



REPUBLIC OF KENYA



**Wachira & another v Republic (Criminal Appeal 46 & 51 of 2024  
(Consolidated)) [2025] KEHC 575 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 575 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 46 & 51 OF 2024 (CONSOLIDATED)**

**DR KAVEDZA, J  
JANUARY 29, 2025**

**BETWEEN**

**HUMPHREY MAINA WACHIRA ..... 1<sup>ST</sup> APPELLANT**

**KELVIN SIFUNA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 25th  
September 2024 by Hon. Temu (SPM) at Kibera Chief Magistrates' Court Criminal  
case no. E373 & E563 of 2023 Republic vs Humphrey Maina Wachira & Kelvin Sifuna)*

**JUDGMENT**

1. The appellants were jointly charged and convicted for the offence of stealing a motor vehicle contrary to Section 268(1) as read with Section 278A of the *Penal Code*. The facts as per the charge sheet are that on the 21st day of February 2023 near Hilton hotel along Mama Ngina Street within Nairobi county jointly and with others not before court stole a motor vehicle registration number KCZ 766U Toyota Voxy silver in colour valued at Kshs 1,550,000 the property of Joan Wanja Njoka. They were each sentenced to serve seven (7) years imprisonment to run from the date of plea.
2. Being aggrieved, they each filed separate appeals which were later consolidated by this court. The coalized grounds of appeal are as follows: The appellants challenged the totality of the prosecution's evidence against which they were convicted. The appellants contend that their identification was not proper. In addition, there was no evidence linking the appellants to the offence. Finally, the sentence meted out was harsh and excessive.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence before



the trial court, and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. The prosecution's case was as follows. Joan Wanja Njoka (PW1), director of Elegant Company and engaged in car hire services, testified that on 21 February 2023, her employee, Daniel Onyango Orote (PW3), arranged for the hire of her Toyota Voxy, registration number KCZ 766U, at a fee of Kshs 11,000. PW3 later confirmed the hire documents were signed, and the vehicle was handed over to the clients by 8:00 PM.
5. Using a tracking system, PW1 verified the vehicle's location in Nairobi on 21 February 2023 and confirmed its presence in Amboseli National Park on 22 February 2023. However, the tracker ceased to function on 23 February 2023, and attempts to contact the clients were unsuccessful. PW1 instructed PW3 to follow up, but the clients' phones were off. She reported the matter to Kilimani Police Station. PW1 valued the vehicle at Kshs 1,550,000 and presented supporting documents, including the Mpesa payment record, hire agreement, and tracking system chart.
6. PW3 testified that the 1st appellant, Humphrey Wachira, contacted him on 21 February 2023 to hire the vehicle. The agreed payment of Kshs 11,000 was made via Mpesa, and the 1st appellant signed the hire agreement, providing his details as the driver. Accompanied by an individual named Mark, the 1st appellant met PW3 in Nairobi's CBD and took possession of the vehicle, stating it would be used for a trip to Amboseli. On 22 February 2023, the 1st appellant called PW3 to confirm they had arrived at Amboseli. This was corroborated by the vehicle's tracking data. However, the tracker went offline on 23 February 2023, and the 1st appellant's phone became unreachable. A friend in Amboseli later informed PW3 that the group had left for other accommodation.
7. Realising the vehicle was missing, PW3 informed PW1, and the matter was reported to the police. On 24 February 2023, the 1st appellant's phone was reactivated, allowing PW3 and police to locate him on Tom Mboya Street. PW3 detained the 1st appellant, who was then re-arrested by the police.
8. CPL Joash Ombati (PW4), the investigating officer, testified that after the report was filed, he tracked the 1st appellant using mobile numbers associated with the car hire transaction. The 1st appellant was arrested on 24 February 2023. During interrogation, he implicated the 2nd appellant, stating that he had handed over the vehicle to him and received Kshs 2,000 for the arrangement. The 2nd appellant was later arrested at Kibera Law Courts.
9. PW4 further confirmed that the hire payment of Kshs 11,000 was made through Mpesa from the 1st appellant's number (0700XXXX) to PW3's number (0799XXXX). Safaricom records verified these details produced as exhibits. The tracking data also established that the vehicle was last active in Amboseli on 22 February 2023.
10. While under cross-examination, PW3 admitted that he had no direct evidence linking the 2nd appellant to the hire agreement. Similarly, PW4 stated that apart from the 1st appellant's allegations, there was no documentary proof connecting the 2nd appellant to the alleged theft. Nonetheless, the prosecution relied on the testimony of PW3, PW4, and the supporting documents to assert that the 1st appellant had primary control of the vehicle and facilitated its disappearance, with the 2nd appellant's alleged indirect involvement.
11. In their defences, the 1st appellant testified under oath that on 21 February 2023, while in Donholm, he was approached by the 2nd appellant and one Kabuda, who offered him a driving job in Amboseli and sought to hire a vehicle. They proceeded to the complainant's premises, where Kabuda negotiated the hire fee of Kshs 11,000 for a Toyota Voxy. Payment was made via Mpesa using money provided by the 2nd appellant, deposited into the 1st appellant's account, and transferred to Daniel Onyango (PW3).



12. The vehicle was taken to Umoja, where the 1st appellant was left behind, and the 2nd appellant drove off, agreeing to reconvene the next day. The 1st appellant, given Kshs 1,000 as a deposit, claimed he returned home but received no further communication. Assuming they had travelled without him, he did not follow up. On 24 February 2023, he was arrested while in town, and the vehicle was never recovered.
13. The 1st appellant later encountered the 2nd appellant in prison, where he notified officers, leading to the 2nd appellant's arrest. He maintained his innocence and was initially a state witness but was later re-arrested and charged.
14. During cross-examination, the 1st appellant admitted using the Kshs 1,000 for personal needs and stated he could not provide the 2nd appellant's contact information to the police. He asserted the 2nd appellant's involvement in hiring the vehicle and its subsequent disappearance.
15. The 2nd appellant also provided a sworn statement, testifying that he was arrested on 2 March 2023 in connection with a different motor vehicle theft. He claimed he was unaware of the Toyota Voxy or the individuals involved. Upon his release from court, he was detained by two police officers, taken to Kilimani Police Station, and questioned about the case. He denied any involvement, stating his phone records would show he was not present in Amboseli or the CBD. He also denied knowing the 1st appellant or being associated with the stolen vehicle.
16. The duty of the 1st appellate court is to analyse and re-evaluate the evidence adduced before the Trial Court and come to its own logical conclusion. The appeal was canvassed by way of written submissions which have been dully considered and there is no need to rehash them.
17. Section 278A of the *Penal Code* provides as follows:  
278A. Stealing motor vehicle  
If the thing stolen is a motor vehicle within the meaning of the *Traffic Act* (Cap. 403), the offender is liable to imprisonment for seven years.
18. The theft of the motor vehicle was established through the testimony of Joan Wanja Njoka (PW1) and Daniel Onyango Orote (PW3). On 21 February 2023, the 1st appellant, Humphrey Wachira, hired PW1's Toyota Voxy (KCZ 766U) for Kshs 11,000, with payment made via Mpesa. PW3 confirmed the hire agreement was signed, and the vehicle was handed over to the 1st appellant and another individual named Mark. Tracking data placed the vehicle in Amboseli on 22 February 2023, but the tracker ceased functioning on 23 February 2023. Attempts to contact the clients failed, leading PW1 to report the matter to Kilimani Police Station.
19. The 1st appellant was arrested on 24 February 2023 and, during interrogation, claimed to have handed the vehicle to the 2nd appellant in exchange for Kshs 2,000. The vehicle was never recovered. Mpesa records verified the payment trail from the 1st appellant to PW3.
20. The 2nd appellant was implicated primarily through the 1st appellant's testimony, corroborated by circumstantial evidence. The 1st appellant stated that the 2nd appellant, accompanied by Kabuda, approached him with a job offer to drive to Amboseli. The 2nd appellant provided the Kshs 11,000 hire fees, which was deposited into the 1st appellant's Mpesa account and forwarded to PW3. The 2nd appellant later drove the vehicle away, agreeing to reconvene the next day.
21. The principle of common intention under Section 21 of the Penal Code applies here. Both appellants acted with a shared intention to unlawfully acquire and misappropriate the vehicle. Circumstantial



evidence, such as the Mpesa payments, tracking data, and the 1st appellant's testimony, pointed to the 2nd appellant's active involvement.

22. In the case of *MCA Uheffe & MCU Lifle* {1995} 183 CLR 108 the Court held that:

“The doctrine of common intention applies where a venture undertaken by more than one person acting in concert in pursuit of a common criminal design such a venture may be described as a joint criminal enterprise. Those terms, common purpose, common design, concert, joint criminal enterprise, are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. Such a common purposes arises where a person reaches an understanding or arrangement arriving to an agreement between that person and another or others that they will commit a crime.”

23. In both the case for the prosecution and the defence common purpose or joint enterprise runs through the unlawful act of accused persons and their accomplices stealing the complainant's motor vehicle. Despite the prosecution's evidence and the 1<sup>st</sup> appellant's defence placing the 2<sup>nd</sup> appellant as the mastermind of the criminal activity, the 2<sup>nd</sup> appellant failed to give any plausible explanation to discount their version of events. His failure to provide corroborative evidence, such as phone records, or a credible alternative explanation weakened his defence.

24. The evidence collectively demonstrates that the 2nd appellant acted in concert with the 1st appellant to execute a common plan, thereby establishing his culpability under the law. The conviction of the 1<sup>st</sup> and 2<sup>nd</sup> appellant for the offence charged was therefore proper and is upheld.

25. On sentence, the appellants were each sentenced to serve 7 years imprisonment. During sentencing, the trial court considered the appellants' mitigation, and being first offenders. The court was of the view that they needed a deterrent sentence given that the motor vehicle has never been recovered.

26. In the premises, I see no reason to interfere with the trial court's discretion. The consolidated appeal is found to be lacking in merit and is dismissed in its entirety.

It is so ordered.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF JANUARY 2025**

---

**D. KAVEDZA**

**JUDGE**

In the presence of:

Sundwa for the Appellants

Mutuma for the Respondent

Achode Court Assistant

