**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: G.B.M. KARIUKI, J. MOHAMMED & KANTAI, JJ.A.)**

**CRIMINAL APPEAL NO. 281 OF 2012**

**BETWEEN**

**AUGUSTINE GICHANE CHEGE….....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Ochieng, J.) dated 1st February, 2012*

*in*

*H.C.CR.A No. 528 OF 2009)*

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**JUDGMENT OF THE COURT**

## Background

1) This is a second appeal by ***Augustine Gichane Chege***, *(hereinafter referred to as the appellant)*, who was charged with one count of robbery with violence contrary to ***Section 296 (2) of the Penal Code***. The particulars of the offence were that, "*on the 9th day of November, 2004 at Ruiru in Thika District within Central Province, jointly with others not before court, being armed with dangerous weapons namely pistols robbed* ***MICHAEL KARIUKI NJOROGE*** *a motor vehicle Reg. No. KAR 974W a Toyota Hiace valued at Kshs. 1.2 million, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Michael Kariuki Njoroge*".

2) After the trial at the Chief Magistrate's Court in Nairobi the appellant was convicted and sentenced to death after the trial court found that the prosecution had proved its case against the appellant beyond reasonable doubt. Aggrieved by the decision of the trial court, the appellant filed an appeal in the High Court. Upon hearing the appeal, the High court quashed the conviction and set aside the sentence and ordered a retrial by another magistrate of competent jurisdiction.

3) The matter went before the Chief Magistrate's Court for a retrial and at the conclusion of the retrial, the

learned Magistrate, ***(E C. Cherono),*** found that the evidence on record proved that the appellant was guilty of handling stolen property contrary to ***Section 322*** of the ***Penal Code***, convicted and sentenced him to 12 years imprisonment.

4) Aggrieved by the said decision, the appellant filed an appeal in the High Court but the learned Judge, ***(Fred A. Ochieng, J),*** found the appeal devoid of merit and dismissed it. The appellant, aggrieved by that decision preferred this appeal.

The appellant has challenged the decision of the learned Judge on several grounds as outlined in his Memorandum of Appeal. Those grounds can be summarized as follows:

> ***(a) That the charge sheet was defective contrary to section 214 of the Penal Code;***
>
> ***(b) that the trial was not conducted by a qualified person contrary to section 85 (2) and 88 (1) of the Criminal Procedure Code.***
>
> ***(c) that vital witnesses were not called to testify;***
>
> ***(d) that the appellant's defence was rejected without due cogent reasons contrary to Section 169 of the Penal Code.***

**Submissions**

5) In his submissions before us, the appellant who was unrepresented relied on his written submissions. He argued that the charge preferred against him was defective in that the charge sheet clearly indicated that the complainant was one

***MICHAEL KARIUKI NJOROGE*** yet the person who adduced evidence as PW1 was ***MICHAEL WAINAINA MUNGAI.*** According to the appellant, the evidence adduced was at variance with the particulars of the charge; that his fundamental rights were violated in that he was taken to court after 15 days; that the learned Magistrate erred in convicting him on charges of handling stolen property without seeing the motor vehicle; and that the motor vehicle alleged to have been stolen by the appellant and the owner of the alleged motor vehicle were not produced in court; that the members of the public who arrested him before being arrested by PW2 were critical witnesses who would have enabled the court arrive at a fair conclusion yet they were not called to testify; that prosecution did not prove its case beyond any reasonable doubt to sustain his conviction; and that the prosecution evidence was contradictory, inconsistent and uncorroborated.

*6)* ***Ms Maina***, the Principal Prosecution Counsel, representing the State, opposed the appeal. She submitted that the charge sheet is not defective in that there is no variance between the charge sheet and the evidence adduced in court; that ***Michael Kariuki Njoroge*** was the driver while the owner of the motor vehicle was ***Michael Wainaina Mungai***; that the trial was conducted by a qualified person, an Inspector of Police; that there was, therefore, no prejudice and that the appellant was positively identified by PW3.

7) On the issue of the appellant's defence not being considered, counsel submitted that the Court found that the appellant was arrested at the scene of the crime after being beaten by a mob. Counsel urged us to dismiss the appeal.

**Analysis and determination**

8) This is a second appeal and by dint of ***Section 361 (1) (a) of the Criminal Procedure Code***, this Court has jurisdiction to consider only matters of law. It is also trite law that a second appellate court cannot interfere with the concurrent findings of the two courts below unless such findings are based on no evidence.

This Court stated this principle in ***KARINGO V R, [1982] KLR 213*** at page 219 in the following words:

> ***"A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did".***

9) We have carefully considered the record of appeal, the rival submissions by the parties and the law. The appellant has argued that the charge sheet is defective.

***Section 214*** of the ***Criminal Procedure Code*** provides:

> ***"214(1) where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case".***

10) The appellant referred us to the charge sheet where the person indicated as the owner of the alleged stolen motor vehicle was not the witness who testified as PW1. We note that the owner of the stolen motor vehicle was one ***MICHAEL KARIUKI NJOROGE*** while the person who adduced evidence as PW1, was one ***MICHAEL WAINAINA MUNGAI.***

11) From the record, the alleged defect in the charge relates to the fact that the person who was driving the motor vehicle at the time it was stolen was ***Michael Kariuki Njoroge***. The prosecution cited him as the complainant in the charge sheet. The motor vehicle was, however, owned by ***Michael Wainaina Mungai***, who produced a logbook to prove ownership of the said motor vehicle. The learned trial magistrate found that there was no variance between the charge and the evidence adduced.

12) This court in the case of ***ISAAC OMAMBIA V REPUBLIC, [1995] eKLR,*** emphasized the need for the substance of the charge to be stated when it stated: -

> ***"In this regard, it is pertinent to draw attention to the following provisions of*** *S. 134 of the Criminal Procedure Code* ***which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence".***

13) In the recent case of ***Nyoro Kimita & Another -v- R., CR. No. 187 of 2009***, this Court cited with approval the decision of the Supreme Court of India in the case of ***WILLIIE (WILLIAM) STANLEY V STATE OF MADHYA PRADESH,***

***[A.I.R. 1956 Madras Weekly Notes 391]***, in which the Court held that:

> ***"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent".***

14) As regards irregularities in the framing of the charge, their Lordships opined that:

> ***"Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities".***

In the ***Nyoro Kimita*** case (supra), this Court stated:

***"We endorse these statements fully. As a court of law, we should not be hyper technical. We should strive to do substantive justice in each case. That is a command to us from Article 159 of the Constitution. We should, however, not ignore the requirements of the law. With regard to the issue before us, Section 134 of the Criminal Procedure Code requires in mandatory terms that every charge should be precise and abundantly clear to the appellant. It provides that:***

***18) Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".***

15) In the circumstances of this appeal, we are satisfied that the appellant knew the offence that he was charged with and particulars thereof. He, therefore, understood the charge against him to be that on the material date, he handled stolen property *viz* a motor vehicle. The variance in the names of the driver and the owner was satisfactorily explained. Accordingly, this ground of appeal fails.

16) On the issue whether the prosecution was handled by an unqualified person, the learned Judge relied on ***Section 85 (2)*** of the ***Criminal Procedure Code*** which provided:

***"The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service to be a public prosecutor for the purposes of any case".***

This power now vests with the Director of Public Prosecutions by virtue of The Statute Law (Miscellaneous Amendments) Act, 2012.

17) The learned Judge found that as at the time when the appellant was prosecuted, the law no longer limited the Attorney General to appointing as a Public Prosecutor, a Police Officer whose rank was not below that of an Assistant Inspector. The record shows that on all the material dates the prosecutor was a Chief Inspector. Accordingly, at no time was the prosecution handled by an unqualified person. This ground of appeal also fails.

18) On the issue that vital witnesses were not called, we the possible materiality of their evidence was not shown nor that there was oblique motive in not calling them.

In ***Mwangi v R. [1984] KLR 595*** this Court stated with regard to this point:

***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive".***

19) On the issue that the appellant's defence was neither considered nor displaced, the record indicates that the learned Judge carefully evaluated the evidence and found that:

***"The suspects' photographs were taken at the scene. The vehicle was also photographed. The said photos together with the logbook established not only the existence of the vehicle in question but also its ownership, and the nexus between the appellant and the said vehicle.***

***As the appellant was driving the vehicle a few hours after it had been stolen, his conviction was based on sound evidence.***

***The said evidence was so overwhelming that the appellant's alleged alibi did not cast any doubts on it".***

20) The learned Judge also found that the failure by the appellant to raise his alibi defence at an early stage of the trial implied that it was an afterthought. Photographic evidence taken by PW 3 placed the appellant at the scene. PW 3 testified that the appellant was driving the motor vehicle when it was

intercepted and that he never lost sight of the appellant until he was arrested. There was therefore a clear link between the appellant and the stolen motor vehicle.

21) On the issue that the prosecution case was not proved, we find that from the record, the ingredients of the offence of handling stolen property were proved by the prosecution beyond reasonable doubt.

22) From the record, we find the evidence of PW 1and PW 3 was consistent and their testimonies corroborative.

23) We are satisfied that the findings of the trial court and the High Court were based on sound evidence. In the circumstances, there is no basis for interfering with those findings.

Accordingly, we dismiss this appeal in its entirety.

***Dated and delivered at Nairobi this 31st day of March, 2017.***

***G.B.M. KARIUKI, SC***

**.....**

***JUDGE OF APPEAL***

***J. MOHAMMED***

**.....**

***JUDGE OF APPEAL***

***S. ole KANTAI***

**.....**

***JUDGE OF APPEAL***

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**