IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU & ONYANGO OTIENO, JJ.A)

CRIMINAL APPEAL NO. 295 OF 2005

BETWEEN

KAMAU JOHN KINYANJUI ……...……. APPELLANT

AND

REPUBLIC ……...……...……. RESPONDJENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Kubo, Kimaru, JJ) dated 24th September, 2004

In

H.C. Cr. A. No. 544 of 1999)

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JUDGMENT OF THE COURT

On 19th July, 1996, Kamau John Kinyanjui, the appellant in the appeal before the Court, appeared before the then Chief Magistrate of Nairobi (Mrs. U. Kidula) charged on a total of twenty-three counts of theft by an agent contrary to ***section 283*** (c) of the Penal Code. The appellant denied all the charges and the Magistrate tried him on them, found him guilty on eighteen counts, convicted him on the said eighteen counts and sentenced him to pay a fine of Kshs.50,000/- on each count. For various reasons, the trial Magistrate had acquitted the appellant on counts one, two, ten, nineteen and twenty. Though the charge sheet purported to contain twenty three counts there was in fact no counts eighteen and nineteen, at least according to the charge-sheet we have in the record before us. How did those charges arise?

The appellant was an advocate of the High Court of Kenya at the time the events which formed the basis of the charges against him arose. We do not know if he is still a practising advocate, but our hope is that he is not. On 1st December, 1994, an accident occurred involving motor vehicle Registration No. GK N 970 an Isuzu Lorry belonging to the Prison Service. That vehicle was transporting prison officers along the Thika-Nairobi Road. Many of the officers lost their lives during the accident. In his capacity as an advocate of the High Court, the appellant somehow came to represent the interests of the estates of those who had died in the accident. The manner in which he took over the cases of the deceased persons was itself wholly questionable and we shall put it no higher than that, but that he did represent the interests of

the estate of the deceased persons was proved in the Magistrate's court beyond any reasonable doubts. He filed various cases in the High Court against the Attorney- General claiming compensation for the deaths of some of the prison officers who had died in the accident. He had no other connection with the people involved in the accident apart from the fact that he was acting on behalf of their respective estates as a practising advocate. The appellant did not say he was connected with the deceased persons in any other way which would have entitled him to make the claims on behalf of the deceased persons. Having filed some cases against the Attorney-General, the appellant then entered into negotiations with a State Counsel called D.M. Kinyanjui who was employed in the office of the Attorney-General; the appellant himself had previously worked with D.M. Kinyanjui in the office of the Attorney-General . The negotiations were for an out of court settlement. Prison Service falls under the Ministry of Home Affairs, Office of the Vice-President. The appellant made proposals to D.M. Kinyanjui for an out of court settlement. D.M. Kinyanjui wholly accepted the proposals and advised the Ministry of Home Affairs to settle the matter on the terms proposed by the appellant. It was said that D.M. Kinyanjui did not have the authority of the office or officers in the Attorney General to settle the matter in the way he did, but as far as the Court is concerned that fact was neither here nor there. The Ministry of Home Affairs accepted the advice given by D.M. Kinyanjui and two cheques, one dated 7th June, 1996 for Kshs.52,170,300/- and the other dated 18th June, 1996 for Kshs.23,439,300/-, were issued by the Ministry of Home Affairs and National Heritage in the appellant's name. The first cheque for Kshs.52,170,300/- was paid and the proceeds deposited in the clients' account maintained by the appellant. But immediately thereafter senior officers in the Attorney General's office raised questions and the second cheque was stopped before it could be paid out to the appellant. The police were informed, obviously by the office of the Attorney-General, and the police tried to freeze the account into which the proceeds of the first cheque, namely the Kshs.52,170,300/- had been deposited. The appellant outsmarted the police in their attempts to freeze the account and the appellant transferred the money from the client account to some other accounts only known to himself. When cross-examined before the trial court on the whereabouts of the money, the appellant told the Magistrate and we quote him:-

"-----. I transferred the money from that account [i.e. the clients' account] because I was the sole controller of the account and I was at liberty to remove the money from that account to any other that I chose. I am not saying I could use the money as I pleased only that I could transfer the money. I transferred the money partly to NBK, Harrambee Avenue. I can't recall account No. I also moved some to Co- operative Bank, Stima Plaza Branch. I don't remember the account number. The account numbers were under my own name in client's accounts. To NBK I transferred about 20 million while I transferred about nine to the Co-operative Bank. I decided to transfer this money because there were already moves to freeze my accounts at Haile Selassie. This money included monies other than the ones for the warders. I didn't tell the police where these monies were because I was intend (sic) on safe case (sic). It is not true that at the time the police came to me I had already stolen these monies. ----."

When asked to state where the proceeds of the cheque for Ksh.52,170,300/- were, the appellant's answer was:-

"-----. It is not true that I am saying I transferred the money to other accounts as an afterthought to cover up the fact of my being (sic) stolen the money. I don't have documents to show that I actually transferred the money to those banks. I have the documents or evidence elsewhere. I don't need time to get this evidence or documents as this is not necessary and I insist that I did transfer the money. I am saying that this is not necessary because the stage for accounting to the respective clients has not reached. -----."

Having been satisfied that the appellant had in fact received the Kshs.52,170,300/-, that the money was meant for his clients, whoever they might be, that the money was not in the clients' account where it had been deposited and that the appellant had adamantly refused to say where the money was, the Magistrate concluded that the appellant had in fact stolen the money and convicted him as we have stated. The appellant's first appeal to the High Court was rejected. That court held:-

"The Appellant also referred us to the Provisions of the Advocates' Act and the Advocates (Accounts)

Rules to support his contention that an Advocate-Client relationship is a special type of agency which has specific rules that governs (sic) it. He also referred to the Provisions of Civil Procedure Act and particularly Order III of the Civil Procedure Rules. After perusing the said Sections of the Law referred to us (sic), we do find that the fact that there is a different and Civil Procedure given by the Law to remedy a situation does not mean that where investigations have been undertaken and a criminal offence disclosed, the person found to have also contravened the criminal law cannot be charged with a criminal offence. In the instant case, it is our finding that the advocate-client relationship does not preclude the State from instituting criminal charges where it has been established that a criminal offence was committed. We, therefore, find the submissions by the Appellant to have no merit. The Appellant cannot hide behind rule to escape criminal liability when the same has been proved. The Appellant manifested his disregard for the said rules by transferring the funds from the clients' account to his own use in utter disregard of the self-same rules that he seeks to invoke in his aid.

After re-evaluating the evidence adduced by prosecution before the trial court and after hearing the submissions made on this Appeal, we find the prosecution did prove its case beyond any reasonable doubt. We find that the Appeal filed by the Appellant against conviction has no merit."

It is this conclusion by the superior court which has provoked the appeal now before the Court. Seven grounds of appeal are listed in the appellant's memorandum of appeal dated 6th July, 2006 filed on his behalf by Messrs Kinoti and Kibe Advocates. Those grounds are:-

> ***"I. THAT the learned Judges of the High Court erred and misdirected themselves in law in holding that the Estate Administrators in all the counts that the appellant was convicted of had the requisite*** *locus standi vis-à-vis* ***the estates of the deceaseds' in respect of which the said Estate Administrators gave evidence in the Chief Magistrate's Court which resulted on a unsafe, wrong and untenable judgment thereby occasioning the Appellant a miscarriage of Justice.***

2. ***THAT the learned Judges of the High Court erred and misdirected themselves in law in holding that notwithstanding that the Estate Administrators as named in the charge-sheet were not in possession of grants of letters of administration to the estates of the deceaseds' named in the charge sheet, the said Estate Administrators were properly constituted principals*** *vis-à-vis* ***the respective estates of deceaseds' named in the charge sheet, thereby arriving at an erroneous, wrong and untenable judgment.***

3. ***THAT the learned Judges of the High Court erred and misdirected themselves in law in holding that the entire prosecution was lawful and in upholding the conviction of the Appellant in view of the law that an intestate's property is not vested in any entity whatsoever before the grant of administration to an intestate's estate consequent to which the money the subject of the respective counts in the charge sheet were neither vested in the purported Estate Administrators nor in the police at any time, or at all, thereby occasioning the Appellant a miscarriage of justice.***

4. ***THAT the learned Judges of the High Court erred and misdirected themselves in law in holding that the chief witnesses who gave evidence in the Chief Magistrate's court were complainants notwithstanding that none of the alleged Estate Administrators had lodged or made a complaint at all with either the police or with any person or lawful authority whatsoever or even authorized and/or requested any person or authority to make and lodge any such complaint on their behalf or behest, (sic) and thus occasioned the Appellant a miscarriage of justice.***

5. ***THAT the learned Judges of the High Court erred and misdirected themselves in law in holding in effect that the police and (sic) complied with section 18 of the Police Act (Cap 84 of Laws of Kenya) and thus occasioned the Appellant a miscarriage of justice.***

6. ***THAT the entire prosecution of the Appellant in the Chief Magistrate's court and proceedings before the superior court were illegal and abuse of the criminal justice system.***

7. ***THAT the conviction of the Appellant was based on presumptions and circumstantial evidence not sufficient to justify any or any reasonable inference of guilt on the part of the Appellant."***

Mr. Kibe Mungai with his usual passion and vigour, argued these grounds before us on behalf of the appellant. Mr. Mungai, of course, appreciated right from the beginning that this being a second appeal the Court is only authorized to deal with issues of law. – See ***section 361*** of Criminal Procedure Code. The grounds of appeal which we have fully set out herein all concern issues of law. At the beginning of his submissions, Mr. Mungai told us that he would argue:-

Grounds 1 and 2 – together; Ground 3 on its own; Grounds 4 and 5 together and Grounds 6 and 7 together.

The main complaint of the appellant as we understand it was that the persons whom the prosecution treated as complainants and who were referred to as "*Estate Administrators*" in the charges did not possess the requisite legal status to be designated as "*Complainants*" because they had not obtained letters of administration to the respective estates of the deceased officers on whose behalf they purported to speak. Count number 3 in the charge sheet, for example, stated in its particulars that:-

"On diverse dates between the 7th June and 28th June, 1996 at Barclays Bank of Kenya, Haile Selasie Avenue Branch in Nairobi within Nairobi Area stole Kshs.2,337,500/- which had been received by him for and on account of Estate Administrators of TOM MBOYA ODIYO."

Tom Mboya Odiyo was one of the prison officers who perished in the traffic accident of 1st December, 1994. To support that charge the prosecution called James Odilo Paul Owiti (PW6) who was the father of Tom Mboya Odiyo. At the time he testified he had not obtained letters of administration to the estate of his deceased son. We have taken count 3 as an example but the same position obtained in respect of all the counts upon which the appellant was convicted. The appellant's contention is that witnesses such as James Odilo Paul Owiti had no ***locus standi*** to testify as complainants in the matter because they had not obtained letters of administration to the respective estates of the dead prison officers. It appears the appellant's position has been throughout the proceedings, that there being no persons who had obtained letters of administration to the respective estates, there was no legal person who could have complained either to the Attorney-General or to the police and therefore, his prosecution was illegal as being based on complaint, which had no complainant. The appellant, as we have seen admitted receiving the proceeds of the cheque for Kshs.52,170,300/- which he alleged he had transferred from his clients' account to another account or accounts. But he contended that in the absence of legal complainants as understood by him and his legal advisers, he was under no duty to account for that money either to the Attorney-General or to the police who questioned him about the money and eventually charged him over it. It also appears to us the appellant has always maintained that even in matters concerning the criminal law only a person who has obtained letters of administration to the estate of a deceased person can legally lodge a complaint with the police or the Attorney-General or with any other person or authority. The appellant relied on this Court's decision in **TOURISTIK UNION INTERNATIONAL & ANOTHER VS. JANE MBEIYU & ANOTHER**, Civil Appeal No. 145 of 1990 which was decided on the basis of ***section 82 (a)*** of the Law of Succession Act, **Cap 160**, wherein the question "**who is an administrator of the estate of a deceased person**?" within the meaning and intendment of the Act. The Court there said:-

"----. But as soon as a grant is obtained, the right or estate vests automatically and by the force of the grant in the administrator."

What the appellant and his legal advisers do not seem to appreciate is that the issue which was for determination in that case was who was entitled to bring a claim in court on behalf of the estate of a deceased person. But if a person be dead and another person, whether it be a relative, a neighbour, a friend or a total stranger goes and makes a report of a crime in respect of the estate to the police, the Attorney-General, or any other authority is the person reporting the alleged crime to be told by the person to whom the report is being made:-

"Before I can take action on your complaint, may I see, the letters of administration which you have obtained from a competent court? If you have not obtained letters of administration, go and obtain them first before you can report the alleged crime against the estate."

No sensible system of criminal justice can operate in that fashion. The fallacy in the appellant's argument lies in the fact that he is confusing the purpose of a criminal prosecution with the purpose of claim in civil litigation where the claimant gets the estate of a deceased person with rights pertaining thereto vested in himself or herself to distribute the assets or liabilities of the estate in accordance with the law. The person who reports an alleged crime to the police, the Attorney-General or any other person or authority does not, by merely reporting the alleged crime, acquire any rights with regard to the assets or liabilities of the estate. If the reported crime is proved in court and the perpetrator thereof is convicted and fined as was the case herein, the reportee does not benefit from the fine imposed. The fine goes to the State, not even to the estate of the deceased or the person reporting the crime. If the perpetrator is sentenced to a term of imprisonment, the reportee of the crime still gains no personal benefit except the satisfaction that a crime has been punished. That now brings us to the issue of the question:

Who is the "complainant in a criminal trial? Is he the victim of the crime?

We start from first principles and on that basis we cannot help but observe that all criminal prosecutions in Kenya, whether they be instituted by a private person or by the Attorney-General, are always headed:-

"**REPUBLIC, i.e. the REPUBLIC OF KENYA Versus THE ACCUSED PERSON**." It is the Republic which undertakes the prosecution for a crime on behalf of the victim of the crime and in doing so, the Republic is acting on behalf of all Kenyans. It is in the interest of all Kenyans that crime be punished and if the issue of punishing crimes was to be left to the victims of such crimes, there will be the question of whether the victims would be in a position to pay for the prosecution of the perpetrators of such crimes. To avoid such questions arising the Republic normally does the prosecution on behalf of the people and hence the title "**REPUBLIC Vs. THE ACCUSED PERSON**" and not **THE VICTIM OF THE CRIME VS. THE ACCUSED PERSON**".

As far as our researches are able to reveal, the nearest authority we came upon on the issue of who a complainant in a criminal trial is, was the Ugandan case of UGANDA VS. MILENGE AND ANOTHER, [1970] EA 269. The facts of that case are really not relevant to the issues at hand and we need not cite them but in the case the Court of Appeal for East Africa relied on the decision of the High Court of Uganda in the case of ARVI RATILAL GANJI, 6 U L.R 237. In ARVI's case, the accused person had been charged with the traffic offence of reckless driving. The case was fixed for hearing and on the hearing day an Inspector of police appeared for the prosecution. The main prosecution witness, although warned to attend, failed to appear in time at the trial and the Magistrate after calling upon the prosecution to prove their case which they could not do, proceeded to acquit the accused. The two judges of the High Court of Uganda, on appeal, held that the Magistrate's proper course was either to have adjourned the case or to have dismissed the charge under the provisions of ***section 197*** of the then Criminal Procedure Code of Uganda. In their judgment the two High Court judges had stated:-

"We think that the proper course for a magistrate where the crown case cannot be heard by reason of a total absence of witnesses is either to adjourn the hearing, or if that is for some reason impossible dismiss the charge unheard. We are aware that the Criminal Procedure Code does not precisely cover the present facts. But we think the position is analogous to that envisaged by Section 197 of the Criminal Procedure Code, i.e. the position which arises when the 'complainant' is absent. That section by the word 'complainant' probably means a private person who has made a complaint to the court. In the absence of this person clearly there can be no trial and no true joinder of issue. The court under these circumstances either adjourns or dismisses the charge.

It seems to us that the position is substantially the same where the Magistrate has before him merely a public prosecutor whose function is simply to conduct the case and to examine the persons who are the true informants. If the latter are absent and yet it is known that they are in existence and that their attendance can be secured, it seems to us little short of farcical to embark on a trial of the case and

to acquit the accused, the complaint against him being wholly unheard."

The Court of Appeal for East Africa basically accepted this position but went on to draw a distinction between ARVI's case and that of MILENGE. The Court of Appeal itself stated at page 275, letter B.

"The position, of course, was quite different in this case. Here the Public Prosecutor, a State Attorney, stated that all the witnesses were present and he was not proceeding with the case and he was not calling the witnesses. Section 202 is designed to cover the

case where a complainant does not appear but here the prosecutor and all his witnesses were present and clearly, in our view, Section 202 could not possibly apply."

We note from the remarks of both courts that at no stage do they refer to the victim of the crime as the complainant. Indeed the two judges of the Uganda High Court specifically say that the word "*complainant*" in ***section 197*** which was changed to ***section 202*** probably meant a private person who has made a complaint to the court. The provisions of ***section 89 (2)*** and ***(3)*** of the Criminal Procedure Code of Kenya allow private persons to make complaints to a magistrate and if such a complaint is accepted by the magistrate, the private person who has made the complaint to the magistrate and who must sign it (see ***section 89 (3))*** truly becomes the complainant. We pass to the provisions of ***sections 202***, ***203*** and ***204*** of the Criminal Procedure Code. Those provisions are in these terms:-

> ***"202. If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it is proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.***
>
> 203.***If at the time appointed for the hearing of the case both the complainant and the accused person appear before the court which is to hear and determine the charge, or if the complainant appears and the personal attendance of the accused person has been dispensed with under section 99, the court shall proceed to hear the case.***
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> 204.***If a complainant, at any time before a final order is passed under this part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused."***

Section 202 is in similar terms to the Ugandan provisions which the Uganda High Court and the Court of Appeal for East Africa were dealing with in the two Uganda cases we have cited. We also think that the use of the term "*complainant*" in that section probably refers to the private prosecutor who is permitted by a magistrate to conduct a private prosecution under ***section 89*** of the Code. We think so because, we cannot imagine that if a public prosecutor is present in court and has other witnesses apart from the victim of the crime, such a prosecutor would be debarred from calling such other available witnesses merely because the victim of the crime is not available at that particular time. The victim of the crime could, for instance, still be undergoing medical treatment as a result of the crime and is admitted in hospital. We are not aware of any provision which requires that the victim of the crime must be the first witness to testify in a criminal prosecution. Yet if the term "*complainant"* in ***section 202*** were to exclusively mean the victim of the crime, and he was served with summons to appear at a particular time and place but is absent, the court might well be forced to acquit the accused person. Of course, in respect of a private prosecutor, he is the one to conduct the prosecution and if he was absent, nobody would call his witnesses and examine them.

Again, looking at ***section 204***, can a victim of the crime without any reference to the public prosecutor

be allowed to withdraw a complaint which he originally filed with the police or with the Attorney-General? ***Section 176*** of the Code gives the court power to promote reconciliation and to encourage and facilitate settlement in respect of minor offences not amounting to a felony. But where an offence charged amounts to a felony, we do not think that the victim of the crime, if he is the complainant as used in the various sections, can be allowed to withdraw, on his own, the complaint. Our conclusion on this issue is that in cases being conducted by the Attorney-General on behalf of the Republic, the complainant is the Republic itself and not the victim of the crime. Of course the Republic as complainant would not go far in a prosecution if the victim of the crime does not co-operate and is unwilling to come and testify, but in such a case, the acquittal of the accused person will not be on the basis that the complainant is absent; it will be on the basis that no evidence or no sufficient evidence has been called to support the charge. The complaint of the Republic respecting the alleged criminality of the accused person would have failed. We repeat that except in those rare cases where the court has allowed a private prosecution, the complainant envisaged in the various provisions of the Criminal Procedure Code is always the Republic. That disposes of the appellant's contention that the various witnesses who testified on behalf of the "*Estate Administrators*" of the deceased warders had no **locus standi** in the matter because they had no letters of administration to constitute them into complainants. They were not complainants; the complainant was the Republic of Kenya and the Republic did not need letters of administration to institute the prosecution of the appellant. We accordingly reject grounds one, two , three and four contained in the appellant's memorandum of appeal.

Ground 5 deals with ***section 18*** of the Police Act, **Cap 84** of the Laws of Kenya. It was contended that those provisions were violated because no complainant went to any police station to make a complaint yet the appellant was charged. ***Section 18*** is in these terms:-

> ***"18 (1) Every police officer in charge of a police station shall keep a record in such form as the Commissioner may direct, and shall record therein all complaints and charges preferred, the names of all persons arrested and the offences with which they are charged.***
>
> 2. ***A copy of an entry in a record kept under subsection (1), certified under the hand of the police officer in charge of the police station to be a true copy, shall be admissible in evidence of its contents in all legal proceedings, and where a copy of an entry purports to be so certified it shall be presumed, until the contrary is proved, that the copy is so certified."***

We do not understand how this section was violated but it appears to us that the appellant and his legal advisers were contending that since the "*estate administrators*" did not report to the police, no-one else could have done so, or ought to have done so. That argument is wholly misconceived. We earlier on mentioned a State Counsel by the name D.M. Kinyanjui who worked in the office of the Attorney-General and with whom the appellant negotiated the out of court settlement. D.M. Kinaynjui worked under Valeria Onyango (PW 31) who was the Deputy Chief Litigation Counsel in the same office and also under M/s Muthoni Kimani (PW28), the Principal Litigation Counsel. They testified that they did not authorize and were unaware of the fact that the appellant was negotiating an out of court settlement with D.M. Kinyanjui. They then learnt that the Ministry of Home Affairs had issued cheques to the appellant. Valeria said she reported the matter to the Attorney-General who in turn instructed that the cheques be stopped. The second cheque was in fact stopped. Valeria told the Magistrate:-

"Settlements were to be approved by HOD and sanctioned in some cases by the Attorney-General. No such approval or sanction had been obtained. By this time, D.M. Kinyanjui had stopped coming to the office. I drew the attention of the Attorney-General to this matter. He directed that the two cheques be stopped. We sought help of the police to stop payment of the cheques as the ministry couldn't do so."

That must be the report on which the police acted. We are not aware that the Attorney-General or the officers under him cannot ask the police to investigate a matter. On the contrary, ***section 26 (4)*** of the Constitution specifically provides that:-

"***The Attorney-General may require the Commissioner of Police to investigate any matter which, in the***

Attorney-General's opinion, relates to any offence or alleged offence or a suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation."

Relatives of the deceased warders need not necessarily have reported to the police. The Attorney-General and his officers did so and Inspector George Maracha (PW33) said he was one of the police officers who carried out investigations into the case upon receipt of complaint from the office of the Attorney-General. It was never suggested to Inspector Maracha that they did not comply with the provisions of ***section 18*** of the Police Act. But even if the police did not do so, we do not see the relevance of that complaint. A report was made to the police and following investigations charges were laid. Witnesses were called before the Magistrate and testified. It is on the basis of the evidence given in the court that the appellant was convicted and not on the basis of what was or was not done at the police station. In our view, this complaint amounts to no more than that the Attorney-General ought not to have raised the matter . We reject that contention, and Ground 5 must also fail.

Ground 6 is also connected to ground 5 in the sense that since no report had been made to the police by the people who ought to have complained and who, in any case, had no capacity to complain, his prosecution amounted to an abuse of the criminal justice process. The appellant appeared to compare his case with that of **BENNETT VS. HORSE FERRY ROAD MAGISTRATES' COURT AND ANOTHER [1993] 3 ALL E.R 138**, wherein the appellant in the House of Lords was, for all practical purposes, abducted from the Republic of South Africa which did not have an extradition treaty with the United Kingdom, taken to the United Kingdom and upon arrival there was arrested by the police and then charged with some offence. The House of Lords held that the prosecution of the appellant would amount to an abuse of the court process, the appellant having been unlawfully taken to the United Kingdom by abducting him from South Africa. We have already rejected the appellant's contention that some law, whether the Police Act, or the Constitution, was violated by his prosecution. Ground 6 of the Grounds of appeal must also tail.

Lastly it was contended in Ground 7 that the conviction of the appellant was based on presumptions and circumstantial evidence which did not justify any or any reasonable inference of guilt. The appellant contended here that as there were no competent complainants or persons to whom he could account to for the Kshs.52,170,700/- he could not be asked to say where the money was and if asked, he was not obliged to account for it to anyone except to his clients. The clients for whose estate he acted, were dead and nobody had taken out letters of administration to their respective estates. *To whom was he to pay the money?* He still had the money somewhere and at an appropriate time he would account for it to those clients who obtain letters of administration. This contention is as strange as it is farcical. Right from the beginning, the appellant knew he was acting on behalf of dead people. But someone must have instructed him to act for the dead people. He did not demand from those who had instructed him that they show to him their letters of administration or that they obtain such letters. If the people on behalf of whom he acted had no capacity to receive the money in the first place, why did the appellant himself receive it? He himself was not hurt in the accident and merely because he was a lawyer did not, perse, entitle him to receive the money. He was receiving the money as a lawyer on behalf of his clients. For him to now turn around and claim that he did not know who those clients were and therefore, could not pay out the money is ridiculous and mischievous. He removed the money from the clients' account and hid it in a place only known to himself. No law entitles a lawyer to do that; if there was such a law, it would only encourage what Kenyans now constantly refer to as "*impunity*". In our considered view, there is no law which empowers an advocate to remove money which does not belong to him from his clients' account and hide such money in an account known only to the lawyer. That, with respect to the appellant, is stealing the money and as the money was received for and on behalf of the client, the theft is described as theft by an agent . Ground 7 of the grounds of appeal must also fail.

In our view, the appellant was convicted on sound evidence which proved beyond reasonable doubts the charges upon which he was convicted. The appeal against the convictions fails and we order that the appeal be and is hereby dismissed. The prison sentences which were lawful and have been served are also confirmed. Those are the Court's orders on the appeal.

Dated and delivered at Nairobi this 15th day of January, 2010

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.