



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 61 OF 2019**

**FREDERIC NGAU MUYA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the original conviction and sentence by Hon. M. O. Rabera, Senior Resident Magistrate, in Mombasa Chief Magistrate's Court Criminal Case No. 2213 of 2016 Consolidated with Criminal Case No. 1427 of 2011).**

**JUDGMENT**

1. The appellant herein was jointly charged with another before the lower court with the offence of stealing a motor vehicle contrary to Section 278A of the Penal Code. The particulars of the charge were that on the 4<sup>th</sup> day of April, 2011 at Magongo area in Changamwe sub-county within Mombasa County jointly stole a motor vehicle registration number KBN 197C Toyota Corolla Saloon white in colour valued at Kshs. 700,000/= the property of Peter Kimani Mugo.

2. The appellant was found guilty of the charge and convicted but his co-accused was acquitted. He filed his petition and grounds of appeal on 28<sup>th</sup> May, 2019. On 28<sup>th</sup> June, 2019 the law firm of Wamotsa & Co. Advocates filed amended grounds of appeal on behalf of the appellant pursuant to leave having been granted by the court for them to do so. They raised the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and fact by convicting the appellant on a case that the prosecution had not proved beyond reasonable doubt;

(ii) That the Learned Trial Magistrate misinterpreted and misplaced the provisions of Section 268 of the Penal Code, Cap 63 Laws of Kenya on stealing and thereby wrongfully convicted the appellant;

(iii) That the Learned Trial Court erred in law and fact by disregarding crucial prosecution evidence that was in favour of the appellant and which was inconsistent with an inference of guilt on his part;

(iv) That the Learned Magistrate erred in law and fact in not considering the evidence as a whole, the crucial exculpatory circumstances of the case and the conduct of the appellant which had he considered would have led the court to an irresistible finding that the appellant was not guilty of the offence;

(v) That the Learned Magistrate erred in law and fact by making findings that were not based on the evidence before court;

(vi) That the Trial Court erred in law and fact by failing to find that there was uncontroverted evidence before court presented by the appellant through cross-examination of prosecution witnesses and during defence hearing which overwhelmingly pointed to his innocence;

(vii) That the Trial Court erred in law and fact by failing to consider the appellant's defence; and

(viii) That the court erred in law and fact by failing to find that the prosecution suppressed crucial evidence that was exculpatory to the appellant.

3. On 20<sup>th</sup> November, 2019 the appellant's Counsel filed written submissions. He opted not to highlight the same. The submissions were to the effect that the Trial Court found that the appellant never disclosed to the car hire company that he was hiring the vehicle on behalf of his co-accused in the lower court (2nd accused). It was further submitted that the appellant disclosed to PW2 when he hired the vehicle that he

was taking it to a friend. It was stated that in cross-examination, PW2 confirmed that he recorded the said information in his witness statement.

4. It was stated that the appellant told PW5, with whom he signed the car hire agreement, that he was hiring the car for a third party. It was argued that PW3 corroborated the evidence of PW2 and PW5 that the appellant had hired the car for Likavo Adoli, the 2<sup>nd</sup> accused. It was contended by the appellant's Counsel that apart from the written agreement, there was an oral one which was to the effect that the appellant was hiring the car for the 2<sup>nd</sup> accused. It was also contended that the Trial Court made an erroneous finding that the appellant was to blame for the consequences that followed, yet he handed the car to the 2<sup>nd</sup> accused. It was indicated that the said fact was confirmed by PW4 who saw the vehicle the day after it was hired, being driven in Nairobi by the 2<sup>nd</sup> accused.

5. In reference to the evidence of the Investigating Officer, it was pointed out that he disclosed that PW2 in his witness statement said that the appellant had hired the motor vehicle for the 2<sup>nd</sup> accused. It was asserted by the appellant's Counsel that the same information was corroborated by the OB entry at Changamwe Police Station in respect to the motor vehicle in issue.

6. It was submitted that the evidence adduced before the Trial Court showed that the 2<sup>nd</sup> accused called PW2 and promised to pay the car hire charges and that he would return the vehicle to the car hire company. As a result of the said promise, the appellant was released from police custody where he was being held. According to the appellant's Counsel, the foregoing pointed towards the appellant's innocence hence he could not have stolen the vehicle whose possession, he handed over to the 2<sup>nd</sup> accused. It was argued that the 2<sup>nd</sup> accused was the person who was accountable for the loss of the vehicle.

7. It was stated that the 2<sup>nd</sup> accused promised to go to the police station but did not and he later refused to pick phone calls made to him by the appellant. The 2<sup>nd</sup> accused was arrested 3 months later with the assistance of the police. It was pointed out that the 2<sup>nd</sup> accused sent car hire charges to the appellant for the car. It was indicated that he also sent an SMS to PW2 in which he asked PW5 to intervene in having the appellant released as he would pay the balance of the car hire charges.

8. It was submitted that the Mpesa transaction and SMS message were not investigated by PW6 to verify the same. It was contended that crucial evidence was withheld by PW6 who testified that he would still have charged the appellant irrespective of the alleged Mpesa transaction and SMS from the 2<sup>nd</sup> accused to the appellant.

9. Counsel for the appellant argued that the Trial Court erred when it made a finding that there was no evidence linking the 2<sup>nd</sup> accused to the loss of the car yet he was the last person to be seen with it.

10. It was submitted that the conduct of the appellant was not consistent with that of a guilty person. The appellant's Counsel prayed for the appeal to be allowed because the evidence against the appellant could not form the basis of a conviction.

11. Mr. Muthomi, Prosecution Counsel, filed his written submissions on 25<sup>th</sup> November, 2019 on behalf of the office of the Director of Public Prosecutions. He conceded to this appeal on the basis that the prosecution did not prove its case against the appellant beyond reasonable doubt.

12. He submitted that on 4<sup>th</sup> April, 2011 the appellant signed a car hire agreement for motor vehicle registration No. KBN 197C and that he was to have the car for 7 days. It was stated that the appellant deposited a copy of his driving licence, national identity card and paid Kshs. 3,000/= as a deposit for car hire charges and took possession of the motor vehicle, which was lawfully handed over to him. It was submitted that there was no indication that on 4<sup>th</sup> April, 2011, the appellant took the vehicle fraudulently hence a charge of theft by taking could not be sustained.

13. On the issue of whether the appellant converted the motor vehicle to his own use, it was argued that in his sworn defence he indicated that he hired the motor vehicle and handed it over to the 2<sup>nd</sup> accused. That after the vehicle was sighted in Nairobi, the appellant was arrested. He contacted the 2<sup>nd</sup> accused who called PW2 and told him that he would return the vehicle and settle the car hire charges. In the said telephone conversation, the 2<sup>nd</sup> accused requested for the release of the appellant from the police station and the same was done.

14. It was further stated that the 2<sup>nd</sup> accused was seen by PW4 on 5<sup>th</sup> April, 2011 driving the car in Nairobi near Chania Bus Stage. Since PW4 recognized the vehicle as being from the company he worked for, he approached the 2<sup>nd</sup> accused to find out if he was heading to Mombasa. PW4 reported to PW2 that he had seen the vehicle in Mombasa.

15. Mr. Muthomi explained that another reason why he was conceding to this appeal was that the Investigating Officer testified on 5<sup>th</sup> April, 2011 that an OB entry for Changamwe Police Station indicated that the appellant had hired the vehicle on behalf of the 2<sup>nd</sup> accused. It was submitted that PW6 stated that the vehicle was found with the 2<sup>nd</sup> accused and that is the reason why he was charged. The said witness said that the appellant contributed to the loss of the vehicle because he is the one who hired it.

16. The Prosecution Counsel relied on the case of **Ketan Somaia & Jason Wellington Oluga v Republic** [2005] eKLR, where Judge F. Ochieng cited the case of **Rex v Cyril J. Watkins** (1945) 12 EACA 81 where the then Court of Appeal stated that the existence of criminal negligence, however reprehensible it may be, does not constitute theft. Mr. Muthomi as such submitted that the prosecution was obligated to prove not only the act of taking or conversion, but also that the person had a fraudulent intent. He stated that it was not sufficient for the prosecution to prove that the accused person was negligent or reckless.

17. The Prosecution Counsel also relied on the decision in **Republic v Jones** [1976] KLR 1, **Wachira v Republic** [1983] KLR 591 and **Mwangi Nyongah v Republic** (1965) EA 526 to support his argument that the appellant's intention when he took the car hire was not to

permanently deprive the complainant of its use or to convert it.

18. In concluding his submissions, he stated that there was no evidence to indicate that by the appellant handing over the vehicle to the 2<sup>nd</sup> accused he intended it to be used or converted to the detriment of its owner. Further, that the appellant went out of his way to trace the 2<sup>nd</sup> accused in Nakuru when he vanished.

19. Mr. Muthomi also stated that the mere fact that the agreement did not authorize the appellant to give the car to a 3<sup>rd</sup> party and the fact that the appellant breached its term by itself, without cogent evidence, could not infer criminal conduct against the appellant once the 3<sup>rd</sup> party lost the vehicle.

#### **THE EVIDENCE ADDUCED BEFORE THE LOWER COURT**

20. PW1, Peter Kimani Mugo testified of how he met PW2 at a funeral in Molo in November, 2010. PW2 informed him that he had a car hire company and encouraged PW1 to buy a saloon car which he could give to him to hire out in return of Kshs. 40,000/= per month. PW1 came to Mombasa and in November, 2010 and bought a Toyota NZE registration No. KBN 197C. He signed an agreement with PW2 of Vigilante (sic) Car Hire Tours. PW1 received monthly payments as agreed for 3 months. On the 4<sup>th</sup> month, PW2 called PW1 and requested him to travel to Mombasa. He did so. PW1 was told by PW2 that he had given his vehicle to the appellant to use in Malindi and Mombasa but he had not paid the amount required. The appellant was present when PW1 was given the foregoing information.

21. It was PW1's testimony that on 27th April, 2011 he was called to Changamwe Police Station to record a statement. He availed a copy of the log book for the motor vehicle and the sale agreement for it dated 25<sup>th</sup> November, 2010 signed between him and the owners of the showroom where he bought the car. He also produced the agreement between him and Vigilante (sic) Car Hire Tours. PW1 stated that he never saw his car again.

22. PW2 was Samuel Kihumba Githinji. He testified that he had a business by the name Vigilant (sic) Tours and Car Services. He indicated that on 4<sup>th</sup> April, 2011 the appellant went to his office and requested for a vehicle to hire. PW2 indicated that the appellant had called earlier and requested for a car hire for 7 days. He paid Kshs. 3,000/= and was to pay the balance the following day. In total, he was to pay Kshs. 21,000/=. They signed an agreement and PW2 retained copies of the appellant's driving licence and identity card. PW2 stated that the appellant said he was to use the vehicle in North Coast and South Coast, which meant that the vehicle was not to be driven past Ukunda or Watamu.

23. PW2 further testified that on 5<sup>th</sup> April, 2011 he was called by a lady by the name Sheila Inyilmet (PW3) who was working at Sundown Car Hire and Tours situated opposite their office who told him that their vehicle which they had given the appellant had been found carrying drugs in Watamu. PW2's testimony was that in the evening of the same day, he was called by one of their drivers Edwin Kihumba Nyambura (PW4) who told him that he had seen the said vehicle in Nairobi being driven by the 2<sup>nd</sup> accused. PW2 indicated that the 2<sup>nd</sup> accused was their client. PW4 informed PW2 that he had asked the 2<sup>nd</sup> accused if he was going to Mombasa so that he could give him a lift.

24. It was PW2's evidence that he went to the appellant's house and asked him what the vehicle in issue was doing in Nairobi when he was to use it within North and South Coast. PW2 indicated that they went to Changamwe Police Station from where they called the 2<sup>nd</sup> accused who promised to be at the Police Station within 20 minutes. He did not turn up. They tried to call him again but he did not take their calls. The appellant was then left at the said police station.

25. PW2's further testimony was that on 6<sup>th</sup> April, 2011 the 2<sup>nd</sup> accused called him and requested for the release of the appellant. He said he would take the vehicle and the money but he never did so. After some time, his cell phone line went off. PW2 indicated that the 2<sup>nd</sup> accused was found after 3 months in Nakuru through the assistance of police.

26. PW2 testified that the appellant had told him that he was to use the vehicle in transporting his visitors and he was the one who would use it. PW2 indicated that he was not supposed to give it to another person. He further indicated that they had done business with the appellant for 5 years and that the 2<sup>nd</sup> accused was also their client for 1 year.

27. PW3, Sheila Ikavai Inyimili testified of how on 5th April, 2011 when working for Sundown Tours, a car hire business, she was called by the 2<sup>nd</sup> accused at 9:00a.m. He inquired from her if she had hired out motor vehicle registration No. KBN 197C. She told him that their company did not have such a vehicle but she would ask from their neighbouring company Light Tours (sic). She testified that she asked PW2 who confirmed that they had leased the vehicle to the appellant on 4<sup>th</sup> April, 2011.

28. It was her evidence that she told PW2 that the 2<sup>nd</sup> accused had informed her that the vehicle had been impounded in Watamu for carrying cocaine. She indicated that PW2 told her that she would ask the appellant about it. He also told her that the appellant was required to pay Kshs. 3,000/- per day and he had requested for a vehicle without a car track.

29. PW3 testified that after a while, the 2<sup>nd</sup> accused called her again and told her he had been threatened through phone No. 0714443411 by being told to either produce the vehicle or his head would be chopped off. PW3 stated that he requested her to report the threat to Changamwe Police Station as he was far away. PW3 did so and she was given an OB number on 9th April, 2011. PW3 indicated that after 2 days, she received a call from the 2<sup>nd</sup> accused person's cell phone number but another person spoke to her and told her that the 2<sup>nd</sup> accused had been attacked and was at Nairobi Hospital. She informed PW2 who went to the said Hospital but found that the information was false. She indicated that the 2<sup>nd</sup> accused had been one of their customers for over 2 years.

30. Edwin Kihumba Nyambura an employee of V-Light (sic) Tours testified as PW4. It was his evidence that on 5<sup>th</sup> November, 2011 he was

in Nairobi. At around 7:30p.m., at Chania Booking Office, he saw motor vehicle registration No. KBN 197C at a petrol station near the said office. He approached the driver of the said vehicle to ask for a lift to Mombasa. The driver told him he had not started his journey.

31. PW4 further testified that he called their office in Mombasa and informed PW2 that they had seen the vehicle in Nairobi. PW2 said the vehicle was supposed to be in Watamu. He told PW4 to look for a police officer to impound the vehicle. PW4 indicated that the driver got out of the vehicle and went to the booking office of Raha bus and came out with a white man. PW4 called PW2 and told him that he had been unable to get a police officer. On 6<sup>th</sup> April, 2011 PW4 was told by PW2 that the driver whom he had seen with the motor vehicle had switched off his phone. PW4 identified the 2<sup>nd</sup> accused as the person whom he had seen driving motor vehicle registration No. KBN 197C.

32. PW5 was Hadson Murimi Mwangi. He stated that he was a director of V-Light (sic) Tours and Car Hire Company together with PW2 and 2 other directors. He testified that on 4<sup>th</sup> April, 2011 he was in the office when PW2 called him and told him that there was a customer who wanted to hire a vehicle. PW5 indicated that the said customer was the appellant whom he assisted to register, using copies of his identity card and driving licence. PW5 stated that the appellant hired the vehicle for 7 days but paid for 1 day. He promised to take the balance to them the following day because he was hiring the vehicle on behalf of a European.

33. PW5 further stated that the following day, PW4 called and told them that he had seen the vehicle in Nairobi, yet the appellant had told them he was going to operate along Malindi. They learnt that the 2<sup>nd</sup> accused is the one who had the vehicle in Nairobi. They asked for payment from the 2<sup>nd</sup> accused who was also their client but he refused to cooperate. They reported the issue to Changamwe Police Station. He stated that the vehicle was never recovered.

34. No. 216316 Chief Inspector James Kimutahi testified as PW6. He indicated that while he was at work in Changamwe Police Station, he was instructed to investigate this case. He interrogated the appellant and established that he had signed an agreement for 7 days with V-Light (sic) Car Hire and Tour Company. He paid Kshs. 3,000/= for a day and was given motor vehicle registration No. KBN 197C, saloon car. PW6 established that the appellant never paid the balance. He also never returned the vehicle on 11<sup>th</sup> April, 2011 as he was expected to do because he alleged to have handed over the said vehicle to the 2<sup>nd</sup> accused. PW6 indicated that was not one of the terms of the agreement between the appellant and the complainant. PW6 produced exhibits in the lower court in support of the prosecution's case. He indicated that the motor vehicle was never recovered.

35. In his sworn defence, the appellant stated that he was a transporter. He denied the charge facing him and said that on 2<sup>nd</sup> April, 2011 the 2<sup>nd</sup> accused called him and told him to request and book a taxi for car hire from a place where the appellant usually booked vehicles. The appellant stated that he had known the 2<sup>nd</sup> accused for 5 years and had no fear of booking for him the vehicle. He testified that he called the offices of V-Light (sic) Tours and Car Hire where he met PW2 who told him all the vehicles were booked for the weekend until Monday. The appellant further stated that the 2<sup>nd</sup> accused told him to book a white vehicle which should not have tracking gadgets as his client, a white man, who was going to use it had been traced by his co-associates and did not want to use his personal car. The appellant indicated that the 2<sup>nd</sup> accused told him that the white man had married his cousin and they were to use the vehicle within North and South Coast of Mombasa and nowhere else for a period of one week. The appellant stated that he gave the details to PW2 who told him that daily charges were Kshs. 3,000/= and for a week it was Kshs. 21,000/=. He indicated that instead of sending to him the whole amount, the 2<sup>nd</sup> accused sent him Kshs. 3,000/= through Mpesa, which the appellant sent to PW2 and that he promised to pay the balance after he returned from Malindi in the evening.

36. The appellant claimed that at first he refused to sign the contract but the 2<sup>nd</sup> accused called him and told him to sign on his behalf and that after paying the balance he would cancel the contract and sign it in his name. The appellant said he took the vehicle and the 2<sup>nd</sup> accused told him to take it to GPO parking yard and hand the keys to a soldier by the name Salim Muyanga who would give them to one David Njuguna Kang'ethe whose original ID was there (sic). The appellant said he declined to hand over the keys to Salim Muyanga and locked the vehicle. At 3:10 p.m., the 2<sup>nd</sup> accused went where the appellant had gone to take coffee. He showed him the vehicle and on enquiring from him as to why he wanted the appellant to leave the vehicle to a person whom he did not know, he kept quiet.

37. Further in his defence, the appellant indicated that the 2<sup>nd</sup> accused never returned the car or paid PW2 the balance of Kshs. 18,000/= but started dodging him. He explained how in the company of police they tracked the 2<sup>nd</sup> accused to Nakuru where he was arrested and brought to Mombasa where he and the appellant were jointly charged with the offence.

38. The appellant called 2 witnesses. The first one was No. 235028 Chief Inspector Maria Mueni who testified as DW2. At the time when the motor vehicle in issue went missing, she was working at Nakuru sub-county. Her testimony was that she assigned 2 police officers to track the 2<sup>nd</sup> accused who had allegedly stolen a car from the appellant herein. She stated that she verified that the information given by the appellant was true and after doing so, she agreed to assist him. She stated that the 2 police officers tracked the cell phone for the 2<sup>nd</sup> accused and he was arrested by PC Muchiri, PC Mwachi and Senior Sergeant Keya of Criminal Investigations Unit.

39. DW2 further said that after the 2<sup>nd</sup> accused was taken to her, he agreed that he had the vehicle which he claimed was in Mombasa. She gave the appellant 2 police officers to escort the 2<sup>nd</sup> accused to Central Police Station, Nairobi. DW2 further stated that after speaking to the OCS Changamwe Police Station, she ordered for the 2<sup>nd</sup> accused to be handed over to PC Miler who was handling the case.

40. DW3, George Kuria Wairimu a resident of Migadini stated that on 18th July, 2011 he, the appellant and PW2 left Mombasa for Nairobi. He was driving. They arrived in Nairobi on 19th July, 2011. They picked 2 police officers from Central Police Station, Nairobi and traveled to Nakuru where they went to the Central Police Station there. DW3 was left in the vehicle as the appellant and PW2 went inside the said police station. After some time, the two came out and told him that the signals indicated that the person who was to be arrested had not reached Nakuru. They slept overnight in Nakuru. The following day he gave out the car he was driving to one of the police officers to go for a search. In the evening they were told the person had been arrested (2<sup>nd</sup> accused). They went to see him. The following day they were given a police officer from Nakuru to escort the 2<sup>nd</sup> accused to Central Police Station, Nairobi. On reaching there, he was handed over to another police officer who escorted them to Mombasa. DW3 stated that along the way, he heard the 2<sup>nd</sup> accused being asked where he had taken the

vehicle. He said he would explain where it was.

## **ANALYSIS AND DETERMINATION**

41. The duty of the 1<sup>st</sup> appellate court is to analyze and re-evaluate the evidence adduced before the Trial Court and come to its own logical conclusion. An appellate court must however bear in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact.

42. Mr. Muthomi conceded to this appeal. Irrespective of the said fact, this court has the duty to analyze the evidence and either concur with the views of the appellant's Counsel and the Prosecution Counsel or hold a different view.

**The issue for determination is if the appellant stole the motor vehicle in issue.**

43. The definition of stealing under Section 268 of the Penal Code is as follows:-

***“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use for any person, other than the general or special owner thereof, any property, is said to steal that thing or property.***

***(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say-***

***(a) an intent permanently to deprive the general or special owner of the thing of it;***

***(b) an intent to use the thing as a pledge or security;***

***(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;***

***(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of 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 to 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.***

***(3) When a thing stolen is converted, it is immaterial if it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.”*** (emphasis added).

44. It is not disputed and the appellant admits to having signed a contract for a self drive car registration No. KBN 197C Toyota Corolla NZE with Vilight Tours and Car Hire Limited. PW2 and PW5 testified that when the appellant signed for the vehicle he said he was taking it for a third party but he did not disclose the name of the person. Instead of paying for 7 days' car hire, the appellant paid for 1 day and undertook to pay the balance the following day. The appellant shifted the blame in the theft of the motor vehicle to the 2<sup>nd</sup> accused. He claimed to have signed for the vehicle on his behalf.

45. His Counsel submitted that the appellant spent a great deal of time and expense in trying to trace the 2<sup>nd</sup> accused. The appellant cannot be said to have spent a great deal of time and expense as he is the one who signed for the car he took. Mr. Muthomi submitted that the appellant went out of his way to trace the 2<sup>nd</sup> accused but that cannot be so. He was under obligation to return the vehicle to the company which had hired it out.

46. From his defence, the appellant heaped all the blame in regard to the loss of the motor vehicle to the 2<sup>nd</sup> accused. There are some pieces of evidence that act against the appellant. Although he stated that he signed for the vehicle on the request of the 2<sup>nd</sup> accused, there is a part of his defence statement that does not add up. He stated that he signed for the vehicle at 1:30p.m., at Vilight Tours and Car Hire Limited and handed it over to the 2<sup>nd</sup> accused on the same day, the 4<sup>th</sup> April, 2011, at GPO parking yard, Mombasa. Taking into account that the 2<sup>nd</sup> accused was in Mombasa on 4<sup>th</sup> April, 2011 nothing stopped him from going to the offices of Vilight Tours and Car Hire Limited in Changamwe to sign the car hire agreement. The 2<sup>nd</sup> accused was known by PW2 and PW5 as their client. The appellant could not have been as gullible as he would want this court to believe. He was seasoned in the business of hiring vehicles. He had been a customer for Vilight Tours and Car Hire Limited for 5 years. Another reason which makes this court believe that the appellant was complicit in the theft of the motor vehicle is that when he went to hire the motor vehicle, he was specific that he wanted a white motor vehicle with no tracking device. One does not have to be a Rocket Scientist to decipher the reasons that would compel a person to request for a motor vehicle with no tracking device. The sinister motive of the appellant came out vividly when he made the said request. Further, the appellant never disclosed that the person he was taking the vehicle for, was the 2<sup>nd</sup> accused. He told PW2 he was taking it for a 3<sup>rd</sup> party. He told PW5 that he was taking the vehicle for a European. It can be safely concluded that he acted in concert with another person or others to fraudulently convert the motor vehicle in issue.

47. The 2<sup>nd</sup> accused was seen driving the motor vehicle in Nairobi on 5<sup>th</sup> November, 2011. According to the evidence of PW2 and PW5, the motor vehicle in issue was not supposed to be driven past North Coast and South Coast. PW5 stated that the contract was for a self-drive vehicle and that days turned into several months without the motor vehicle being returned. The conduct of the appellant which this court has outlined above does not come across as that of an innocent man. He only started making earnest efforts to trace the 2<sup>nd</sup> accused after he was arrested and charged in court on 26<sup>th</sup> April, 2011.

48. The argument by the appellant's Counsel and Mr. Muthomi that the appellant should be absolved from blame because he told PW2 and PW5 that he was taking the car for a 3<sup>rd</sup> party cannot hold. The defence that the appellant had been informed by the 2<sup>nd</sup> accused that he would go to Vilight Tours Car Hire Limited to pay the balance of the car hire charges and cancel the contract he had signed and enter into a new one, cannot hold. Since the appellant signed the contract for the vehicle he is culpable for its loss.

49. It is the finding of this court that even in the absence of investigation of the phone data record between the appellant and the 2<sup>nd</sup> accused, the evidence against the appellant was overwhelming. I concur that the Trial Court misdirected itself by stating that PW2 was not informed by the appellant that he was taking the vehicle for a 3<sup>rd</sup> party. That in itself cannot vitiate the conviction against him.

50. This court will not comment about the culpability of the 2<sup>nd</sup> accused who was acquitted as there was no appeal filed against him by the DPP before this court. It is the finding of this court that the prosecution proved its case beyond reasonable doubt and the appellant was properly convicted.

51. This court notes that the appellant absconded court as from 27<sup>th</sup> November, 2018. A warrant of arrest was issued on 4<sup>th</sup> December, 2018. The Judgment was read in his absence on 19<sup>th</sup> December, 2018 and he was sentenced to 3 years imprisonment. He was arrested and taken to court on 25<sup>th</sup> February, 2019. The said fact of disappearing from court could not have endeared him to the Trial Court. Since the appellant's sentence was meted out in his absence, he was not given a chance to mitigate. In his submissions to this court, he still denied having committed the offence and expressed no remorse.

52. This court notes that the appellant is an elderly man of 67 years who suffers from diabetes. His medical notes were produced before the Trial Court in the course of the proceedings in the said court. If this court upholds the sentence of 3 years imprisonment there is a possibility that the appellant might be unable to go to Coast Province General Hospital for treatment due to the current Covid-19 pandemic. For the said reason, this court reduces the sentence imposed against the appellant to the period he has already served. The appellant shall therefore be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DELIVERED through Teams online platform, DATED and SIGNED at MOMBASA on this 12th day of May, 2020.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present

Mr. Obara holding brief for Mr. Wamotsa for the appellant

Ms Valerie - Prosecution Counsel for the DPP

Mr. Mohamed Mahamud - Court Assistant.