

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL E258 OF 2022

JOSEPH NJUGUNA.....APPELLANT

WACHIRA

VERSUS

REPUBLIC.....

.....RESPONDENT

[Appeal from the judgment in Milimani Chief Magistrates Criminal Case No. 872 of 2018 by E. Kimilu, Senior Principal Magistrate, delivered on 3rd August 2023]

JUDGMENT

1. The appellant was adjudged guilty of stealing a motor vehicle contrary to section 278A of the **Penal Code**. He was fined Kshs 500,000 in default to serve three years in prison.
2. The particulars were that on the night of 5th and 6th May 2018 at Brits Freighters Parking Yard in Bahati Estate, Buru Sub-County within Nairobi County, jointly with others not before the court, he stole a motor vehicle registration number KCJ 361M prime mover make Mercedes Actros valued at Kshs 6.5 million the property of Brits Freighters Limited.
3. The appellant was aggrieved and lodged the petition of appeal dated 5th September 2023. It raises *six* grounds but which I will compress into *four*. Firstly, that the learned trial

magistrate erred by relying on the evidence of his co-accused. Secondly, that her analysis was contradictory by stating that the accused stole the vehicle from Bahati Estate when there was overwhelming evidence that he was not there. Thirdly, that the evidence was at variance with the charge sheet; and, fourthly, that the prosecution failed to prove the charge beyond reasonable doubt.

4. The appeal is contested by the Republic through grounds of opposition dated 2nd October 2025. In a synopsis, the State contends that all the elements of the offence were proved beyond any reasonable doubt; and, that the appeal is hopeless.
5. The appellant filed detailed submissions dated 4th December 2025. The Republic replied through submissions dated 23rd January 2026.
6. On 29th January 2026, learned counsel for both parties informed the court that they were relying entirely on those submissions and prayed for a date for judgment.
7. This is the first appellate court. I have reappraised the evidence and records and drawn independent conclusions.

There is a caveat because I neither saw nor heard the witnesses. **Pandya v Republic** [1957] E.A. 336, **Okeno v Republic** [1972] E. A. 32, **Njoroge v Republic** [1987] KLR 19.

8. It is a truism that the legal burden rested squarely on the Republic. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332. I will now highlight the key evidence at the trial to determine whether the prosecution proved the charge to the required standard.

9. PW1 was *Patrick Kibanya*, a director and shareholder of Brits Freighters Limited, the owners of the motor vehicle registration number KCJ 361M a prime mover make Mercedes Actros (hereafter the vehicle). The head of the trailer (usually referred to as the prime mover) was disconnected from the trailer and driven from the company's yard at Bahati to Embakasi behind Transami Enterprises. He was emphatic that the journey was unauthorized by the company.

10. The vehicle had been parked at Bahati by *Peter Wanjiru* (PW2) who left its keys hanging on a board in the manager's

office and confirmed by the guards. That was on 5th May 2018. He was thus surprised to receive a call at 6:00 a.m., the following morning from one of the guards, *Onesmus Kioko*, (PW3) enquiring about the whereabouts of the prime mover.

11. When the vehicle was located through digital tracking, its number plates had been plucked out but were recovered hidden under a bed. *Brian Kario Mwai* (PW4) testified in detail how Retriever Company Limited, globally known as *Cartrack*, generated a report tracking the movement of the vehicle from Bahati at 3:19 a.m. on 6th May 2018 until it stopped in Embakasi at 4:29 a.m.
12. PW1, whose mobile device was connected to the tracking service, got in touch with *Sgt Oscar Mutinda* (PW6) of Parklands Police Station. He, together with his colleagues *Cpl Tirop*, *PC Juma* and *Cpl Njagi* located the stolen vehicle and arrested a Tanzanian national, *Mrisho Kambi* (accused 1) and *Frank Ondwasi* (accused 3) at the yard. When *Mrisho* opened his house at the yard, the missing number plates and car keys were recovered. Upon interrogation, he said the

vehicle was driven in by someone he knew as *Njuguna* and with whom they had spoken (appellant/accused 4). The 3rd accused equally stated that the vehicle was driven in by the appellant.

13. The appellant was arrested by *PC Mureithi* and *I.P. Kathurima* and handed over to the investigating officer (PW9). The scene at Embakasi was processed and photographs taken by *PC Balesa* (PW7). From the call data produced by *Cpl Gerald Kamwaro* (PW9), the appellant's mobile phone number 0717***429 was tracked moving along Mombasa Road towards Transami where the lorry was found. On 6th May 2018 at around 3:40 a.m., he called *Mrisho* on 0720***678 while in the locality of NextGen. At 4:13 a.m. on the same night he called *Mrisho* again at Transami area where the vehicle was recovered.

14. When the appellant was placed on his defence, he protested his innocence. He said he is a director of Njoru Enterprises and lives in South C. In his sworn evidence, he stated that on 5th May 2018, he left his house at 8:00 a.m. He spent the evening at various drinking spots in Nairobi

West and Karen. Some of the people with him were senior policemen or notable politicians and they drunk until 4:00 a.m. He denied knowing the 1st or 3rd accused or having anything to do with the stolen vehicle. He added that he was neither familiar with Bahati area nor licensed to drive a trailer.

15. But part of his evidence in chief is telling. He said-

I had my own phone when I parted with Mutai Alfred. From Karen, I drove towards South C, T-Mall, Nairobi West. My phone can confirm my movement. I met Mrisho and did not even take ten minutes. I drove to my house. I am not familiar with Bahati area. I have never been to those areas.

16. In cross examination, he conceded as follows-

I interacted with the 1st accused when I visited with Alfred Mutai. I had known Mrisho for one year and 3rd accused....on 6/5/2018 Alfred Mutai talked to me to speak to Mrisho while inside my motor vehicle...I never called Frank [3rd accused] to inform him about a motor vehicle. I called him when heading to church about a spare part...

17. On the date of his arrest, the police blocked his vehicle, disarmed him and booked him at Parklands Police Station.

He claimed the 2nd accused paid the police Kshs 80,000 to

have him arrested. He denied going underground or switching off his phone. In his words: *“The officers who testified never interrogated me. I was just presented to court after money changed hands”*.

18. Upon reappraisal of the evidence, I disagree with the appellant that the burden of proof was shifted to him; or, that his defence was disregarded. On the contrary, his entire defence was a sham. In parts of his defence he distanced himself from knowing the 1st, 2nd or 3rd accused. Yet in others or under the cross, he admitted knowing them for a period of time, albeit through business associates. On the material night, call data placed him at the *locus in quo* and in communication with *Mrisho* (1st accused) and *Ondwasi* (3rd accused).

19. I have kept in mind, that the charge facing the appellant was that in concert with others not before the court, he stole the vehicle. He did *not* have to *drive* it himself. But in this case there is the clear evidence of the 1st and 3rd accused that he was in control and *delivered* the vehicle to Transami and told the 3rd accused he would collect

it later. The garage belonged to the 2nd accused. The number plates were then plucked out and hidden under the 1st accused's bed.

20. It was never the appellant's case that the vehicle belonged to him. He and his accomplices intended to permanently deprive the owner of it. It was obviously property capable of being stolen. Those are the primary elements of the offence.

21. I have also kept in mind the danger of relying on the evidence of the 1st, 2nd and 3rd accused. But that is not the only incriminating evidence. For instance there is the additional *call data* showing communication with *Mrisho* (1st accused) and that the appellant was travelling along Mombasa road towards the *locus in quo*. He also communicated with *Ondwasi*, the 3rd accused early on Sunday, 6th May 2018. *Mrisho* and *Ondwasi* were arrested that very morning at Embakasi where the vehicle was recovered.

22. In addition, the appellant in his sworn evidence that I quoted above admitted that on the material night, he met

Mrisho and did not even take ten minutes. He thus unwittingly corroborated the 1st accused's evidence that he met the appellant at the yard in Embakasi. He also admitted that he called Frank (3rd accused) early that Sunday "*when heading to church*". I thus do not believe the appellant that he was tucked far away in Karen drinking with senior police officers and politicians the whole night of 5th and 6th May 2018.

23. I do not also believe his version that he was set up by the police or the 1st and 3rd accused. Tellingly, he never called any of the witnesses he was drinking with or whose names he gave to the trial court. His *alibi* was a red herring. I have no clear evidence that he went underground after the offence. But it was a little too convenient that upon the arrest of the 1st and 3rd accused, the appellant went to Nyeri until 7th May 2018.

24. In the end, I concur with the learned trial magistrate that the prosecution marshalled sufficient evidence that proved *all* the elements of theft of a motor vehicle beyond reasonable doubt. I equally find that the totality of the

evidence was *not* at variance with the *amended* charge sheet read out on 25th April 2019.

25. Regarding the *sentence*, I find that that there is *no* appeal on the fine imposed or the default sentence. There is also no *cross-appeal* by the Republic. I will accordingly let the matter rest.

26. The upshot is that the entire appeal is devoid of merit and is hereby *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 12th day of March 2026.

KANYI KIMONDO
JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

Appellant.

Ms. Njeri Kariuki for the appellant instructed by Onesmus Githinji & Company Advocates.

Ms. W. Awino for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.