



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 112 OF 2019

FELIX OTIENO.....APPELANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. M. O. Rabera,

Senior Resident Magistrate on 6th June 2019 in Criminal Case No. 1172 of 2018,

Republic v Felix Otieno).

JUDGMENT

Background

1. Felix Otieno was charged with the offence of stealing goods in transit contrary to Section 279(c) of the Penal Code. The particulars are that Felix Otieno on the 20th day of March 2017 along Mombasa Nairobi highway within the republic of Kenya jointly with others not before court stole 650 packages of ladies synthetic hair valued at Kshs. 2 million from motor vehicle registration number KBV 959/ZD 4289 container number BSIU9082054, the property of Beyond Africa Freight Ltd Nairobi while the said property was in transit from Mombasa to Nairobi.
2. In Count Two, Felix Otieno was charged with the offence of stealing goods in transit contrary to Section 279(c) of the Penal Code. The particulars are that Felix Otieno on the 9th day of November 2017 along Mombasa Nairobi highway within the republic of Kenya jointly with others not before court stole 1040 pieces of pedestal toilets valued at Kshs. 4 million from a motor vehicle registration number KBV 570F/ZD 0904 container number PCIU8652849, the property of Mwando Logistics Agent Company while the said property was in transit from Mombasa to Nairobi.
3. In count Three, Felix Otieno was charged with the offence of conspiracy to commit a felony. The particulars are that Felix Otieno on the 9th day of November 2017 along Mombasa Nairobi highway within the republic of Kenya jointly with others not before court conspired to commit a felony, namely theft of goods in transit from a motor vehicle registration number KBV 570F/ZD 0904 container number PCIU8652849, the property of Mwando Logistics Agent Company while the said property was in transit from Nairobi to Mombasa.
4. In Count Four, Felix Otieno was charged with the offence of making a document without authority contrary to Section 357(a) of the Penal Code. The particulars are that Felix Otieno at unknown time and place within the Republic of Kenya, with intent to deceive, and without lawful authority made a motor vehicle registration certificate serial number R 0192790Y for motor vehicle Reg. No. KBV 570F Prime Mover purporting it to be issued by Kenya Revenue Authority.
5. In Count Five, Felix Otieno was charged with the offence of making a document without authority contrary to Section 357(a) of the Penal Code. The particulars are that Felix Otieno at unknown time and place within the republic of Kenya, with intent to deceive, and without lawful authority made a motor vehicle registration certificate serial number R 0159641M for motor vehicle registration No. ZD 0904 BACHU Trailer purporting it to be issued by Kenya Revenue Authority.
6. In Count Six, Felix Otieno was charged with the offence of making a document without authority contrary to Section 357(a) of the Penal Code. The particulars are that Felix Otieno at unknown time and place within the republic of Kenya, with intent to deceive, and without lawful authority made a PIN (Personal Identification Number) certificate number xxxxxx for Fredrick Musee Njuki purporting it to be issued by Kenya Revenue Authority.

7. In Count Seven, Felix Otieno was charged with the offence of forgery contrary to Section 349 of the Penal Code. The particulars are that Felix Otieno on the 25th day of May 2017 at unknown time and place within the Republic of Kenya, with intent to deceive forged a motor vehicle inspection report VC 818314 for a motor vehicle chassis no VMAH 24ZZ06W070872 type prime mover make MAN purporting to be a Vehicle Inspection issue by Motor Vehicle Inspection Unit Mombasa.

8. In Count Eight, Felix Otieno was charged with the offence of forgery contrary to Section 349 of the Penal Code. The particulars are that Felix Otieno on the 25th day of May 2017 at unknown time and place within the republic of Kenya, with intent to deceive forged a motor vehicle inspection report VC 818314 for a motor vehicle chassis No. PADK124496M256931 Type trailer BACHU purporting to be a Vehicle Inspection Report issued by Motor Vehicle Inspection Unit Mombasa.

9. In Count Nine, Felix Otieno was charged with the offence of making a document without authority contrary to Section 357(a) of the Penal Code. The particulars are that Felix Otieno at unknown time and place within the republic of Kenya without lawful authority made a document to wit Kenya National Identification Card No. xxxxxx in the name of Fredrick Musee Nzuki purporting it to have been made by the registrar of persons in Kenya.

10. The trial magistrate considered the evidence of the fifteen prosecution witnesses and the unsworn statement of the appellant and acquitted the Appellant under Section 215 of the Criminal Procedure Code on Count Number 1, 2, 8, and 9. On the other hand, the accused was convicted as charged on Count Number 3, 4, 5, 6, 7, and 10 where he was sentenced to serve 7 years in prison.

11. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds:-

- 1) That the learned trial magistrate erred in law and fact by arriving at the conviction and sentence without properly finding that the charges on 3, 4, 5, 6, 7, and 10 were not proved beyond reasonable doubt.
- 2) That the learned trial magistrate erred in law and fact by failing to find that the documents which were produced went contrary to section 106B(4) of the Evidence Act and that there was no certificate identifying the electronic records which were produced during the hearing.
- 3) That the learned trial magistrate erred in law and fact as crucial witnesses were never called to testify in the trial.
- 4) That the learned trial magistrate erred in law and fact by failing to find that the prosecution side never moved the court to have those documents produced as exhibits and be part of the record.
- 5) That the learned trial magistrate erred in law and fact by failing to find that the Appellant raised a plausible defence which ought not to have been dismissed.

12. The Appellant prayed that the appeal be allowed, conviction quashed and the sentence set aside.

Prosecution Case

13. PW1, Joseph Mwanzia Muindi, one of the directors of Mwando Logistics Ltd was authorised customs agent in the business of clearing and forwarding and his duties as customs agent is to receive different clients where they get documents of import and start the process through the shipping line, customs (customs duty payment) verification and release goods to the CFS where delivery is done. PW1 said that he had a client at Erdemam Company (K) Ltd who had imported some containers for his building housing projects called Great Gardens in Athi River. Container BCIU 8652849 with wash down toilets and pedestal basins was not delivered. PW1 said that as at 9.11.2017 two containers were at CFS regional logistics and he needed two trucks for loading them which he got from Joseph Simiyu Waboba. The trucks were KBU 570F/ZD 0904 and KCK 806X/ZF 5935 and PW1 instructed Mr. Waboba to send the full details of the trucks to his clerk one Silas Ogutu. When PW1 called his clerk Ogutu, he was told that the truck KBV 570F was not registered at that particular CFS but which was done on the same day after presentation of the registration documents. PW1 then dispatched through his Equitel line a sum of Kshs. 100,000 towards fuel which got the two trucks each Kshs.50,000. Waboba then told PW1 that he had sent the money to two different people. On 10.11.2017, PW1 left Mombasa and instructed Waboba to ensure that the goods got to the owner on Friday 10.11.2017. One of the trucks arrived on Saturday and was offloaded on Sunday. The other one KBV 570F did not and PW1 was informed that the drivers of the said truck were not picking calls. PW1 reported the issue to Athi River Police Station while Simiyu Waboba reported to Changamwe Police Station. PW1 stated that the goods were worth Kshs. 3.5 million and have never been recovered.

14. PW2, Silas Ogutu works with Mwando Logistics working with clearing and forwarding. He works as a clerk and his general duties entail going to the field to verify containers and consignments. He is also in charge of loading and releasing cargo. On 9.11.2017, PW2 said they had 3 containers which their client had imported through the company. They only had one vehicle KBZ 885Q which belonged to the company which loaded the container number GESU 5770035. PW2 said Mr. Simiyu who hires out vehicles sent vehicles for loading the two containers. The truck numbers were Reg. No. KCK 806X and KBV 570F. After getting the details, PW2 went ahead and prepared the gate pass. However, PW2 learnt that motor vehicle registration No. KBV 570V was not registered in the CFS as it was required. The accused took registration documents to Regional for registration of the truck. The station staff agreed to process the gate pass for KBV truck and KCK. PW2 was handed over the gate pass to confirm the details of the trucks which he confirmed and counter signed. The documents provided by Felix include a letter requesting for registration dated 30.8.2015 (MFI-7(a)), the log book for truck KBV 570F (MFI-7(b)), Log book for trailer ZB 0904 (MFI-7(c)), PIN certificate for Fredrick Nzuki (MFI-7(d)), Inspection report for truck KBV 570F (MFI-7(e)), Inspection Report for the trailer (MFI-7(c)), and identity card No. of Fredrick Nzuki. PW2 said that after getting the gate pass, he went to the border controlling officer where Border Controlling Officer KRA authorised the trucks to enter the CFS. PW2 then proceeded to the gate to allow the trucks into the CFS. He then went back to the regional office gate to generate the loading slip. PW2 said that it was his duty to proceed to the field to load the containers but instead the accused went and took the loading of motor vehicle Registration KBV 570F. The accused told PW2 that he was going to use his money so that the said lorry can be loaded faster. After loading, PW2 then prepared a delivery note for which he

counter signed (MFI-6). PW2 then went back to BCO office to knock out the document out of CFS (to remove it out of KRA (MFI-3)). PW2 said that he then proceeded to the gate to allow the trucks to get out of CFS. PW2 and the accused then parted ways. The next day, PW2 tried to call the accused who did not pick or call back. The accused's phone then went off. On Tuesday, Simiyu Waloba called PW2 and told him the truck had not arrived in Nairobi. PW2 was then advised by his boss to go and report the matter to Changamwe Police Station.

15. PW3, Joseph Simiyu Waboba works with Trade Line Express Kenya Ltd that deals with clearing, forwarding and transport and his duties involve documentation, clearing, shipping, and transport. PW3 said that on 9.11.2017 around 4.30pm, Mr. Mwanzia Josephat of Mwando Logistics (managing director) called him and asked/requested for two trucks to load 2 40ft containers to deliver in Athi River Edama Group. Each container was weighing 21 tonnes containing ceramic toilets. PW3 said that he then called Mr. Julius Wesonga (Managing Director Swift Strides Logistic Transporter) and he was told that he had one truck registration No. KCK 806X/Trailer No. ZF 5935 whose driver was Nicholas Kipkorir. PW3 said that after that, he called the accused and told him that he had 1 40ft container to be loaded from Regional Logistics Centre at Miritini headed to Hedaman Group Athi River and the agreed price was Kshs. 80,000. They also agreed on a down payment and a balance after a signed and stamped delivery note by Hedaman together with interchange container (empty container). The accused (Felix) sent PW3 the vehicle details, registration No. KBV 570F and trailer No. ZD 0904. The driver was one Stephen Mwanga Kamari. PW3 then forwarded the details of both trucks to Silas Ogutu (PW2) who was the clerk for Mwando Logistics stationed at Regional Logistics Centre together with details, names and mobile numbers of the driver for each vehicle. After one hour, Silas called PW3 and informed him that M.V. KBV 570F had not been registered at the Regional Logistics Centre. PW3 informed the accused of this position who said that he was with the driver and had all the documents and was going to register. PW3 sent Silas the details of Felix Ogutu (the accused) to liaise and register the truck who obliged and headed to club standard next to New Time Hotel. Then Mr. Mwanzia sent PW3 an Mpesa from Equity Bank which was Kshs. 50,000 being the down payment for each truck. PW3 said that Felix called him at around 7.30 pm and told him that he had already loaded and the truck was headed to Athi River. At around 7.44 pm, PW3 sent the accused an Mpesa account (Safaricom line) being 07126xxxx in the name of Felix Otieno. PW3 said he sent him Kshs. 45,000. On the following day around 9.30 pm, PW3 went to Swift Strife Logistics and paid Kshs.45,000 to one July (accountant) being down payment to track KCK 806X. PW3 said that the driver Stephen Mwangi Kiari was not picking his calls and when he called Nicholas Kipkorir, PW3 was told that the truck was stuck in a traffic jam somewhere in Emali and around the period, it had rained heavily and there was massive traffic jam along Emali area on both ways. At around 3 pm on 10.11.2017, PW3 called Stephen again but he never picked the calls. He resorted to calling the accused who was the custodian of the truck who said it was at Salama headed to Nairobi. PW3 suspected foul play as the truck did not arrive at the destination. He then made a report at Changamwe Police Station and later recorded his statement. PW3 said he knew the accused very well as he had previously done transport with him. He also knew drivers of the two trucks very well.

16. PW4, Stephen Kimari Mwangi stays at Githurai 44 and works at Nyamakima where he sells cereals. PW4 said that on 6.3.2018 when he was in his house at Githurai 44, at around 1 pm, his wife was called by a person who posed as a customer and wanted her to go and sell him clothes. When she went, after about 20 minutes she came back with two CID officers. One of the officers asked whether PW4 was Stephen Kimani Mwangi of which he said yes. The officer then asked PW4 for his identity card number which he gave them. They then asked him to accompany them to CID headquarters where he was interrogated. PW4 told them that he had never driven vehicles, does not have a relative who deals with transport, went to Mombasa 6 years ago when he took his family on holiday, and that he had lost his identity card. He was asked to record a statement. PW4 produced a copy of his national identity card MFI-9.

17. PW5, Francis Ndungu Waweru works as a director with Beyond Africa Freighters Ltd that deals with clearing and forwarding. PW5 was introduced to the accused by Mr. Githinji who told him that the accused deals with transport business and in case he had any business, PW5 should consider him. PW5 said that on 16.3.2017, they received instructions from one of the clients by the name Style Industries where PW5 booked one 40ft container from Wecklines Shipping Company who gave them a shipping order container release which was sent to the accused who was supposed to give out the truck to go and pick the empty container. The accused gave PW5 the truck number and the name of the driver who was to go and pick the container. The truck registration number was KBV 959V ZD 4289. The details were given to PW5 on phone by the accused and PW5 informed the port clerk one Titus Ngei to get in touch with the said driver called Albert Nkonge Lawrence. PW5 said that the driver and the port clerk proceeded to Swami depot in Nairobi where they collected the container on a Friday and proceeded to Style Industries at Industrial Area in Nairobi. On Monday of 20.3.2017, the truck was loaded with 650 packages of synthetic hair to be transported from Nairobi to Mombasa for Export to Sudan. PW5 said that after loading and finalizing all the formalities the truck left his client's premises and PW5 sent Kshs.19, 900 to the initial driver through Mpesa as he was told that there was no fuel. Titus travelled to Mombasa but the accused's phone was not going through. The driver informed PW5 that the truck had developed some mechanical problems in Emali and he was trying to fix it. On 22.3.2017, the driver called and informed PW5 that he was at Bonje, which PW5 communicated with Titus. Titus told PW5 that he had already paid KRA charges and was waiting for the truck on 22.3.2017. PW5 tried to call the drivers again but their phone numbers were not going through. Titus was able to get the driver who said that they meet at Changamwe roundabout on 23.3.2017. When they met, the driver instructed Titus to proceed to KPA and wait for the truck as he was waiting for the port pass for the truck as it had expired and someone was working on it. However, Titus waited in vain as the driver did not go to the port and his phone number was also not going through. Titus went to Bonje to look for the truck but it was not there. PW5 called Githinji who told him that Felix was no longer working with them. PW5 told Titus to go and report the matter to Changamwe Police Station. Later, PW5 was called by Mr. Nyaga a CID from Changamwe Police Station who informed him that they had received the report of lost goods and they had done investigations and found the trailer lying somewhere in Mombasa, was not working and it did not even have wheels but the number plate was intact. PW5 went to Mombasa and recorded his statement on 29.3.2018. In August 2018, PW5 was called from CID headquarters Nairobi and he was told that the suspect had been arrested. He was told to give out the shipping documents which included the commercial invoice for the goods, customer entry, container release, delivery order from Style Industries signed by Albert (driver), and container interchange showing that the container was collected from Swami and signed by Albert.

18. PW6, Titus Munyao Ngei, works as a port clerk at Beyond Africa Freighters and his responsibilities include overseeing loading, liaising with drivers of trucks for goods on transit. PW6 said that on 17.3.2017, his boss by the name Francis Ndungu sent him details of the driver. PW6 was told to call the driver so that they could go for the empty container which they did and the container picked was No. BSIU 9082054 and the name of the driver was Lawrence Ngoge Albert and the truck registration was KBV 959V/ZD 42829. PW6 said that on Monday 20.3.2017, Laches synthetic hair consisting of 650 packages was loaded onto the truck. PW6 ensured that the truck had been removed from the loading zone by another driver and they met Albert at General Motors on Mombasa Road where they agreed to meet in Mombasa the following day. PW6 said he went to ICD and picked KRA witnessing form then went home. When PW6 arrive in Mombasa, he said that he called Albert who told him that the vehicle had a puncture and that he slept at Emali. Thereafter, Albert took PW6 in rounds about the truck, PW6 tried to call the driver who did not pick up and whose phone was eventually switched off. PW6 said he was instructed by his boss to report the matter t Changamwe Police Station where he made the report and returned to Nairobi the following day after reporting. PW6

produced a copy of the identity card he was given at the time of loading- MFI 15. PW6 said that the consignment was destined for Port Sudan and the driver is always the custodian of the consignment during transportation. Further documents that PW6 produced include the export delivery note after loading the container MFI-14, customer's entry MFI-11, a commercial invoice MFI-10, the container release order MFI-12, the container inter change MFI-13, the KRA witness form dated 17.3.2017 which was issued after loading the consignment MFI-19, KRA payment receipt MFI-17, KRA tax invoice for payment of handling charges MFI-16(a & b). PW6 said that the container and the goods have never been recovered to date and the owner of the goods in Port Sudan was Mohamed Osman.

19. PW7, Ndolo Mulandi Nthiani works at Mwando Logistics, a clearing and forwarding company as one of the directors. PW7 said that on 14.11.2017 when he was in Nairobi, there was a vehicle from Mombasa to take a cargo to Nairobi but had not reached. PW7's co-director one Mwanzia Joseph called and gave him the information. The vehicle Reg. No. KBV 570F/ZD 0904 was loaded with 1 by 40ft container. The two went and reported the matter to Arthi River Police Station and the police officers at the station advised them to make a similar report at Changamwe Police Station. Because of pressure from clients and investigations that seemed to be slow, another report was made at CID Headquarters in Nairobi where PW7 was given two officers to assist with investigations where they interrogated the port clerk Silas Ogutu and asked him as well as PW7's co-director Joseph Mwanzia to record their statements. PW7 said that Mr. Mwanzia was directly involved in the operation of transport of the consignment. PW7 had never seen the accused. The port clerk always deals with operations and ensures that the consignment reaches the destination. The broker also should be able to know where the consignment has reached to avoid container charges. The broker is the one who knows the driver. No recoveries were made in terms of the consignment and the container.

20. PW8, No. 235206 Chief Inspector Mariam Kemunto, a full time document examiner based at DCIO headquarters Nairobi. She was testifying on behalf of her colleague one Inspector Cheruiyot who had a case at Milimani Law Courts. PW8 said that on 12.7.2018, she received an exhibit memo under the escort of C.I. Paul Omweri with exhibits that included Exhibit marked B9 (i) – a document from Tumaini Stores which is the document in dispute, Exhibit marked S1 which bears specimen signature and handwriting of Felix Otieno alias Fredrick Msee Nzuki, Exhibit marked S2 – specimen signature and handwriting of Felix Otieno, Exhibit marked S3 – specimen signature and handwriting of Felix Otieno, and Exhibit marked S4 – specimen signature and handwriting of Felix Otieno. PW8 says that it was desired to ascertain whether the signature and handwriting arrowed in red on exhibit marked B9(i) were made by the same hand when compared with specimen signature and handwriting on exhibit marked S1 to S4. PW8 says Inspector Benard Cheruiyot examined and compared the question handwriting and signature on exhibit marked S1 to S4 and in his opinion, the handwriting and signatures were made by the same author. PW8 produced exhibit memo MFI-19 dated 12.7.2018. She also produced the specimen signature marked S1 to S4 – exhibit 20 (a to d), the report dated 13.7.2018 which was produced as exhibit 21, the document marked B9(1) – MFI-7 which was an application to register a motor vehicle KBV 570F.

21. PW9, Teresia Muthoni Wamu works with NTSA at vehicle Inspection Centre, Miritini. PW9 says that on 29.6.2018, two CID officers went to their Miritini office and she was in charge as the boss and had gone on another assignment. The two officers presented vehicle inspection reports which had details indicating whether the vehicle was compliant or not. The documents belonged to a prime mover and its trailer. The officers wanted to verify if the documents were genuine or counterfeit. PW9 said that she found a few things on the documents that were not right. PW9 noted that the vehicle certificate number for the prime mover and for the trailer were the same V.C. No. 818314 which was not right. The prime mover should have different number from the trailer. However, there were two inspection reports bearing the same number. PW9 said that secondly, she noted that the inspection was done in Nairobi Likoni road but bearing Mombasa stamp and the stamp used was a Kenya Police stamp instead of their stamp. Thirdly, PW9 noted the kind of weights where prime mover does not have gross weight load capacity weight. It has tear weight only but in the VIR those weights were indicated. Fourthly, PW9 noted that on the VIR there was governor's certificate and serial No. of the governor's certificates, she also noted that the number on the identification marks was different from the chasis number but there should be the same. Also, the mover did not have the engine number which should be indicated. PW9, said that having looked at those differences, she was able to tell the CIDs officer that those were not the genuine documents. From the way the documents looked, the vehicle in issue did not exist.

22. PW10, Jeremiah Waweru Githinji, has a clearing and forwarding company called Jerryton Investments that deals with clearing, forwarding and transport. Was introduced to the accused through Mr. Ndung'u. PW10 then introduced the accused to the complainant. One Anthony also had a transport deal with the accused but failed to pay the balance and could not pick his calls. After 6 to 7 months, PW5, Mr. Ndung'u called PW10 and asked whether he had spoken with the accused lately as Ndung'u had given the accused a container which he had disappeared with. PW10 advised PW5 to go to the registrar and confirm the owners of the trucks. The trucks were traced at Migadini together with the owner who went and showed them the trailer which had no tyres and had been grounded for some time. The owner stated that the number plates had been stolen when the trailer was grounded and that he had reported to the police.

23. PW11, Fredrick Musee Nzuki, stays in Nairobi and works with the Ministry of Defence (DOD-Headquarters) as well as doing business where has trucks used in carrying the cereals. PW11 said that in June 2016, the truck registration number KBV 570F had been contracted to carry building stones from Thika to Maralal. The truck developed mechanical problems at Njambini. Because it was at night, PW11 went to the scene the following day and found that the engine had knocked. PW11 asked for another truck which went and took the stones to Maralal. Later, PW11 towed the truck to Nairobi for repairs. However, he assessed the cost of repairs and found that it was expensive. He decided to put the prime mover and the trailer inside the garage. PW11 says that after 2 to 3 days, he found 5 missed calls and when he called back, he was told that the trailer with Registration No. ZD 4011 had been stolen. He reported at Embakasi Police Station. He then requested for the report to be circulated. PW11 said in February 2018 he was called by an officer by the name Mr. Musembi who requested to see him over the vehicle. PW11 said that he was interrogated and recorded his statement. He said that he knew where the prime mover was but the trailer had been stolen. PW11 went to where the prime mover was parked and it was confirmed that the vehicle was still there. When they went to the CID headquarters, PW11 was told that his vehicle had been used in stealing goods from the port. He was presented with some documents which were allegedly from him. The documents which were presented were MFI-7(d) which was the vehicle log book KBV 570F which was not a copy of the real log book. The PIN No. used was not his. PW11 said he had bought the vehicles through a bank and the dates on the log book were wrong. He was also presented with registration for the trailer which was used MFI-7(c) which trailer does not belong to him. He was also presented with a copy of identity card which allegedly belonged to the PW11 but which was not his MFI-7(g). The photo on the identity card was not his. The PIN Certificate was also not his MFI-7(f). PW11 gave officers copies of his real documents.

24. PW12, Rosemary Wanjiru, works as a clerk at the regional CFS. Her duties entail registering trucks which came in to collect consignments. In registering trucks, PW12 said that there is a procedure to be followed. One has to bring a covering letter to register the

truck, the log book of the truck and the trailer, a copy of the insurance of the truck and the trailer, inspection certificates, PIN certificate of the person registering the truck or the owner of the truck, and the certificate of registration in case of the company. PW12 said that on 10.11.2017, she received documents to register truck registration No. KBV 570F/ZD 0904. The documents were presented by a clerk from Tumaini Stores. PW12 received the documents and registered the truck. In doing this, PW12 received a few documents which includes the cover letter from Tumaini Stores, Log Book KBV 570F, Log Book ZD 0904, Inspection Report of KBV 570F, Inspection Report of ZD 0904, Certificate of owner of the truck one Fredrick Mzee Nzuki, and a copy of the identity card of Nzuki Mzee. PW12 said that after receiving the documents, she realised that the registration certificates of Tumaini Stores and insurance of the truck and the trailer were missing. Since they were their clients, PW12 proceeded and registered the trucks with the promise that they would bring the documents. Thereafter, a gate pass was issued to the clearing agent and the container was loaded. PW12 produced the document generated from their computer to show that the truck is in the system. It is the CFS program MFI-26 and the gate pass that was issued MFI-8. After the process, the truck was dispatched. PW12 said that during registration, the owner may not be present.

25. PW13, No. 79886 Cpl. Jared Oroko attached at Mombasa County performing general duties. On 25.6.2018 at around 10.00 am, PW13 was at dog section around light Kongowea where he met two police officers C.I. Omweri and P.C. Kisaki both from CID Headquarters Nairobi who went to track a suspect by the name Felix Otieno. The two police officers called PW13 because at one time he had communicated with the accused person where his contact was on the accused person's call data. PW13 said that they called to find out whether he knew the accused person which he answered in the affirmative since PW13 had communicated with him in respect to another case in Nairobi of stealing goods on transit. PW13 said that the officers requested for his assistance in arresting the suspect who was tracked for two days but the officers left for Nairobi and left PW13 with the responsibility of arresting the accuse. PW13 said that on 5.7.2018, PW13 managed to arrest the suspect after he had called and tricked him. PW13 met the accused in Saba Saba but when the accused realised that PW13 was on another mission, he decided to run away. The accused person fell down and became violent forcing PW13 to draw his weapon. However, PW13 managed to arrest the accused and took him to Makupa Police Station. The accused was later transferred to Changamwe Police Station. PW13 identified the accused at the dock.

26. PW14, No. 83583 PC Njihia Kamau attached at DCIO Changamwe performing investigation duties said that on 14.11.2017 Joseph Simiyu who worked with Trade Line Express (K) Ltd reported that on 9.11.17 he was requested for two trucks by the managing director of Mwando logistics. The case was minuted to one PC Joyce who was the initial investigating officer but later went for a promotional course at Embakasi. PW14 took over investigations from PC Joyce and continued investigations until a letter dated 30.12.2017 from CID Headquarter which requested that the investigation file is handed over to officers at DCI headquarters. On 7.2.2018 the file was handed over to DCIO officers being led by chief inspector Paul Omweri who took over the investigations.

27. PW15, No. 231902 Chief Inspector Paul Omweri from CID Headquarters Nairobi, the Investigating Officer. PW15 said that he recalls one Ndolo Mulandi the director of Mwando Logistics, the clearing and forwarding company based in Nairobi and a branch in Mombasa. Mr. Ndolo reported that on 9.11.2017 a consignment was cleared from Mombasa regional Logistics Centre at Miritini carrying 1040 pieces of pedestrian toilets (flash toilets) valued at Kshs. 4 million. The same were loaded in truck registration No. KBV 570F trailer No. ZD 0904, the same trailer that was taken by one broker namely Felix Otieno with the driver Stephen Kimani Mwangi. The vehicle had been requested by his co-director one Josephat Mwanzia through one broker Joseph Simiyu Waboba. PW15 says the truck was released and was supposed to deliver the goods to Athi River near Mavuno Church. The said driver never reached the designated point. On 22.1.2018, Ndolo Mulandi reported to PW15 with the documents that include Certificate of incorporation S.No. CPR/2015/214125 (MFI-1), Bill of lading S. No. PV700084200 (MFI-2), Customs duty stamp (MFI-3), Copy of certificate of continuity from Kenya Bureau of Standards S. No. R0152914 (MFI-4), Release order from regional logistics centre Ltd S. No. 37727 (MF1-5), Delivery Notes to where the goods were to be supplied S. No. 658 (MFI-6). PW15 said that he interrogated Joseph, who told him that they had 3 containers of 1X40 ft of pedestrian toilets, he requested one Joseph Simiyu Waloba to avail two trucks at CFS. Joseph Waloba contacted Felix Otieno, a friend whom he knew very well in that industry. He requested the accused who sent him M. V. registration No. KBV 570F/ZD 0904. PW15 said that another person sent MV registration No. KCK 806X/ZF 5935. The vehicles were sent to Josephat Mwanzia who communicated the same to Silas Ogutu. Joseph Waboba informed Felix Otieno to send the vehicle to Regional Logistics Centre where he met Silas Ogutu and Joseph Simiyu Waboba but the vehicle was not registered. It had to be registered before picking any consignment from the CFS. The accused gave Silas an application to have the motor vehicle registered. There was a driver in the vehicle by the name Stephen Kimani Mwangi who never came out of the motor vehicle at any moment. PW15 said that the clerk took the application letter (MFI-7(a)), the cover letter which was addressed to CFS dated 30.8.2017 and the same was from Tumaini stores requesting for registration of motor vehicle KBV 570F/ZD 0904. The copies attached to the original letter was a copy of log book of the truck KBV 570F, a copy of log book of the trailer ZC 0904 MFI-7(c). All the log books bear the name of the owner of the truck and trailer as Fredrick Musee Nzuki. In the letter was an attachment of M.V. Inspection Report V.C. No. 818314 for M.V. KBV 570F (MFI-7(d)). There was also M.V. Inspection Report of ZD 0904 VC 818314 (MFI-7(e)). The two motor vehicle inspection reports had similar serial numbers which was questionable. MFI-7(f) was a KRA certificate dated 29.3.2017, PIN No. xxxxxx MFI-7(9) was also a photocopy of National Identity Card for Musee Fredrick Nzuki which indicated that the owner comes from Makueni district Identity Card No. 1057568. Since some other documents were missing like registration certificate and the insurance of the Tumaini Company, Silas Ogutu requested the registering clerk to do registration as he promised to present the other documents later. PW15 said the vehicle was allowed after registration to carry the consignment and the delivery note was issued to the driver (Stephen Kimani) and since the driver did not come out of the vehicle, the accused signed the delivery note on behalf of the driver. The vehicle left the CFS with the consignment and was released to go to Athi River. PW15 said that the said consignment did not reach the destination as per the delivery. Joseph Waboba tried to communicate with the driver Stephen Kimani Mwangi and the accused person Felix Otieno on 10.11.2017 but he would not reach them as their phones were switched off. Joseph Waboba communicated this to his co-director of Mwando Logistics that the accused and the driver's phones were switched off. Joseph Waboba tried to call the accused and the driver again on 11.11.2017 but their phones were still off. On 14.11.2017, a report was made under OB No. 27/14/11/2017. The investigating officers had mobile numbers of the accused being 0712xxxx and 0734xxxx and for the driver Stephen Kimani Mwangi being 0738xxxx and through the assistance of cybercrime officers, the mobile for Felix Otieno was traced to Tena Estate in Nairobi. On 23.1.2018, PW15 wrote a letter to NTSA to know the registered owner of the vehicles of the said vehicles MFI-27(a) and the reply showed that KBV 570F was registered on 30.5.2013 in the name of Fredrick Musee Nzuki PIN No. xxxxxx. Trailer ZD 0904 was registered on 30/4/2009 in the name of Ibrahim Mohamed Bashiri of PIN No. xxxxxx. PW15 said that he also wrote another letter to registrar of companies dated 16.2.2018 requesting to know the status of Tumaini stores MFI 28(a) where he received a report from the registrar of companies dated 23.2.2018 MFI 28(b) which indicated that Tumaini Stores does not appear in their data base as a registered business name or company.

28. DW1, Felix Otieno, stated that on 5.7.2018 at around 8.00 am, he was called by police constable Jared Oroko who wanted to see him on the issue of a number which had been used to communicate with him. DW1 went to Makupa Police station where he was asked about pedestrian toilets. PC Oroko took DW1's phones and told DW1 that he was under instructions not to release him. He was then taken to the cells. 30 minutes later two police officers went and took photos of DW1 using their phones.

29. DW1 was then led out of the cells to a van parked outside the police station, who interrogated him about number plates. DW1 told them he was in Mombasa for two weeks and that he was residing in a guest house at VOK Mombasa. The police officers asked DW1 to take them to the guest house where he took them to Leisure Lodge. They inquired from the reception whether he stayed there which was confirmed by the receptionist. The police officers went and searched the room where DW1 was staying but found nothing DW1 was then taken to Changamwe Police Station. PC Nyaga went to the shelves and came out with a file and asked DW1 in Swahili 'Nywele ziko wapi na container?' DW1 told them he does not know about the issue and has never been summoned about the same. DW1 was then asked whether he knew Francis Ndungu which he answered in the negative. He was told he had a case and was taken to the cells.

30. DW1 said that on Saturday 7.7.2018 at 3.00pm PC Nyaga went and asked DW1 whether he could be given cash bail, DW1 asked for his phone from Mr. Oroko so that he could bail himself out. However, Mr. Oroko could not release the phones. On Sunday 8.7.2018 at 10.00am, DW1 was asked about pedestrian toilets by Chief Inspector Paul Omweri in the presence of PC Nyaga and Mr. Silas Ogutu but DW1 said he did not know anything. Immediately Mr. Simiyu Waloba arrived, Paul Omweri asked DW1 whether he knew him and he said he knew him because they had a business with him around 20.10.2017.

31. DW1 said that on 20.10.2017, Mr. Waboba, PW3 had wanted a truck to load for Kshs. 90,000 transport costs. On this day, PW3, Mr. Waboba sent DW1 Kshs.45,000 down payment and the balance was to be paid upon return of the container and inter-change. It took around 6 days for the whole transaction to be complete. The truck came back loaded with the container and DW1 received an interchange from the container terminal in Mombasa. DW1 then met Mr. Simiyu at the customs stores and that is when he was introduced to Mr. Silas Ogutu. That is when he handed the interchange to Mr. Simiyu who told DW1 to wait for 4 days for the money to be ready. The balance of Kshs. 45,000 was sent on 9.11.2017.

Appellant's Submissions

32. The Appellant submits that PW12 Rose Marry Wanjiku who worked at regional CFS as a clerk told the court at page 63 line 1-2 stated that the documents were presented by a clerk from Tumaini stores and that she received the documents and registered the track. The Appellant further submits that the police did not organize an identification parade to test whether PW12 could identify the Appellant as the clerk who presented the alleged documents to her. On cross examination at page 64 line 8, she said that she could not remember the name of the clerk who went there. The Appellant submits by citing the case of *John Mwangi Kamau v Republic* [2014] eKLR where the Court of Appeal held that a dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade.

33. The Appellant submits that PW12 produced MFI-26 to show that the alleged track KBV 570F/ZD 0904 was in their system and MFI-8 to show the gate pass that was issued for the track to be released. These documents are computer printout. The Appellant submits by quoting Section 106B(4) of the Evidence Act provides that:- *'In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate...shall be evidence of any matter stated in the certificate and for the purpose of this sub section it shall be sufficient for a matter be stated to the best of the knowledge of the purse stating it.'* The Appellant submits that there was no such certificate identifying the electronic record which was produced during the hearing. The documents were therefore not procedurally produced in court. The documents MFI-26 and MFI-8 could be relied upon to prove that the track KBV 570F/ZD 0904 was registered in CFS program and a gate pass issued to release the container serial number PCIU 8652849 the property of Mwando Logistics Agent Company as was indicated in count 3 and 4 of the charges.

34. The Appellant submits that the burden of proof lies solely on the prosecution. The investigating officer produced MFI-33 and MFI-34 to show that PW3 Joseph Simiyu Waloba sent Kshs. 45,000 in Mpesa account 0712622150 in the name of Felix Otieno. The statement is a computer printout. The Appellant submits by citing Section 106B(4) of the Evidence Act requires the production of such a statement to be accompanied with a certificate identifying electronic record. No such certificate was produced during the hearing. There was no Safaricom employee who was called to testify on the document to prove to court that the documents originated from Safaricom. PW15 was not a liaison officer attached to the Safaricom Company. The Appellant submits that the statement was therefore not procedurally produced in court. The statement could not be relied upon to prove that the Appellant communicated with any of the prosecution witnesses and that PW3 sent money from 0712xxxx.

35. The Appellant submits that PW15 the investigating officer stated that the Appellant made documents in count 5, 6, 7, and 10 without authority. The same continues to show that MFI-7(a)-7(g) were received without authority. However, the investigating officer never made any proper application which was granted by the trial court to have those documents produced and marked as exhibit in the court's record. The Appellant submits by citing the case of *Kenneth Nyaga Mwige v Austine Kiguta and 2 Others* [2015] eKLR in whose light the Appellant states that PW15 the investigating officer never moved the court or made any application to have the document produced as an exhibit and be part of the record. The Appellant submits by stating that the trial court magistrate therefore erred in marking as an exhibit the documents which were not formally produced and proved. Therefore, they were hearsay, untested and unauthenticated account. The Appellant submits by stating that in any event in order to rely on Section 77 of the Evidence Act, to produce an expert report or document, proper basis must be laid as to why the maker cannot be called to testify in the trial court. This is because PW15 the investigating officer testified that when he compared MFI-7 (b) as against MFI-22 registration certificate, there was a big difference. When he compared MFI-7(c) against a report from a registrar of motor vehicle MFI-27(c) he found it to belong to Mohamed Bashir Ibrahim whose pin certificate was totally different from MFI-7(c).

36. The Appellant submits that PW15 not being an NTSA official was not qualified to tender evidence with respect to whether or not MFI-7 (b) and 7(c) were made falsely. There was no NTSA official called to testify in the trial court to prove to court that the documents MFI-22 and MFI-27(c) were made and/or originated from them. PW15 also mentioned MFI-27(c) belonged to Mohamed Barshir Ibrahim whose PIN certificate was xxxxx. However, Mohamed Barshir Ibrahim was not called to testify in the trial court to confirm the same. The Appellant

submitted by citing *Bukenya & Others v Uganda* [1972] EA 549 where it was held:-

“...the prosecution must make available all the evidence necessary to establish the truth, even if such evidence may be inconsistent with their case, the court too has the right and duty to call witnesses whose evidence appears essential to the just determination of the case, and lastly that where the evidence called is barely adequate, the court may infer that the uncalled evidence would have been advanced to the prosecution case.”

37. The Appellant further submits to the above that Mohamed Bashir Ibrahim was not called to testify in the trial court to prove beyond reasonable doubt that MFI-7(f) pin certificate No. A008419109W belonged to him. There was also no KRA official who was called to testify in the trial court to prove that MFI-7(f) was forged and was not an original document. The Appellant submits that there was no official from the registrar of persons who testified in the trial court to prove that the identification card was forged. Cross examination of PW11, Fredrick Musee Nzuki stated that the identification card and PIN do not belong to him. PW15 the investigating officer never bothered to investigate whether the signature on MFI-7(g) and PIN MFI-7(f) corresponded with PW11's signature. It is therefore that there was no sufficient evidence to prove to court that MFI-7(g) and MFI-7(f) were forge as claimed by PW15. The Appellant submits that the claims herein originated from MFI-7(a) a letterhead of Tumaini Stores, there was no official from Registrar of Companies who was called to testify in the trial court to prove that Tumaini Stores does not exist as a company in their data record, given the fact that the real owner of MFI-7(g) and MFI-7(f) whose document appears as the person who registered Tumaini store was never called to testify in the trial.

38. The Appellant submits that since all the documents produced before court all being computer printouts, Section 106B(4) of the Evidence Act requires the production of such statement to be accompanied by a certificate identifying the electronic records. The Appellant submits by citing the case of *Hamisi Bakari and Another v Republic* [1987] eKLR where it was held that where a heavy minimum sentence is involved, the lower court should be particular to see that each ingredient in the charge is reflected in the particulars of the offence and is properly proved. The Appellant also cited the case of *Sekitoleko v Uganda* [1963] EA 531 where it was held that as a general rule of law, the burden is on the prosecution of proving the guilt of prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else.

Respondent's Submissions

39. The Respondent submits on charges not proved beyond reasonable doubt that the state adduced sufficient evidence against the Appellant. PW2 in his testimony stated that the Appellant was actively involved in the loading process of Motor Vehicle KBV570 F/ZD 0904. The Appellant also took over this loading process from the said witness by taking the loading papers from PW2. In the ordinary course of events, PW2 was supposed to have remained in possession of the loading papers and used them to load the motor vehicle. Through the evidence presented in court, the Respondent submits that they were able to show that the said truck was presented by the accused who also gave details of the driver of the said truck being Stephen Kimari Mwangi. The said goods were transported by the driver to who also switched off his phone, which established conspiracy.

40. The Respondent further submits on the above that they produced evidence to show that the accused person made a motor vehicle registration certificate serial number R0192790Y for motor vehicle registration number KBV 570 F Prime Mover, a Motor Vehicle registration certificate serial number R015964M for motor vehicle registration number ZD 0904 Bachu Trailer and a PIN (Personal Identification Number) certificate number A00841909W for Fredrick Musee Nzuki. PW2 in his testimony stated that the accused person presented exhibits 7(a-g) to him. PW12 also testified that Exhibit 7(a-g) were presented to their office for purposes of registering the motor vehicle KBV 570F/ZD 0904. The accused person therefore presented the said exhibits while knowing that the same were false. PW11 who is the owner of Motor Vehicle Registration No. KBV 570F testified and produced the exhibits which is the original registration No. KBV 570F, thereby proving count 5.

41. The Respondent further submits on the above that they were able to establish the registration certificate for motor vehicle registration ZD0904 which indicated that the said vehicle belonged to Fredrick Msee Nzuki whereas a copy from the Registrar of Motor Vehicles which was produced as exhibit 27(c) indicates that the same was owned by Ibrahim Mohamed Bashir, thereby establishing count 6. The Respondent submits that through the testimony of PW11, who is the owner of the PIN Certificate No. A00841909W denied making exhibit 7(f). The Respondent submits that count 7 was established through the evidence available that the said PIN certificate was executed by the Appellant in order to falsely register Motor Vehicle KBV 570F. The Respondent submits that the Appellant also presented to PW2 a Kenyan Identity Card Number 217064748 in the name of Fredric Musee Nzuki. PW2 in turn issued the said document to PW12. PW11 who is the original holder of the said identity card testified and produced a true copy of the original identity card as exhibit 23, which established count 10. The Respondent submits that the charges were proved beyond reasonable doubt and requested that the ground of appeal be dismissed.

42. The Respondent submits on the production of documents as evidence that the Appellant stated that PW15 who is the investigating officer never made any proper application which was granted by the trial court to have MFI-7(a)-7(g) produced and marked as exhibits. The Respondent submits that the said documents were marked and produced before the trial court and therefore form the evidence on record. The Respondent therefore submits by asking that this ground of appeal be dismissed. The Respondent further submits that the Appellant submitted that PW12 production of MFI-26 and MFI-8 were never accompanied with a certificate as is required under Section 106B(4) of the Evidence Act. However, the Respondent submits that the Appellant was not prejudiced in any way as he never raised any objection throughout the proceedings. The Respondent submits by stating that the Appellant went further to cross-examine the said witness as can be seen on page 64 of the proceedings. The Respondent submits by asking that this ground of appeal be dismissed.

43. The Respondent submits on crucial witnesses not called that the Respondent ought to have called an NTSA official in order to produce MFI-22 and MFI-27(c), Mohamed Bashir Ibrahim as well as a KRA official to prove that MFI-7(f) was forged and not an original. The Respondent further submits that there is no requirement that the prosecution should call any particular number of witnesses to prove its case. This is buttressed by Section 143 of the Evidence Act which provides that ‘No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.’ All that the prosecution is required to do is to call such a number of witnesses as it thinks is sufficient to prove its case. The Respondent submits that there is no inconsistency in the case and therefore asked that this ground of appeal be dismissed.

44. The Respondent submits on dismissal of the Appellant's defence that the trial court failed to find that the Appellant raised a plausible defence which was dismissed. However, the trial court did in fact put into consideration the Appellant's defence and mitigation in issuing the judgment.

45. The Respondent prayed that the court finds that the prosecution prove its case against the Appellant, the appeal is wholly without merit and the same should be dismissed in its entirety.

Analysis and Determination

46. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic [2010] eKLR** where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

47. After considering the amended grounds of appeal, Records of the trial court, and submissions by the Appellant and the Respondents, the issues for determination are as follows:-

- i. Whether the charges on 3, 4, 5, 6, 7, and 10 were proved beyond reasonable doubt
- ii. Whether Section 106B(4) of the Evidence Act regarding the production of electronic evidence was complied with
- iii. Whether crucial witnesses were called to testify
- iv. Whether documentary exhibits were produced to form part of the record
- v. Whether the Appellant's defence was considered

Whether the charges on 3, 4, 5, 6, 7, and 10 were proved beyond reasonable doubt

48. The Appellant submitted that the police did not organize an identification parade to test whether PW12 could identify him as the person who presented the alleged documents to her. PW12 stated in her testimony that the documents were presented by a clerk from Tumaini stores and she proceeded and registered them since they were clients. However, PW15 in his testimony on page 80 of the proceedings stated that he wrote a letter to the Registrar of Companies dated 16.2.2018 requesting to know the status of Tumaini Stores and he received a report which indicated that Tumaini Stores did not exist in their database as a registered business name or company. The prosecution through PW2, PW3, PW5 established beyond reasonable doubt that the Appellant presented documents for registration to PW12 with the knowledge that the same were false. Therefore, the issue of identification by PW12 as raised by the Appellant cannot succeed as a ground of appeal and there was no need for an identification parade.

Whether Section 106B(4) of the Evidence Act regarding identifying the electronic records produced during the hearing

49. The Appellant in submission stated that there was no certificate identifying the electronic record which was produced during the hearing. That the documents were therefore not procedurally produced in court. He went further and stated that the documents MFI-26 (registration at CFS) and MFI-8 (Gate Pass) could not be relied upon to prove that the track KBV 570F/ZD 0904 was registered in CFS program and a gate pass issued to release the container serial number PCIU 8652849 the property of Mwando Logistics Agent Company.

50. Exhibits 8 and 26 were produced by PW12 for purposes of loading the motor vehicle registration No. KBV 570F and PW2 a clerk at Mwando Logistics who works as a clerk with duties to verify containers and consignments and in charge of loading and releasing cargo testified that the motor vehicle in question was not registered as CFS and the Appellant took documents for its registration. That registration at CFS was done on the same day and a gate pass handed over to him and he allowed the truck into the CFS. PW2 testified that although it was his duty to proceed to the field to load the containers, the Appellant went and took the loading of the motor vehicle KBV 570F and even used his money so that it could be loaded faster. Upon loading the truck, PW2 prepared a delivery note which was countersigned by the Appellant and after allowing the truck out of CFS, he parted ways with the Appellant.

51. It was also the Appellant who sent the details of the truck herein KBV 570F and trailer No. ZB 0904 to PW3 and the name of the driver as Stephen Mwanga Kamari and when it was found that the said truck cannot be registered with CFS, PW3 informed the Appellant of the position who said he had all the documents and he was going to register.

52. The fact that there was no certificate of the gate pass and track registration in the system cannot waive the evidence of the three prosecution witnesses, PW2, PW3 and PW12 that the truck and documents that the Appellant presented at CFS, and which goods were loaded and later stolen on transit were registered in the system and a gate pass issued.

Whether crucial witnesses were called to testify

53. The Appellant in submission stated that no Safaricom Company employee was called to testify on the document to prove to court that the document originated from Safaricom. The Appellant further submitted that the prosecution failed to call NTSA officials to come and testify in the trial. Further, the Appellant submitted that Mohamed Bashir Ibrahim, the owner of the lost consignment was not called to testify to prove that Exhibit 7(f) PIN certificate No. A008419109W belonged to him. That there was also no KRA official who was called to testify in the trial court to prove that Exhibit-7(f) was forged and was not an original document.

54. The prosecution called 15 witnesses to support its case which established a prima facie case to warrant the accused to be placed on his defence. In the case of *Keter V Republic [2007] 1 EA 135* the court held:-

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

55. Further, the prosecution’s discretion of calling witnesses was addressed in *Julius Kalewa Mutunga Vs. Republic [2006] eKLR*, the Court of Appeal held as follows:-

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

56. In criminal cases the prosecution is required to avail to the court all relevant evidence to enable court make an informed decision based on evidence available. This court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. **Section 143 of Evidence Act (Cap 80) Laws of Kenya** provides:-

‘143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.’

57. In the case of *Bukenya & Others V Uganda [1972] EA 549* court addressed itself thus:-

‘(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.’

58. From the foregoing, the prosecution has the discretion of calling the necessary witnesses to support its case. It is on this basis that the Appellant cannot hold the prosecution down for failing to call the Safaricom company employee, NTSA officials, Mohamed Bashir Ibrahim, and a KRA official. Instead, the Appellant should have called defence witnesses to support his case. This court finds that the evidence presented by the prosecution was sufficient for the trial court to base its decision.

Whether documentary exhibits were produced to form part of the record

59. The Appellant in submitting stated that PW15 the investigating officer never moved the court or made any application to have the documents produced as an exhibit and be part of the record. On the contrary, in PW15’s evidence in court under **page 88 lines 10, 11 and 12**, PW15 stated that, **“I wish to produce the Exhibits marked as MFI-1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 33 produced as exhibits respectively.”**

60. In the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others (2015) eKLR*, the court held that:-

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case” Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.”

61. This court is therefore satisfied that the PW15 marked and produced the documents as exhibits and formed part of the record of the trial court. The said documentary evidence went through all the stages highlighted in the above case and the trial court took into consideration all facts and evidence on record.

Whether the Appellant’s defence was considered

62. The Appellant in his unsworn statement denied the offence as presented by the prosecution. He stated to court that he previously had business with Mr. Simiyu Waboba (PW3) and on 20.10.2017, Mr. Waboba wanted a truck to load for Kshs. 90,000 which he paid Kshs. 45,000 as down payment and the balance was paid on 9.11.2017 upon return of the container and interchange. However, the Appellant did not produce any evidence or witness to court to corroborate his evidence in court. The trial magistrate analysed the prosecution's evidence as relates to the charge against the accused person and found that the accused person was not guilty in counts 1, 2, 8, and 9 and found him guilty in counts 3, 4, 5, 6, 7, and 10. Although the Appellant gave an unsworn statement without barely any probative value and having not responded to any of the allegations in the Prosecution's evidence, the trial magistrate fairly looked at the entire evidence and arrived at the conclusion in the judgment. If the Appellant's unsworn statement had not been considered, the trial magistrate may have found him guilty.

63. In conclusion, having reevaluated and reanalyzed the evidence on the trial court record, the judgment of the trial magistrate, the grounds of appeal, and the submissions filed herein, this court finds that the appeal herein has no merit and the same is dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 16TH DAY OF NOVEMBER 2021**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE