainant admitted having had some negotiation with a Mr. Wesley and his team over the sale. So that defence and the prosecution agrees that indeed the Appellant and others went to the Complainant's home a business discussion.
71. That another indicator for bias on part of the Trial Court is that, after the Trial Court finding the Appellant guilty, it canceled his bond and threw him into prison without a sentence, and started her annual leave. It took the efforts of the defence counsel to have the Trial Court recalled from her long leave, and back to the station to sentence the Appellant.
72. When the Trial Court was recalled from leave to deal with the case, the Court prosecutor rightfully informed the Court that the Appellant was a first offender and then defence addressed the Court on mitigation which stated as follows;
- “.....the Appellant is a third-year student pursuing a bachelor's of Education degree. He is the only child in his family who has attained secondary education. He is a first offender. I pray for a non-custodial sentence. I pray that this Court be lenient on him and grant him a non-custodial sentence.....”
73. What followed from the Trial Court was a clear demonstration of bias against him. The Court handed the Appellant, a first offender, then in college, a custodial sentence for 3 years which was devastating to a very young man who was trying to build his life in college. The sentence was against the judiciary sentencing policy which all judicial officers have been sensitized on.
74. The Appellant urges this Court to find that, the Trial Court exhibited bias against the Appellant as has been laid bare in his submission to the Court.



75. The Appellant invites the Court to the following case law which state the test in establishing bias as appreciated in *Nixon Ngikor Nicholas v IEBC & 2 Others* [2018]; -

The test of reasonable apprehension of bias, was found to be good law in the persuasive authority of the East African Court of Justice in Attorney General of the Republic of Kenya Vs Prof Anyang Nyong'o and others (52007) [2007] EACJ 1 (6 February 2007) where it was stated that:

"... the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair-minded and informed member of the public... "See also *Financial Services Ltd and 2 others v Manchester Outfitters Civil Application No Nai. 224 of 2006.*"

76. In *Judicial Service Commission v Gladys Boss Shollei & another* (2014) eKLR (Civil Appeal 50 of 2014) this Court held that an impression or perception of bias has to be evaluated with reference to a reasonable person who is fair-minded and informed about all the circumstances of the case.
77. The Appellant prays that the Appeal be allowed and set aside both the conviction and sentence of the Trial Court and acquit him.

### **Respondent's Case**

78. The Respondent filed written submissions that, the Appellant pleaded not guilty to the charge; hence the case was scheduled for hearing. The prosecution called a total of five (5) witnesses in support of its case in an endeavor to prove beyond any reasonable doubt, that the Appellant committed the offence he was charged with. At the close of the prosecution case, the Court made a ruling that the prosecution had established a prima facie case against the Appellant; hence he was put on his defence. He opted to give sworn evidence and indicated that he would call a total of three witnesses.
79. The learned trial magistrate in his judgment found the Appellant guilty as charged and sentenced him to serve three years' imprisonment. The Appellant pleaded for a non-custodial sentence, which was however declined by the Court.
80. That in order to ascertain whether the prosecution proved its case against the Appellant beyond any reasonable doubt, and whether he was properly convicted? it will be incumbent upon the Court to of necessity delve into the provisions of section 278A with a view to determine whether the Appellant's conduct squarely fall within the requirement of those provisions.
81. That section clearly states that if the thing stolen is a motor vehicle, within the meaning of the *Traffic Act*, the offender is liable to imprisonment for seven years. Section 267 (1) generally deals with things capable of being stolen, and the meaning of stealing is outlined. From the definition it is clear and there is no doubt, that a motor vehicle falls in the category of things capable of being stolen.
82. That the most critical issue for determination, is whether the Appellant's conduct in general amounted to an offence of stealing in terms of the provisions of Section 278A of the *Penal Code*, on which conviction of the Appellant was based?
83. Secondly, whether the prosecution proved its case against the Appellant beyond reasonable doubt to warrant his conviction. The Respondent's answer to that question is that the Appellant's conduct generally amounted to stealing and case against him was proved beyond reasonable doubt because his



- conduct in cheating workers of PW1 and him were completed to the point of payment, was an act of the bad faith with clear intent of stealing.
84. Thirdly, the case against the Appellant was proved beyond reasonable doubt, because as is apparent from prosecution evidence, same was straight forward uncontradictory and well corroborated. Nothing was raised in cross examination of the prosecution witnesses by the defence, capable of rebutting evidence against him. In brief, evidence against him was overwhelming.
85. Lastly, Appellants conduct, fall well within the definition of the provisions stealing contrary to Section 278 A of the [Penal Code](#).
86. The Respondent relied Upon the case of Josephat Kimutai Versus Republic Criminal Appeal No25 of 2019 High Court of Kenya At Kabarnet which held that: -
- a. “The Appellant 's appeal on conviction was dismissed. The Court however pursuant to and in compliance of orders in Kiarie vs Republic (1975) EA 324 put the matter right by amending the record and entering convictions for theft of motorcycle contrary to section 278 A of the [Penal Code](#) in count and stealing Contrary to section 268 of the [Penal Code](#) in count II.
  - b. The omnibus sentence of imprisonment for five (5) years on the Appellant by- the Trial Court was set aside.
  - c. The Appellant was sentenced to serve for four (4) years imprisonment for the offence of stealing a motorcycle contrary to section 278A of the [Penal Code](#) charged in count I and imprisonment for a term of two (2) years for stealing contrary to section 275 as read with section 268 of the [Penal Code](#) charged in count II. The sentences were to be served concurrently and were to commence on 28/8/2018 as ordered by the Trial Court.
87. The Respondent submit that the facts and circumstances of this authority are to a large extent similar and applicable to the present appeal, the basis upon which conviction and sentence was founded on is more elaborate, clear and definite, unlike in the authority just cited where the Appellant was handed over an omnibus sentence.
88. The Respondent urge the Court to make a finding that, given the corroborative nature of evidence by the prosecution witnesses and the fact there were no material contradictions, the Prosecutions proved its case beyond reasonable doubt. In addition the defence adduced by the Appellant did not displace Prosecution evidence. Consequently, the Respondent prays that the appeal be dismissed entirely and conviction and sentence of the trial Magistrate’s Court be upheld.
89. I have considered this Appeal, the arguments for and arguments against, reviewed the evidence in the record of appeal, and find that the conviction and sentence, was not safe and sound for the following reasons: -
- a. Section 268 of the [Penal Code](#) provides the definition for “stealing” that;
    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 0a 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;
- b. It was unsafe for the trial magistrate to rely on the black's law dictionary definition and that the omission of section 268 as part of the charge was prejudicing of the Appellant. That to prove theft of motor vehicle it was imperative for the prosecution to prove stealing with all its peculiar ingredients including criminal intent. Section 278A has to be read together with Section 268 of the *Penal Code*.
- c. The Court finds no criminal intent was proven in evidence.
- d. That the Complainant was selling his motor tractor, the subject matter of this appeal. The Appellant in his defence claimed to have been a purchaser of the same tractor, under which circumstance the Court ought to have keenly considered. The Complainant had in cross-examination admitted hearing the Deputy OCS Matunda Police Station tell the Appellant that he had been conned.
- e. This Court is of the opinion that the Appellant was consistent from the point of arrest that he had overseen the purchase of the tractor on behalf of his father DW2.
- f. The Appellant informed the Trial Court that he saw the advertisement of the sale of the tractor on the OLX online selling platform and the contact number was of one Wesley.
- g. The Appellant in his defence before the Trial Court on oath, informed the Court that the family paid a total of KES: 580,000/= for the purchase of the motor tractor.
- h. From the evidence of PW1 Complainant before the Trial Court at page 11 from paragraph 1 Wesley was a person familiar or known to the Complainant, that is PW1.

90. The Prosecution was expected to prove their case beyond reasonable doubt, this case raises significant doubts that make it unsafe to convict, the Trial Court was in error in convicting the Appellant in total disregard of his defence evidence and failing to afford the same due consideration.

91. This Court shall allow the appeal, quash the conviction of the Appellant of the offence of theft of motor vehicle contrary to section 278A of the *Penal Code* and set aside the sentence imposed on him of Three (3) years imprisonment.

92. The appellant shall be forthwith set free from prison custody unless he is otherwise lawfully held.

93 It is so ordered.

**SIGNED, DATED & DELIVERED VIRTUALLY AT NAKURU ON THIS 17<sup>TH</sup> JULY 2023**



**MOHOCHI S.M**

**JUDGE**

**In the Presence of;**

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

