Muloki v Republic (Criminal Appeal E010 of 2022)
[2025] KEHC 14352 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 14352 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E010 OF 2022

NIO ADAGI, J

JULY 24, 2025

BETWEEN

JOHNES MUSEMBI MULOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background:

1. The appellant Johnes Musembi Muloki was charged with the offence of Stealing Motor Vehicle Contrary to Section 268(1) as read with Section 278A of the Penal Code. The particulars of the offence were that on the 19th day of a-August 2017 at Mlolongo Township, Athi River Sub County within Machakos County, jointly with others not before court stole motor vehicle Registration No. KCK 572Y make Isuzu NKR white in colour valued at Kshs.3,111,700.00/- the property of Jonathan Musee Kio.

2. The appellant pleaded not guilty to the charge and the matter was set down for hearing. The prosecution called three witnesses in proving its case.

   At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the appellant and he was put on his defence. The Appellant gave sworn evidence and called one witness in support of his defence.

3. At the conclusion of the trial, the appellant was found guilty as charged and was convicted and sentenced to serve one year probation sentence.

4. Being dissatisfied by the said conviction and sentence, the appellant filed an undated Petition of appeal raising five grounds of appeal which are paraphrased as follows:

i. That: The learned trial Magistrate erred in both law and fact by convicting the appellant on evidence which did not meet the requisite standards of proof as per the law.

ii. That: The learned trial magistrate erred in law and fact by failing to observe that the evidence adduced before court could not support the charge under Section 278 A of the Penal Code.

iii. That: The prosecution`s case was marred with contradictory statements and there were also inconsistencies and material discrepancies as well as gaps which could only be filled by the prosecution and none else.

iv. That: The failure by the prosecution to avail the key witnesses in this case was fatal to the prosecution`s case since it is very clear that the case was never investigated and the evidence was so underwhelming to sustain a conviction.

v. That: The learned trial magistrate erred in law by rejecting the appellant`s plausible defence without providing any valid reason for rejecting the same Contrary to Section 169(1) of the Criminal Procedure Code.

5. Directions were given for the appeal to be canvassed through written submissions. The Appellant's submissions dated 07/05/2024 are filed by Ndiema & Co. Advocates while the Respondent's submissions dated 07/03/2025 are filed by Ms. Agatha Abang, learned prosecution counsel for the State.

Appellant's Submissions

6. The appellant submitted that on the 19th day of August 2017, while employed on contractual basis by the complainant was assigned to go and ferry some goods for a customer at Kyumbi which is a small town along the Mombasa Road at Machakos Junction. The appellant was to ferry some mitumba (used) clothes. On arrival at the place, it's alleged that the lady customer informed him that the clothes would be collected further ahead at Emali Township. On arrival at Emali the goods had not arrived and they went to a hotel to await the arrival of the goods. The appellant further submitted that he stated in his sworn statement that the lady customer (who was never called as a witness) ordered for him a soda sprite brand which was brought while open. He stated that after he took the soda he lost conscious and only found himself in a room at I0.00 P.M (2200hrs). That it was the prosecution's evidence that the two; the appellant and the lady customer went into the bar and ordered for beer and a room, it was hired to them by a lady called mama Mwikali who was also never called as a witness at a different bar called London View Bar and Restaurant. That the prosecution alleged through PW2 Elizabeth Mbithe that at around 10.00 P.M. (2200 hours) the appellant went back to the bar and asked her if she had seen the lady he had been with and she answered in the negative. The appellant stated that he was drugged through the soda that the lady had ordered for him and when he came back to his senses at about 10.00P.M he found himself at London view bar and restaurant and not Ithumba Hotel where he had been, he went ahead to report the incident to Emali police station.

7. The appellant submitted that after reporting he was locked in and later his statement was taken and he was never taken to hospital.

8. It is the appellant's submission that this was a conspiracy between the owner of the motor vehicle (complainant), the lady customer and the attendants at the bar. He submitted that the motor vehicle was traced across the border of Tanzania where the tracker was last spotted and he was later charged with the offence.

9. The appellant framed the following issues for determination in his submissions:

1. Whether the appellant together with others not before court arranged for the stealing of the motor vehicle Registration No. KCK 572Y ISUZU NKR the property of Jonathan Musee kioi?

2. Whether the prosecution called all the necessary witnesses to enable the court to reach a just and fair decision?

3. Whether the appellant adequately rebutted the prosecution evidence to warrant himself an acquittal?

10. On issue No.1:- Whether the appellant together with others not before court arranged for the stealing of the motor vehicle Registration No. KCK 572V ISUZU NKR the property of Jonathan Musee Kioi, the appellant submitted that the prosecution called three (3) witnesses in total. PW1 was Jonathan Muse Kioi, the alleged owner of the motor vehicle in question and the complainant. The appellant submitted that he uses the word "alleged" deliberately, because the motor vehicle was in joint ownership of the Cooperative Bank and the complainant in this case. The appellant pointed out several contradictions and inconsistencies in the testimony of PW1; for instance, PW1 did confirm that he had employed the appellant as a driver for his lorry (canter). He went further to confirm that on the material day, he spoke to the appellant in regards to the job at hand and they even negotiated the payment/price with the lady customer whom the appellant was to work for on that day by ferrying her goods (second hand clothes) from Kyumbi Area.

11. On cross examination at Page 8 of the proceedings, PW1 had this to say;

> ''.....You could call me if you get a client.....after a client has been engaged, he pays down payment and clear later, you could then send the money.....I had asked for Kshs.6,000/- but we settled at Kshs. 5,000/-....I talked to you via the client's phone.....I had known you for a year. I allowed you to go to Emali. Issue of going to Emali was around 10.28 A.M. It was after about 10 minutes from the first call. I didn't save the client's number. It was 0717875724. It was normal for you to call me over work progress. .....you were to tell me any trip you were about to make.....my car had a tracking system.....I only do tracking whenever there is suspicion.....''

12. The appellant submitted that from the excerpt above, four things come out very clearly, first, that PW1 was duly informed and fully aware of the appellant's movement on that day. That he was even involved in the negotiations and fixing of the payment. He even had the client`s mobile number which he stated as 0717875724 and that he is the one who authorized the appellant to drive to Emali.

13. It was submitted that PW1 also confirmed that the motor vehicle had a tracking system which he only used whenever there was suspicion. The appellant posed the questions that: why didn't PW1 use the tracking system to stop the said motor vehicle when he saw it at Loitoktok, a place where he had not authorized?;Why didn't he disable the motor vehicle using the tracking system when the appellant's mobile phone was switched off and the said motor vehicle could be seen heading towards Tanzania border?; Finally, Why didn't he reach out to the customer lady when he failed to reach his driver on phone yet he had the customer`s mobile phone number and he had even spoken to her earlier?

14. The appellant submitted that PW1 produced an original receipt which he said the appellant was issued with when he bought the beer and again the appellant questions where he got it from. Normally an original receipt is usually given to the purchaser as proof of purchase. Again, the purported receipt was a cash sale receipt and not printed with the Bar's name or logo. The appellant concluded that he must have gotten it from anywhere else in his futile attempt to prove the appellant`s negligence or the

appellant`s involvement in the alleged theft. The appellant asserted that definitely couldn't be telling the truth.

15. The appellant also submitted that PWl admitted in in his testimony that at 1600 hrs. (4.00P.M) he saw the motor vehicle through its tracking device at Illasit in Loitoktok while he was at Kithua in Makueni County. The said motor vehicle when it left Mlolongo was headed to Kyumbi and later was allowed by PWl to proceed to Emali. There was no permission to travel to Loitoktok yet PW1 never used the tracking device to immobilize the motor vehicle at that time. He never reported anywhere about that abnormality until five and half hours later when he reported to Mlolongo police station about the loss of the motor vehicle. PW1 never bothered to find out from his driver (the appellant) why the motor vehicle which was destined to Emali was now headed to Loitoktok at 4:00P.M.

16. The appellant submits that in between Emali police station and Mlolongo police station there are many other police stations such as Tawa, Masii, Machakos, Kyumbi and Athi - River police stations where PW1 could have reported the incident but he did not. The appellant is questioning why PW1 had to travel all the way from Makueni where he was at that time to report his suspicion over theft of his motor vehicle at Mlolongo, late in the day at 9.30 P.M. That, it is a fact that if PW1 could have reported the said suspicion early enough considering that the tracking system was still on, the motor vehicle could not have crossed over to Tanzania as it could have been intercepted by the police.

17. The appellant submits that in his defense he stated that the complainant and others planned this theft of the motor vehicle. That this alleged 'theft' was a stage-managed affair as the lapse of those hours (5 and half hours) after the discovery of the motor vehicle at Loitoktok and PW1's reporting at Mlolongo was to effectively facilitate and give time for the motor vehicle to cross the border into Tanzania. This coupled with the fact that he had five and half hours to immobilize the motor vehicle using its tracking device but he never did so, raises more questions than answers.

18. Additionally, the appellants submits that at Page 7 of the courts typed proceedings, PW1 avers that the motor vehicle's tracking device had been disabled and wonders how could that be so when PW1 had used the same tracking device to trace the motor vehicle after it crossed the border into Tanzania; at what point in time was the said tracking device got disabled. Secondly that, if it is true that the tracking device was disabled, then it must have been after several days had lapsed since the PW1 confirmed to court that he personally tracked the motor vehicle on the same day at 4.00P.M and he saw it at Loitoktok then he also continued tracking it all the way into Tanzania up to a place called Mji wa Loto. The appellant is concerned on how PW1 allowed his motor vehicle to cross over into Tanzania when he had the opportunity to switch the engine off through the tracking device.

19. Moreover, PW1 in his evidence in court said that in trying to trace the motor vehicle he crossed the border into Tanzania. According to the appellant that is a lie as Safaricom data which was used in court in cross examination by the appellant, and the investigation report by the C.I.C investigators which report was produced in court by DWI Muthengi Wambua showed that the complainant never went to Tanzania and that he was always at all material times within the boundaries of Kenya.

20. The appellant submitted that it was rather curios as well that PW l reported the loss of this motor vehicle well before the appellant. He reported it at Mlolongo police station at 9.30 P.M. (2130 hours) while the appellant reported its loss at Emali police station at 10.10 P.M (2210 hours) and the all-important question is; how did he know the motor vehicle had been stolen before the driver had reported its loss?

21. The appellant submits that, more curiosity is raised on Page 11 of the proceedings during cross – examination, it is confirmed that PW1 sent some two people to the appellant on 10/7/2017 who took pictures of the said motor vehicle but he later denied that he did not send them to take pictures but

they were to be taken to Makueni a statement which was not only contradictory but was also very inconsistent. That another issue that came out is that the said motor vehicle was being hidden to avoid its repossession by the Bank/ financiers and this meant that PW1 had difficulties in repaying his loan.

22. The appellant submitted that on page 11 at line 14 of the proceedings, PW1 when confronted with the question of his supposed involvement in the theft of his own motor vehicle in order for him to be compensated by the insurance, denied the same. The appellant contended that these contradictions and inconsistencies all support the Appellant`s assertion in his defense and the report by the C.I.C investigators that (PW1) the complainant was part of the scheme to have this motor vehicle "get lost" and then blame it on the innocent appellant.

23. The appellant observed that when PW1 testified in court on the 10.11.2017 he informed court that he had filed his claim form with the insurance company on 23.08.2017 and that this was so immediately after the appellant was charged on the 19.08.2017 and PW1 was compensated in a record speed even before the case began and no one even bothered to record the appellant`s statement.

24. That in re – examination at Page 12, PW1 again when asked whether he stage managed the theft of his Motor Vehicle, he denied but before. he testified on the 10.11.2017 he had already been compensated even against the C.I.C investigator's recommendations that he should not be compensated before the case at the trial court in Mavoko Law Courts had been heard and determined. The appellant considered this to be a conspiracy. The appellant submitted that it is quite evident that he was only an innocent driver and employee who was sacrificed in the complainant`s dirty scheme to have his motor vehicle stolen in order to get compensation from C.I.C Insurance.

25. The appellant further submitted that PW2, Elizabeth Mbithe who was the counter lady at Ithumbi Bar and Restaurant where the Appellant and the customer lady visited when they arrived at Emali Township stated that she sold Tusker to the Appellant and a Guinness to the lady customer. She said that she rented to them a room at lthumbi Bar and Restaurant and she delivered their drinks and left them in the room. She said that she issued them with a receipt which was produced as (Exhibit No. I) she also said that she gave them Room No.33. The appellant questions where PW2 got the original receipt if the same had been issued to the appellant and the lady customer. This clearly shows that PW2 was not being truthful, she was either coached to paint a picture that the appellant and the customer lady were together merry making or that they conspired to steal the said motor vehicle so as to dispel the fact that the appellant was drugged and the motor vehicle stolen from him.

26. The appellant submitted that PW3, Phyllis Mwikali a laborer at London View Guest House in Emali stated that on 19.08.2017, she saw the appellant who was looking for a room at that bar at 3.00 p.m. (1500 hours). That the appellant looked drunk and he was with a woman. PW3 stated that she gave them a room No.33 and produced a book (Exhibit .4) showing her writing. That they then went to the room. She stated that she left at 6. 00P.M without knowing whether or not they left the room.

27. The appellant maintained that there were glaring contradictions and inconsistencies in the prosecution`s evidence that cannot be swept away. That it is a big puzzle how PW2 and PW3 both interacted with the appellant and the customer lady at the same time but in different locations and they both issued them with a receipt for Room No.33 and that the appellant and the customer lady occupied together both Room No.33 at Ithumba Bar and Room No.33 at London view bar all at the same time.

28. The appellant submitted that the prosecution`s evidence was not credible enough to warrant a conviction based on the evidence tendered by PW1, PW2 and PW 3 herein. He placed reliance on the case of PANDYA -VS -REPUBLIC (1957) E.A, where the Court held that:

> `` It is trite law that evidence which has several contradictory statements and inconsistencies cannot be relied upon as true.''

29. On issue No.2:- Whether the prosecution called all the necessary witnesses to enable the court reach a just and fair decision, the appellant submitted that the facts do not support the charge. The facts in the charge sheet purport that the offence was committed at Mlolongo Township Athi River Sub-County, Machakos County. However, throughout the evidence adduced by the prosecution show that the offence was committed at Emali Sub-County in Makueni County. Though it was admitted by both the complainant and the appellant that the point of dispatch of motor vehicle was Mlolongo, it finally ended in Emali and that is where the offence is alleged to have been committed. The fact that the complainant reported the matter to Mlolongo police station does not invalidate the fact that the offence was committed at Emali.

30. The appellant submitted that it was important to note that he was an employee of the complainant as he was employed as a driver to the said motor vehicle. The appellant cited Section 268 (1) of the Penal Code which Provides as follows:-

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

31. The appellant placed reliance on the definition of stealing in the case of R–VS- JONES (1976) KLR 1 that:

> `` On a charge of theft, it was necessary to prove a fraudulent taking or conversion without a claim of right, and a person was deemed to have taken or controverted money fraudulently if he did so without a claim of right with intent to use it at his will, even if he intended to use it afterwards to repay the money to the owner. ``

32. Reference was also made to the case of Marknon Masika Wafula v Republic [2021] eKLR

33. The appellant thus submitted that no fraudulent intent was established in the instant case, he referred to the case of H.K. Bwire vs Uganda (1965) where it was stated that the gist of the offence of theft is the fraudulent intention to appropriate permanently.

34. On issue No.3:- Whether the appellant adequately rebutted the prosecution evidence to avail himself an acquittal, the appellant submitted that he gave a very consistent and factual of the events as they happened. The appellant submitted that he had been employed by the complainant in this case. On the date in question, the complainant asked him to take a client to collect goods at Kyumbi. They proceeded to Emali because the goods had to be delivered there, at Emali they got into a hotel, the customer lady asked for a soda for him which was served open already and after he took it he was unconscious only to wake up at around 10.00 p.m. and realize that the motor vehicle had disappeared. He reported the matter at Emali police station and later taken to Athi - River police station and later to Mavoko Law Court where he was charged with the offence of stealing Motor Vehicle.

35. That the appellant called one witness and for all intents and purposes, the witness was the insurance investigator who established that it could not have been possible for the appellant to steal the motor vehicle, he did establish that this theft of motor vehicle was staged managed so that the owner of the

motor vehicle could be compensated. DW1 confirmed to court that the complainant was compensated by the insurance company even before the matter was heard and concluded contrary to the insurance investigators recommendations.

36. It was submitted that the appellant had been employed by the complainant, he is a pastor, they had worked together for many years, the complainant had experienced difficulties in paying his monthly loan amount to Co – operative Bank who were the co – owners of the said motor vehicle as they had financed its purchase thus leading to the conclusion that the complainant (PW1) could have staged managed its disappearance to avert the possibility of a repossession by the Bank as a result of him having defaulted in his loan repayments.

37. The appellant argued that it is the prosecution to prove the guilt beyond reasonable doubt. The appellant had discounted the prosecution's case and stated what transpired from the evidence adduced and the defense offered was a plausible defence. The appellant urged the court to find that the he did not commit the offence and acquit him as per the law provided.

38. The appellant submitted that him being a church minister and a respectable member of the society sought to appeal the conviction and sentence with the sole purpose to clear his name and reinstate his damaged reputation, regardless of the fact that he is now a free man having served his non – custodial sentence.

39. The appellant is of the view that he ought not to have been punished for reporting the said theft of the motor vehicle that he was driving to the police since that is exactly what was expected of him. The fact that the said motor vehicle was fitted with tracking device meant that for it to be recovered, the driver had to report theft or its disappearance immediately so as to assist in its quick recovery.

Respondent's Submissions

40. The respondent in opposing the instant appeal submitted that the trial court properly evaluated the evidence and came to the right conclusion. The Respondent submitted as follows:

41. On whether the learned magistrate erred in convicting the appellant in evidence that didn't meet the requisite threshold to uphold a conviction, the respondent tackled Ground i, ii & iii of the appellant's submissions together. It was submitted that in evaluating the evidence vis-a`-vis the law the ingredients of the offence were proved beyond reasonable doubt.

42. That the appellant was charged with stealing a motor vehicle contrary to section 268(1) as read with section 278A of the Penal Code.

43. Section 268(1) provides that: A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

44. Section 278A provides that : 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.

45. Under the *traffic act* section 2 "motor vehicle" means any mechanically propelled vehicle, excluding any vehicle running on a specially prepared way such as a railway or tramway or any vehicle deriving its power from overhead electric power cables or such other vehicles as may from time to time by rules under this Act be declared not to be motor vehicles for the purposes of this Act;

46. Stealing is defined under section 264 of the Penal Code as fraudulently and without claim of right, taking anything capable of being stolen, or fraudulently converting to the use of any person, other than the general or special owner thereof, any property.

477. To prove the offence of stealing of motor vehicle the prosecution has to prove:

i. fraudulent and without claim of right

ii. take anything capable of being stolen

iii. or fraudulently converting to the use of any person other than the general or special owner thereof any property.

iv. the thing stolen is a motor vehicle as defined under the *Traffic Act* section 2

48. PW1 stated that the appellant was his driver who had his car KCK 572 Y an Isuzu. On 19/8/17 the appellant informed him that he got a job to go to Mlolongo. PW1 availed documents to prove that the motor vehicle belonged to him. He told the appellant to agree with the client. 10 days later the appellant informed him that the goods had been ferried from Mombasa but the car ferrying them had broken down at email and thus he had to drive to Emali. He agreed on condition that the charges increased to Kshs.10,000/= He then went to Emali but his phone was off. He tried reaching him but he couldn't find him. The appellant then called him with another number which he claimed was for the customer. He tried the number later but couldn't get through to him. When he called the car tracking, he was informed the motor vehicle was at Tanzania and had entered Tanzania via Loitoktok. He was called from Emali and found the appellant was dragged and the lorry was stolen. PW2 stated that on 14/8/17 the appellant went to their pub with a woman. She sold them drinks and escorted them to the rooms. PW2 also delivered drinks to the room. He produced PExt.1 as receipt for the drinks and PExt.2 as the book record for room customers with the appellant's details. Later PW2 stated that the appellant came and asked her if she had seen the woman he was with and he stated that the car was stolen. PW3 stated that she works at Emali and on 19/8/17 he saw the appellant with a woman and he was looking for a room and they were both drunk. She saw PW2 carry alcohol for them. She also referred to PExt. 2 where she recorded the room and details of the Appellant.

49. PW1 indicates that the appellant was the last one with the said motor vehicle. he indicated that he had a job that a client had hired him for. All along he was communicating with PW1 when he was negotiating with the said client and when he was instructed by the said client to go to Emali to pick goods. PW2 and PW3 confirm he was in Emali with a woman and they had drinks and they went to a room. The evidence proves that the appellant was last in possession of the motor vehicle. The appellant further had his mobile phone switched off for the better part of the day when the motor vehicle was stolen. It begs the question as to why the appellant's phone was off showing he had mens rea to defraud PW1 his employer. The evidence of the witness is not inconsistent.

5.0 The Respondent submitted that, the appellant stated that the charge sheet is defective as the charge sheet indicates the offence was at Mlolongo township as opposed to Emali. The witnesses indicate that the motor vehicle reached Emali and this was the last known place within Kenya that the motor vehicle was. The appellant was present throughout the trial and heard the witnesses. The appellant was able to cross the examine the witnesses on the contents of the charge sheet and of the evidence they adduced in court. The respondent submitted that any inconsistency in the charge sheet and in the witness's, evidence is not substantial to the extent of affecting the conviction. Reliance was placed on Justive Mativo finding in MTG v Republic [2022] KEHC 189 (KLR) that:

> " Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it can say it feels an abiding conviction to a moral certainty of the truth of

the charge. Further, the evidence in question is to be considered together with the rest of the evidence including the defense."

51. The respondent further submitted that the prosecution tendered evidence that proved the offence beyond reasonable doubt and discharged its burden of proof. The evidence by the prosecution witnesses was credible, consistent, reliable and well corroborated. All the ingredients for the offence were established. The respondent submitted that the conviction was safe. The respondent therefore urged this honourable court to uphold the conviction.

52. On whether the failure of the prosecution to avail key witnesses in this case was fatal to the prosecution case, the respondent observed that, the appellant submits that the prosecution did not call all the necessary witnesses to enable the court reach a just and fair decision. Section 143 of the *Evidence act* provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

53. By virtue of Article 157 of *the Constitution* of Kenya, the Prosecution is in conduct of criminal cases in the courts of law. The Prosecution is in conduct of the witnesses called in support of the charges preferred against an accused person and does so at their own discretion.

54. The prosecution need not call a plethora of witnesses to prove a fact. The respondent submitted that the witnesses who testified in this matter were able to give sufficient and consistent evidence to convict the appellant.

55. The respondent cited the case of Julius Kalewa Mutunga v Republic [2006] KECA 79 (KLR) it was stated that:

> "As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

56. The Appellant argues that the lack of certain witnesses including the investigating officer was fatal to the prosecution case. From the record, it shows the investigating officer was called several times and the matter was old and thus the prosecution saw fit to close their case without the investigating officer evidence. However, the investigating officer usually sums up the evidence of the witnesses in the matter. The matter was properly investigated and the other witnesses were availed to give their evidence. The witnesses availed did tender evidence that was enough to convict the appellant. The respondent urged this court to disregard this ground of appeal for lack of merit.

57. On whether the learned trial magistrate erred in both law and fact by not considering his sworn defence and rejecting the same contrary to section 169(1) of the Criminal Procedure Code, the respondent submitted that the appellant gave sworn evidence with one other witness testified. He testified that its PW1 who called him and informed him of the client. he found the motor vehicle parked at PW'1s house. He states that he went with the woman to Emali and the lady ordered for him drinks and food. He took a sprite and he heard the lady asking for a lodging. The appellant states he lost consciousness and regained it back alter and found himself in the room fully dressed and locked inside. He states that he didn't see the lady, the car had been stolen but he had the car keys in his pocket. He reported the matter at Emali police station. DW2 was a private investigator who claimed that after his investigations

he concluded that the theft was stage managed by the insured accused and not the accused. DW2 evidence was of no probative value to the case.

58. The respondent submitted that the appellant's defence is an afterthought and is not strong enough to rebut the prosecution evidence. The trial court in its judgment did consider the appellant's defence which was full of inconsistencies when mirrored against the prosecution's case. The trial court was correct in noting that the prosecution tendered solid and corroborative evidence against the appellant. It is the respondent's submission that the trial court was right in rejecting the appellant's defence.

59. The respondent argued that the appellant took advantage of the position of trust that was placed on him. He was entrusted to his employer's motor vehicle for business. with the loss, the employer is deprived of his motor vehicle and loss of business. The trial court was right in convicting and sentencing the appellant to a probation sentence. Considering the provision of the law on sentencing in Section 278A of the Penal Code, the respondent submitted that the sentence was very lenient, which has already been spent.

60. In conclusion, the respondent submitted that the appeal lacks merit and should therefore be dismissed in its entirety.

Analysis and determination

61. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal in Okeno – v– Republic (1972) EA 32 has been consistently cited as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

62. Having considered the record, the submissions and the law, the issue for determination is whether the prosecution proved the charge of stealing a motor vehicle by the appellant.

63. Stealing is defined by the Black's Law Dictionary, 8th as:

> " To take (personal property) illegally with the intent to keep it unlawfully"

64. Section 268 of the Penal Code defines stealing as:

> " A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any person, is said to steal that thing or property"

65. In the case of Wycliffe Anyona Nyabuto -vs- Republic (2014) eKLR the court stated that:

> " Essential element in charge of theft is that the person accused fraudulently converts a property which is capable of being owned so as to deprive the owner of such property. It is not in dispute that the appellant was lawfully in possession of the subject motorcycle as he was retained by the complainant as his rider. The argument of the prosecution was that the

motorcycle got lost while in custody of the appellant under suspicious circumstances and following investigations carried out the appellant was suspected to have colluded with the person who took the motorcycle and permanently deprived the owner of it.

Being a criminal case, the burden of proving that fact was upon the prosecution and the standard proof was beyond reasonable doubt.

It was proved that the appellant was the last person with the motorcycle. It is not in dispute that following loss of the motorcycle the appellant was taken to hospital. The complainant admits having found him bandaged, but, argues that two (2) days later he was seen riding another motorcycle. The appellant on the other hand stated that he was hospitalized for four (4) days and this evidence was not disproved. He reported the incident to the Police, and after he gave the police the phone number of the suspect, they commenced investigations which were not concluded. After the suspect switched off the phone, the police opted to charge the appellant.

While the prosecution has the burden of proving every element of crime, the accused (appellant herein) had no duty of proving his innocence so as not to be convicted. The appellant rendered an explanation that made the investigators act but for no apparent reason failed to conclude investigations. The conviction by the trial court was entirely based on circumstantial evidence".

66. In the case of Rex -vs- Kipkering Arap Koske & 2 Others (1949) EACA 135 the court stated that:

> "In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

67. In Marknon Masika Wafula v Republic [2021] eKLR the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.

68. In Simoni Musoke -vs- Uganda (1958) EA 71 the court stated that before drawing the inference of guilt from circumstantial evidence the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference. (Also see Martin Kimeu vs. Republic (2002) eKLR.

69. To rely on circumstantial evidence, the court should satisfy itself that there are no coexisting circumstances to weaken such evidence. In the instant case it was established that the appellant reported an incident that occurred to the police. He gave an account of how he was drugged. Investigations to establish the whereabouts of the vehicle were not conducted despite the tracking having shown the vehicle to have crossed to Tanzania.

70. The evidence on record reveals that neither the complainant nor anyone else saw the appellant steal the subject motor vehicle or explain how the appellant stole the same and that the only evidence against appellant is that of him being an employee of PW1 and that he stole the said motor vehicle.

71. The degree of proof in criminal cases was properly established in the classicus English case of Woolmington vs. DPP 1935 A C 462. Similarly, in Bakare vs. State 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

> "Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused

is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".

72. The trial magistrate in her judgment stated that the appellant had a well calculated plan of damaging the venue of where the goods were to be picked. He went to the club, ordered for alcohol and was in company of a lady. He ordered for room 33 and later pretended that the motor vehicle had been stolen. The motor vehicle was tracked in Tanzania and it was never recovered.

73. The trial magistrate further stated that the appellant by switching off his phone showed that he had mens rea to steal the motor vehicle. He actually stole the said motor vehicle and deprived the owner of the said motor vehicle and its use. It is my considered view that the trial magistrate failed to consider that PW1 had in his testimony confirmed to have allowed the appellant to proceed to Emali and thus there was no calculated plan of damaging the venue of where the goods were to be picked by the appellant.

74. In considering the appellant's defence, the trial magistrate stated that the appellant's testimony was full of inconsistences and of no probative value. That the defence evidence on record was not credible and did not rebut the prosecution case.

75. It is trite that the prosecution's duty is to prove its case beyond any reasonable doubt; the trial magistrate nevertheless wholly relied on the evidence of the three witnesses which did not at all prove that the appellant stole the subject motor vehicle and rejected appellant's defence for the reason that it did not rebut the prosecution case.

76. To my mind, the defence raised by the appellant raises reasonable doubts on the prosecution case. Any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.

77. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

78. From the totality of the evidence, I find that this is a case where the appellant ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case does not require many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right.

79. In the case of Michael Mumo Nzioka v Republic [2019] eKLR, the court cited with approval the holding in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR where Mativo, J (as he then was) stated that:

> " To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the

doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

80. My finding is that the trial court erred in not giving the defence due consideration and thereby arrived at an erroneous decision.

81. In the end, the appeal succeeds even though the appellant has completed serving the probation sentence that was imposed on him. It is hereby ordered that the conviction and sentence of the appellant were unsafe and are hereby quashed.

82. Orders accordingly.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 24TH JULY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 24TH JULY 2025

In the presence of:

Mr. Odhiambo..... for Appellant

Ms. Agatha..... for Respondent

Milly..... Court Assistant

11