REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 165 OF 2018

BETWEEN

SYMON NYONGESA MUSAMALI...APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Cr. Case No. 4884 of 2012 delivered by Hon. A. R. Kithinji (SPM) on 16th August, 2018).

JUDGMENT

1. The Appellant, **Symon Nyongesa Musamali** was charged with five counts of offences. In count 1, he was charged with forgery contrary to **Section 345** as read with **Section 349** of the **Penal Code**. The particulars thereof were that on the 8th day of August, 2008 at an unknown place within the Republic of Kenya with intent to defraud, forged a certain false document namely Southern Credit Banking Corporation Limited letter referenced **SCBC/DK/0778/08/dk** dated 8th August, 2008, purporting it to be a genuine letter issued by Victor Wesonga, a legal officer of the said Southern Credit Banking Corporation Limited.

2. In Count II, he was charged with uttering a false document contrary to **Section 353** of the **Penal Code** in that on the 8th day of August, 2008 at Bruce Truck and Equipment East Africa Limited premises in Industrial Area in Nairobi within Nairobi County with intent to defraud, knowingly uttered a certain false document namely Southern Credit Banking Corporation Limited letter referenced **SCBC/DK/0778/08/dk** dated 8th August 2008 to Joseph Machungu Mwangi, Finance and Administration Manager of the said Bruce Truck and Equipment East Africa Limited purporting it to be a genuine document issued by Southern Credit Banking Corporation Limited.

3. In Count III, he was charged with stealing contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. The particulars thereof being that on the 1st day of November 2008 at Bruce Truck and Equipment East Africa Limited premise Industrial Area in Nairobi within Nairobi County, jointly with others not before court, stole a motor vehicle registration number KAV 555R Toyota Harrier valued at Kshs. 1,580,000/=, the property of Equity Bank Limited and Patel Kamlesh Kumar.

4. In Count IV, he was charged with obtaining by false pretences contrary to **Section 313** of the **Penal Code.** It was alleged that on diverse dates between 19th day of December, 2008 and the 20th day of March, 2009 in Nairobi and Kajiado Counties within the Republic of Kenya, with intent to defraud, obtained from **Janerose Wanjiku Kamau** a sum of Kenya Shillings 800,000/= by falsely pretending that he was in a position to sell to her a motor vehicle registration number KAV 555R Toyota Harrier, a fact he knew to be false.

5. The Appellant pleaded not guilty. Upon trial, he was convicted of counts III and IV above. In count III, he was fined Kshs. 30,000/= in default to serve six (6) months imprisonment. In count 4, he was fined Kshs. 50,000/= in default to serve twelve (12) months imprisonment. He was also ordered to compensate the complainant in count IV by either transferring the vehicle to her or refunding the purchase price. Aggrieved by both his conviction and sentence, he preferred the instant appeal to this Court.

6. The Appellant raised nine (9) grounds of appeal in his Memorandum of Appeal filed on 20th September, 2018 by T.T.Ng'ang'a & Associates, his advocates. I duplicate them as under:

> ***i. THAT the learned trial magistrate failed to appreciate each of the elements of the charges and therefore reached a bad and unreasoned decision by convicting him on two out of four counts.***
>
> ***ii. THAT the learned trial magistrate misdirected himself in convicting the Appellant of Counts 3 and 4 after acquitting him of***

Counts 1 and 2 when the offences were linked and interdependent on each other.

iii. THAT the learned trial magistrate erred in both law and fact and brought confusion while sentencing him by passing a sentence on count 1 and 2 rather than on counts 3 and 4 which he had been convicted of yet there was no amended charge sheet after conviction to be able to have only count 1 and 2.

iv. THAT the judgment was contrary to the weight of the prosecution evidence before the learned trial magistrate and rebutted by the defence.

v. THAT the learned trial magistrate erred in law by convicting him on the offence of stealing and obtaining money by false pretence when the offence of forgery of the document that gave him the authority to reposess, sell and receive money from the sale of the motor vehicle in question arose from the letter of authority which wasn't proven as a forged document in Count 1.

vi. THAT the learned trial magistrate erred in law by convicting him on the offence of stealing and obtaining money by false pretence when the complainant is still in possession of the suit motor vehicle on the basis of the letter of instructions to reposes given to the Appellant.

vii. THAT the court while directing him to in addition to paying a fine of Kshs. 50,000/=; refund the purchase price to the complainant or specifically transfer the suit motor vehicle to the complainant, indirectly acknowledges that the Appellant from the word go had authority (however remote) to sell and subsequently pass a good title and was wrong to convict the Appellant on the two counts.

viii. THAT the court's sentence of giving the Appellant an option of either transferring the suit motor vehicle is ambiguous and actually unavailable to the Appellant more so after being convicted of the offense of stealing and obtaining money by false pretences. If at all that option was available, it means the court was ready to abet an illegality or better still, was in doubt whether the Appellant was actually guilty of the two charges. This uncertainty should have been resolved in favour of the Appellant.

ix. THAT the sentence is harsh, vindictive and excessive given the nature of the offence and charge and given the fact that he was a first offender.

Summary of Evidence

7. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32)**.

8. The prosecution's case can be summarized as follows: On 25th July, 2008, the Appellant took the subject motor vehicle, a Toyota Harrier registration number KAV 555R, to Bruce Trucks and Equipment E. A. Ltd in Industrial Area (hereinafter **"Bruce Trucks"**). Bruce Trucks had been contracted by Southern Credit Banking Corporation Limited (hereinafter **"SCBC bank"**) to store motor vehicles repossessed by Track Finders, which the Appellant was a director of, on its behalf. The Appellant went with a copy of a letter dated 24 th June, 2008 from SCBC bank addressed to Deeya Hardware and Wholesalers, Kakamega. In the letter, SCBC bank had authorized him to repossess various motor vehicles enlisted therein one of which was the subject motor vehicle.

9. Later on 8th August, 2008, the Appellant took to **PW2, Joseph Muchiri Mwangi** of Bruce Trucks, a photocopy of a letter from SCBC bank referenced number SCBC/DK/0778/08/dk dated 8th August, 2008. The letter was purportedly authorizing Bruce Trucks to release the subject motor vehicle to him. It bore the signatures of **PW6, Victor Mitungu Wesonga**, a former legal officer at SCBC bank and Dismus Ndege, manager legal services. The Appellant told PW2 that he would furnish them with the original letter later. PW2 acted on the letter because of the good working relationship they had with the bank.

10. PW2 issued the Appellant with an invoice No. 0599 for Kshs. 2,900/= in respect of the storage charges. The Appellant paid and PW2 issued him with receipt No. 1599. However, the Appellant did not take the vehicle that day but said that he would go for it on a later date as he was still sorting out some matters. He went back to Bruce Trucks yard on 1st November, 2008 and asked to be given the motor vehicle. He was issued with an invoice number 1647 for Kshs. 9,500/= on account of storage charges which he paid in cash then was issued with a receipt number 1621.

11. Within the same month of November 2008, the complainant **PW1, Janerose Wanjiku Kamau** went to Bruce Trucks to source for a motor vehicle to purchase. PW1 identified the subject motor vehicle and **PW2** informed her that he would contact her once he got in touch with the Appellant. PW1 met the Appellant later on in December 2008. He showed her a copy of a logbook for the subject motor vehicle and a copy of the letter dated 24th June, 2008. The Appellant told him that the subject motor vehicle belonged to him and that it had been given to him as part payment for repossession of other vehicles which he had conducted on behalf of SCBC bank. As such, on 18 th December, 2008, PW1 entered into an agreement with the Appellant for the sale of the motor vehicle at Kshs. 800,000/=. She gave him a cash deposit of Kshs. 300,000/= on 19th November, 2008. He acknowledged receipt in writing then gave her possession of the motor vehicle. Thereafter, PW2 issued them with a gate pass allowing the motor vehicle to leave Bruce Trucks yard.

12. Before paying the last installment of Kshs. 35,000/=, PW1 requested the Appellant to give her the original logbook for the subject motor vehicle. Instead of doing so, on 20th March, 2009, the Appellant went to Kajiado Central Division Administration Police Office and reported that PW1 had refused to pay him the said balance. He requested **PW3, Ibrahim Wako,** an inspector of Administration Police Kajiado County to provide him with security while going to demand the balance from PW1. PW3 summoned PW1's husband **PW4, Peter Maina Mwaura** to his office and inquired to know why they had refused to pay the balance. PW4 told him that they wanted the Appellant to

furnish them with a logbook for the subject motor vehicle before releasing the final balance. The Appellant insisted that he would only give them the logbook if the balance is paid. As such, PW4 paid him the balance and undertook to deliver to PW1 the logbook the following day but failed to do so. He also stopped answering PW1's calls.

13. PW1 went to PW3's office and informed him that the Appellant had failed to deliver the log book as promised. PW3 called the Appellant but he could not give any proper explanation for failing to honour his promise. PW3 advised PW1 to report the matter to police. PW1 carried out a search at the motor vehicle registry and found out that the subject motor vehicle was registered jointly in the name of Equity Bank and Patel Kamlesh Kumar. The vehicle was originally owned by Trimpex and Autos and had never been registered in the Appellant's name. She therefore reported the matter to the CID who allowed her to keep the motor vehicle.

14. According to **PW5, Beatrice Muraguri** a legal officer from Equity bank, the subject motor vehicle had been committed for an overdraft of Kshs. 850,000/= advanced to Bulovi Jaggery Mills through a customer named Kamlesh Kumar Ramesh Bhai Patel pursuant to a letter of offer dated 22nd May, 2008. The logbook was thereafter registered jointly in the name of the said Kamlesh and Equity bank and retained by the bank, although PW5 could not trace it at the time when she was coming to testify in court. The outstanding amount owing to the bank had also never been cleared. Further, Equity bank had never authorized anyone to sell the motor vehicle and any attempt to sell it without such authorization would amount to fraud.

15. PW6 denied any knowledge of and/or co-signing the letter from SCBC bank referenced number SCBC/DK/0778/08/dk dated 8th August, 2008 that purported to authorize the release of the motor vehicle to the Appellant. He stated that he was aware that the Appellant had been assigned to recover the movable assets of Deeya Hardware in Kakamega. However, they had advised the manager of the bank that the subject motor vehicle could not be repossessed since a search conducted by them revealed that it was jointly owned by Deeya Hardware and Equity bank.

16. **PW7, Brian Otieno Asin** was an assistant manager in the debt recovery department of Equatorial Commercial bank which was formed following a merger between SCBC bank and Equatorial bank in 2010. He stated that according to their records, the subject motor vehicle was repossessed on 28th June, 2008 by Track Finders and Assessors owned by the Appellant herein. However, SCBC bank had instructed the Appellant to release the motor vehicle as it was jointly owned by Equity bank and Kamlesh.

17. **PW8, Husna Abdala Said**, an assistant manager at Kenya Commercial Bank, Kipande House branch produced certified copies of documents in respect of account number 1103425188 held by Track Finders and Assessors. **PW9, Ntoyian Sakipa Polong** formerly of Kenya Commercial Bank, Kajiado confirmed that on 23rd January, 2009, she issued PW1 with a receipt upon her depositing the sum of Kshs. 150,000/= in the account held by Track Finders and Assessors. **PW12, Dansan Amukoba Emerit** also formerly of Kenya Commercial Bank, Kajiado confirmed that she served PW1 on 9th February, 2009 when she was making a deposit of Kshs. 50,000/= to the account held by Track Finders and Assessors.

18. PW11, Steven Asena Asiachi, a manager in charge of records at the Kenya National Transport and Safety Authority stated that according to a Search Certificate generated from their records, the subject motor vehicle was first registered in the name of Trimpex and Autos on 7th June, 2006 followed by Afro American Industries. However, at the time of the search conducted on 27th October, 2010, it was jointly owned by Equity bank and Patel Kamlesh Kumar. He also stated that for a logbook to be issued to a new owner, the previous one must be cancelled.

19. PW13, CIP Daniel Gutu, a forensic document examiner from the Directorate of Criminal Investigations, Nairobi confirmed that the signature of **PW6** on the letter dated 8th August, 2008 from SCBC bank referenced number SCBC/DK/0778/08/dk did not tally with his known signature. He stated that PW6's signature on that letter was forged. He denied being influenced by anybody to write the report prepared in that respect which he produced in evidence.

20. **PW14, Corporal Fredrick Muriuki** investigated the case. He summarized the case and produced various documents in evidence.

21. Upon being placed on his defence, the Appellant elected to give a sworn testimony and called one witness. **DW1, Emmanuel Kenga**, a retired commissioner of police and a forensic document examiner in private practice. He was instructed by the Appellant's advocates to compare questioned signatures of PW6 on a copy of the letter dated 8th August, 2008 from SCBC bank with his known signatures. He formed the opinion that the signatures were made by the same author.

22. **DW2, the Appellant** herein stated that he worked with Track Finders which is contracted by various banks to assist in recovery of defaulted loans. He denied stealing the suit motor vehicle and stated that on 24th June, 2008, SCBC bank instructed them to repossess the suit motor vehicle from Deeya Hardware which was under receivership. As they were doing stock taking in the hardware, officials from Equity bank went there and told them that Patel had an overdraft of Kshs. 200,000/=. The officials from Equity bank went to the yard and accessed the registration of the subject motor vehicle. They drove the suit motor vehicle to Bush Truck in Nairobi. Later, SCBC bank gave him authority to sell the motor vehicle vide a letter dated 8th August, 2008 signed by PW6 which he was alleged to have forged but the prosecution did not produce the original.

23. Further, he confirmed receipt of the sum of Kshs. 800,000/= from PW1 following a sale of the subject motor vehicle by a private treaty but denied obtaining the money fraudulently. He stated that he remitted the money received from PW1 to SCBC bank which owned the vehicle. However, before transferring the vehicle to PW1, they did a search and discovered that Equity bank had committed a forgery and gotten the logbook registered in its name two months after he had repossessed the motor vehicle. In view of the forgery by Equity bank, he was unable to transfer the vehicle PW1 and therefore lodged a complaint against them with the police. He questioned why PW5 did not produce the original log book to ascertain that the vehicle was owned by Equity bank as alleged. Further, he stated that PW1 was not prejudiced in any way since she has had possession of the motor vehicle since it was sold to her.

Analysis and determination

24. This appeal was canvassed by way of written submissions. The Appellant filed his written submissions on 24th June, 2019 whilst the Respondent's written submissions were filed on 8th October, 2019. The Appellant was represented by the learned counsel Mr. Ogwe whilst the Respondent was represented by the learned State Counsel, Mr. Momanyi. Upon carefully reevaluating the evidence on record and considering the parties' respective arguments, I find that the following are the issues for determination: whether the offences of stealing and obtaining *by false pretences* were proved beyond a reasonable doubt and whether the Appellant was exposed to double jeopardy.

Whether the offence of stealing was proved beyond reasonable doubt.

25. On this issue, the Appellant submitted that he had a claim of right to the subject motor vehicle by virtue of the letter from SCBC bank dated 8th August, 2008. He argued that having been acquitted of the charge of forgery, it followed that all the other charges ought to have failed too since a genuine document could not give rise to a bad title. He argued that despite claiming ownership, Equity bank could not produce the original logbook which they claimed was in their possession. In his view therefore, the prosecution did not prove this charge against him beyond a reasonable doubt.

26. The Respondent submitted that there was no doubt that the Appellant stole the motor vehicle. The Respondent argued that the prosecution proved that the Appellant had no right of ownership and could not therefore transfer a clean title to PW1. The Respondent stated that the Appellant's act of selling the suit motor vehicle while he knew that he had no right to it amounted to stealing as provided under **Section 268 (1)** as read with **Section 275** of the **Penal Code.**

27. Section 268(1) of the **Penal Code** defines 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"***

28. Section 268(2) of the Penal Code further provides as follows:-

> ***"a person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—***
>
> ***(a) an intent permanently to deprive the general or special owner of the thing of it;***
>
> ***(b) an intent to use the thing as a pledge or security;***
>
> ***(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;***
>
> ***(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;***
>
> ***(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question;***
>
> ***and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question."***

29. No doubt a motor vehicle constitutes something that is capable of being stolen. A Search Certificate generated by PW11 from the records of Kenya National Transport and Safety Authority (NTSA) revealed that at the time when the Appellant sold the motor vehicle to PW1, it was jointly owned by Equity Bank and Patel Kamlesh Kumar. The search also revealed that the Appellant had never been registered as the owner of the motor vehicle at any point in time. This therefore proved that the Appellant had no claim of right to the motor vehicle.

30. As to whether the Appellant fraudulently took the motor vehicle from the registered owners, PW6 testified that they had advised the manager of SCBC bank that the motor vehicle could not be repossessed since a search conducted by them revealed that the vehicle was jointly owned by Deeya Hardware and Equity bank. This evidence was corroborated by PW7 who stated that SCBC bank had instructed the Appellant to release the motor vehicle as it was jointly owned by Equity bank and Kamlesh Kumar. However, despite being advised as such and knowing too well that he had no claim of right to the motor vehicle, the Appellant went ahead and took the vehicle from Bruce Trucks yard and sold it to PW1. He told PW1 that the vehicle had been given to him as part payment for repossession of other vehicles on behalf of SCBC bank.

31. Notably, the Appellant in his defence claimed that he sold the motor vehicle on behalf of SCBC bank and remitted the money received from PW1 to the bank. However, he did not provide any proof of the same. It is therefore manifest that he took the subject vehicle from Bruce Trucks Yard knowing too well that he had no claim of right to it with the intention of permanently depriving Equity Bank and Kamlesh Kumar of it.

32. I note that there were conflicting expert reports regarding the signature of PW6 on the letter dated 8th August, 2008 purportedly from

SCBC bank authorizing Bruce Trucks to release the vehicle to the Appellant. Such evidence coming from experts leaves the court doubting which one, between the two is factual. On the account of this doubt, the court is enjoined to re-evaluate other evidence and determine whether it linked the Appellant to the offence. This, I have aptly done, leaving me with no doubt that the Appellant was culpable. It follows therefore, that I have disregarded the two hand writing expert reports.

Whether the offence of obtaining by false pretences was proved beyond reasonable doubt

33. The Appellant submitted that the element of intention to defraud was not established since he delivered the motor vehicle to PW1 as agreed and has also since transferred it to her. He argued that by directing him to transfer the suit motor vehicle to PW1 in addition to his sentence on count 4, the trial court indirectly acknowledged that he had authority to sell it and subsequently pass a good title to PW1. He also stated that by so doing, the trial court abetted an illegality and/or was in doubt whether he was actually guilty of the two charges.

34. In rebuttal, Mr. Momanyi submitted that the evidence of PW1, PW3 and PW4 was consistent and unrebutted by the Appellant's defence. He added that the Appellant obtained money from PW1 through a false pretence that he could pass a good title of a vehicle he knew he had no ownership rights to at all, a testament that he clearly intended to defraud PW1.

35. Section 313 of the Penal Code provides as follows:-

> ***"Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years."***

36. The provision discloses the following essential ingredients of the offence:-

> ***i) The act of obtaining something capable of being stolen.***
>
> ***ii) Obtaining the thing through false pretence.***
>
> ***iii) Obtaining the thing with intention to defraud.***

37. "False pretence" is defined under **Section 312 of the Penal Code** as:

> ***"Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."***

38. It is not in doubt that the sum of Kshs. 800,000/= obtained from PW1 constituted something capable of being stolen. Further, the Appellant made a false representation to PW1 that the motor vehicle belonged to him and that it had been given to him as part payment for repossession of other vehicles which he had conducted on behalf of SCBC bank. The Appellant also made a false representation to PW1 that he would furnish her with the original logbook for the said motor vehicle upon full payment of the agreed sum of Kshs. 800,000/= which was paid in installments. He then stopped answering PW1's calls upon receipt of the last instalment. It is then that PW1 carried out a search at the motor vehicle registry and found out that the subject motor vehicle was registered jointly in the name of Equity Bank and Patel Kamlesh Kumar. It was also confirmed that the Appellant had never been registered as the owner of the motor vehicle.

39. The Appellant claimed that he discovered that Equity bank had committed a forgery and gotten the logbook registered in its name two months after he had repossessed the motor vehicle. He claimed to have reported the alleged forgery to the police. However, he did not deem it fit to inform PW1 about the new development, if at all, but instead went missing in action. He also did not produce a copy of the search and/or any proof of the report allegedly made against Equity bank to the police. It is therefore clear that the Appellant intended to defraud PW1 since he was indeed well aware that he had no claim of right to the vehicle.

40. I add that the representation in the transaction did not relate to a future event but a current one. The Appellant represented himself as capable of immediately passing on the tittle of the vehicle to PW1 immediately she made full payment. Upon the full payment as stated above, he went underground.

41. In sum, I find that all the elements of the offence of obtaining by false pretences were established beyond a reasonable doubt. I dismiss the Appellant's defence as lacking in merit.

Whether the Appellant was exposed to double jeopardy

42. The Appellant faulted the trial court for sentencing him on counts 1 and 2 despite having acquitted him of the same under **Section 215** of the **Criminal Procedure Code**. He argued that doing so violated his constitutional right to a fair trial under **Article 50** of the **Constitution** as it exposed him to double jeopardy. He also argued that the trial court subjected him to double jeopardy by ordering him to compensate PW1 in addition to sentencing him to pay a fine or serve a prison term in default on count 4.

43. Under our statutes the principle of double jeopardy in criminal justice is provided for in instances of *autrefois acquit* and *autrefois convict, implying one* cannot be tried for an offence for which he has already been convicted or acquitted. **Section 138** of the **Criminal Procedure Code** provides as follows in this regard:

"A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence."

44. This principle is not applicable in the present case since no other criminal proceedings had ever been instituted against the Appellant in respect of the subject matter herein. I have noted that the trial court erroneously referred to counts 3 and 4 which the Appellant was convicted of as counts 1 and 2. I find that this was not fatal as the Appellant was well aware of the counts that he had been convicted of. He cannot therefore ride on an obviously inadvertent error by the trial court. This ground of appeal therefore lacks merit.

45. I also hold the view that double jeopardy may apply in other instances especially if an error is made in sentencing. I have rendered myself as regards the fact that double jeopardy did not apply in the manner the Appellant was sentenced. I need not add more.

Sentence

46. As regards the sentence, my view is that the trial was extremely lenient notwithstanding that the sentences were legal. I would have been inclined to enhance them save that the Appellant was not given of the likelihood of enhancement. He should consider himself lucky for getting away with such a light sentence.

47. As regards the sentence for the offence of obtaining by false pretences, he submitted that the same fell under a civil remedy and not a criminal one. He argued that the trial court's order that he compensates PW1 by either transferring the vehicle to her or refunding the purchase price was ambiguous and unavailable to him since a sentence had been passed. In ***Byrne Cathal v Republic [2017] eKLR*** the court stated as follows when faced with similar circumstances:

"In sentencing an accused person, the trial magistrate is exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Appellant or that the sentence was illegal. In the present appeal, it was clear that the trial court properly exercised its discretion when it ordered the Appellant to pay a fine or in default a custodial sentence and in addition pay compensation to the complainant. However, this court is of the view that the trial court did not specify the amount of compensation that the Appellant was required to pay to the complainant. This court cannot fault the trial court for directing that the Appellant pays the complainant compensation in view of the enormous financial loss that the complainant suffered as a result of the Appellant's fraudulent and criminal conduct. This was in line with the Sentencing Policy Guidelines issued by the Judiciary that requires, where appropriate, the court to consider compensation as a way of taking into account the victim's needs in the dispensation of justice (see Policy Direction 10.7)."

48. Similarly, in the present appeal, I see no reason to interfere with the specific order for compensation. The court should however have borne in mind that he was not capable of transferring a vehicle he did not own. Hence, the order ought to have been specifically for monetary compensation. I will, nevertheless, not interfere with order made because there is room for the monetary compensation. In principle, the sentence was legal and proper.

49. In the result, I find that this appeal lacks merit and is dismissed in its entirety. It is so ordered.

Dated and Delivered at Nairobi This 3rd March, 2020.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Ogwe for the Appellant.

2. Mr. Momanyi for the Respondent.