



REPUBLIC OF KENYA



**Oyier v Republic (Criminal Appeal E161 of 2021)
[2024] KEHC 9361 (KLR) (Crim) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E161 OF 2021
LN MUTENDE, J
JULY 31, 2024**

BETWEEN

KENNEDY OTIENO OYIER ALIAS SPIDERMAN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal arising from the original conviction and sentence in Criminal Case.
No. E511 of 20201 at the Chief Magistrate's Court Milimani, by Hon. J. Kamau (SRM))*

JUDGMENT

1. Kennedy Otieno Oyier, the appellant, having come into conflict with the law was charged as follows:

Count I

Burglary contrary to Section 304(2) of the Penal Code Cap 63 laws of Kenya.

Particulars of the offence being that on the night of 15th/16th March, 2021 at Komo Court in Kilimani area within Nairobi county, jointly with others not before court broke into a dwelling house and stole from therein an HP Laptop, three flash disks, an external hard drive, two pairs of eye glasses and a USA Passport No. 567745951 all valued at Kshs. 104,000/- the property of John Cheevers Lusson.

In the alternative Count:

Handling stolen property contrary to Section 322 (2) of the Penal Code Cap 63 Laws of Kenya.

Particulars of the offence being that on the night of 10th/11th of April 2021 at Radiance Apartment on Nderu Road within Nairobi County, otherwise than in the course of stealing, dishonestly retained two flash disks and to eye glasses the property of John Cheevers Lusson, knowing them to be stolen property.



CountII –

Office breaking and stealing contrary to Section 306(b) of the Penal Code Cap 63 laws of Kenya.

Particulars of the offence being that on the 11th day of March, 2021 at Kilimani Business Center in Kilimani Area within Nairobi County, jointly with others not before court, broke into an office and stole from therein a Toshiba Laptop and a flash disk all valued at Ksh. 46,200/- the property of David Deng Ibrahim Awok.

In the alternative Count:

Handling stolen property contrary to Section 322(2) of the Penal Code Cap 63 laws of Kenya.

Particulars of the offence being that on the night of 10th/11th of April 2021 at Radiance Apartment on Nderu Road within Nairobi County, otherwise than in the course of stealing, dishonestly retained one flash disk the property of David Deng Ibrahim Awok, knowing it to be stolen property.

CountIII –

Handling suspected stolen property contrary to Section 323 of the Penal Code Cap 63 laws of Kenya.

Particulars of the offence being that on the night of 10th/11th of April, 2021 at Radiance Apartment on Nderu road within Nairobi County, retained (as per attached list of items) knowing them to be stolen property.

List of Items For Count III

1. Sony T.V S/NO-6014258 Model NoKDL 48W650D
2. Nunix Water Dispenser Model NoKB .
3. Fujica CameraS/No2060890
4. Mobile Phone MakeOPPO red in colour.
5. Mobile Phone Make Nokia106 IMEI 352894107776148
6. TecnoT3115 IMEI 359913086716827
7. NokiaRH 125 IMEI 356998/04/639627/6
8. ITEL IT 2160 IMEI 355316283775626/34
9. ITEL IT 2160 IMEI 359717109801403/11
10. NokiaTA-1034 S/No357907088508/50/68
11. NokiaRM 1134 IMEI 354896085900408
12. NokiaTA 1174 IMEI 354243682165293/8
13. USBType/C HUB-Pro ModelTT/HB0020
14. USB HubMake Volcano
15. Kensington RemoteS/NoA1522A00082
16. Logitech RemoteS/No1751WD07C008
17. DVD Remote



18. 16 Pieces of Assorted Flash Disks
 19. 1 Pair of Eye Glasses
 20. A Pair of Leather Hand Glove
 21. Zook Headphones
 22. 3 Pieces of Memory Card Holders
 23. Apple Adaptor
 24. Six Pieces of Electricity Socket Adaptors
 25. Type C Adaptor
 26. Five Sim Card Holders with the following
Serial Numbers (1) 892540210941016XXXX
(2) 89254021084159881XXXX
(3) 8925402110415987XXXX
(4) 8925402115421939XXXX
(5) 89254021094120023XXXX
 27. One table watch labelled National
assembly Republic of Korea
 28. Exercisebook under the name-Najib Ali of Makini School
 29. Text Book "Buried Treasure" Under The Name- Sumeya Ahmed
 30. 46 Pieces 5000 of Leones Currency (Sierra Leone Currency)
 31. Egyptian Currency 5 Pounds 10 Pieces,
10 Pounds 2 Pieces, 20 Pounds 2 Pieces,
1 Pound 3 Pieces, 1000 Leone 1 Piece
 32. 50 Pounds of South Sudan 1 Piece
 33. 2 Pieces of 2000 Kwacha Malawian
Currency, 1000 One Piece, 500 One Piece, 20 Kwacha 2 Pieces
 34. 4 Pieces of 500 Nira
 35. OTG Cable
 36. 8 Laptop Bags and 3 Female Purses
2. This is a matter where the Police received complaints from inhabitants of Kileleswa, Lavington, Kilimani and Adams Arcade about illegal entry into their houses with intent to commit crimes especially theft. The Police investigated and had intel that the offender was an alias Spiderman as he would climb up walls and enter into apartments and houses.



3. On 10/11/2021 the police including PW5 No. 83994 Corporal Noah Kiplangat, DCI Kilimani as well as the Investigating Officer, who had done analysis on intelligence reports, visited the appellant's house at Radiance Apartments, Kawangware, along Nderu road, searched and recovered items which they suspected or believed to be stolen property.
4. PW1, John Cheever Lusson, a complainant, who resided at Koma Apartment B11 was asleep in the house on 15/3/2021. The door to the apartment had a grill and was under key and lock. He had left his laptop at the sitting room on the table. He woke up on 16/3/2021 to find it missing. He noticed that the front window was open and established that the intruder had climbed from the balcony and entered the house through the window. He saw a handprint which looked like a dark charcoal mark. He reported the break in to the caretaker and the police. The police visited the scene of crime, took the prints and also interviewed the guards.
5. Two months later he was called to Kilimani Police Station where he identified 2 eye glasses, 2 flash drives, his National Identity cards, Somali employee identity card, his USA Passport(No. withheld), his United Nations employment Identity card, Jambo Jet board pass and a diary.
6. PW2 Damaris Njeri was assisted by John to prepare a curriculum vitae. Her folder was found in one of the flash disk hence she received a call from DCI Kilimani where after she went to the Police Station to record a statement.
7. PW4 David Deng Ibrahim Amok the complainant in Count 2 worked at his aunt's office at Kilimani Business Centre Suite1 plus 2 on 2nd floor. He had left his laptop at his desk when he left work on 12/3/21 and on going to the office on 13/3/2021, the following day he found it missing. He described it as a white Toshiba laptop, worth Ksh.45,000/= and that it had a flash drive connected to it. Later he was called to the police station to find the flash disk which contained information from South Sudan.
8. The investigating officer told court that when they went to the appellant place of residence on 10/4/21 at Radiance apartment they recovered several items which included the flash drives some that contained information like PW2's curriculum vitae
9. That the appellant signed the inventory by thumbprinting, and when summoned by the police PW1 had a police abstract for lost items stated to be valued at ksh 140,000/=. They also found a flash drive belonging to Danny Ibrahim,PW2.
10. Upon interrogation the appellant led the police to the place where the passport was recovered, at Menelik road. The area was fenced and had a garden, the police recovered the passport from a bush at the area.
11. PW5 alluded to have arrested the appellant as he was driving into his of place of residence. Also recovered were two cars that the accused had in his possession.
12. Upon being placed on his defence the appellant stated that he worked as a mechanic at Dagoretti corner and he lived in Kawangware. Regarding the case he alleged that he had been doing business with his friend George Otieno where he trafficked cannabis sativa(bhang) and would distribute it and make sales. That sometime in 2021 the police seized the bhang and he reported the occurrence to his friend George who did not believe him hence vowed not to do the business with him. On 10/4/2021 he found George with the police and some other men at his place of residence at 8 00pm.
13. That the police searched the house but did not find the bhang hence asked for receipts of all the house hold items. Since he had no receipts, they carried away the goods, took their phones and searched for Mpesa, then took his sim cards. The items were put the items in two (2) cars.



14. His wife and child were also arrested but they were released the next morning. That the police took him to Kenya Commercial Bank (KCB) to confirm his account balance. He was detained for 7 days following a court order. They were given more days to detain him further and the police sought to fix him during that period. Subsequently he was granted cash bail of Ksh 50,000/=.
15. He dismissed the inventory as being false arguing that he was forced to thumbprint on the same. and that the he did not have a USB in his house. That they took him to about 10 houses and looked for complainants asking them if their houses had been broken into. They went to a white man's house, and also a Sudanese man's house. In the course of investigations, they stopped at the side of the road and the police went to collect things from the bush. The White man did not accompany them to the bush. He denied the charges and claimed that they were fabricated.
16. The court considered evidence in totality; found that the main charges of Burglary, Stealing and Office breaking had not been proved beyond reasonable doubt. The appellant having failed to render the required explanation, the court found the alternative counts having been proved and sentenced the appellant to pay Ksh. 500,000/- and in default to serve 5 years imprisonment on the 1st and 2nd alternative counts; and 5 years imprisonment on the 3rd count.
17. Aggrieved by the conviction and sentence, the appellant proffered the appeal on the grounds that: the court failed to find that the key ingredients of the offence were not proved; there was no nexus between the accused and the crimes in question; the overall burden of proof was not discharged and that the evidence was weak and insufficient; the defence without being given due consideration and the appellant was prejudiced; and, the court reached a wrong conclusion on forfeiture of the accused items and vehicles.
18. The appeal was canvassed through written submissions that I have duly considered alongside authorities cited.
19. The role of the first appellate court is to reassess and reappraise the record and come up with independent conclusions bearing in mind the fact of not having seen the witnesses or heard their evidence. In doing so it must give due allowance for that. This was clearly addressed in *Odhiambo -Vs- Republic Cr App No 280 of 2004 (2005) 1 KLR* where the Court of Appeal held that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”
20. On the question of burglary and stealing, no evidence was called of the appellant having been seen entering the houses in question at whatever time. The prosecution did not present direct evidence placing the appellant at the two crime scenes. The investigating officer testified that investigations and CCTV footage showed the appellant's vehicle at PW1's residence, the window panes also had marks which were believed to be prints and also that the accused was known for climbing walls and breaking into houses but no witnesses were called to give these details. The evidence did not prove that the appellant was involved in the theft particularized in both counts, hence the learned trial magistrate reached a correct finding with respect to the principal counts.
21. On the issue of Handling Stolen property; Section 322 of the Penal Code provides as follows:
 1. A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods,



or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

2. A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.
22. PW1 and PW4 testified that their property was stolen on 15/3/2021 and 13/3/2021, respectively. PW2 corroborated PW1's evidence that he had been victim of a break in and that he lost his laptop, and its bag. PW3 stated that PW1 had police abstract and that he had reported the matter. PW1 also explained how his laptop and flash drive had been stolen from the office.
23. The police recovered flash disks from the apartment at Radiance, a house acknowledged by the appellant who even complained that his wife and child were also arrested following the search.
24. Section 4 of the Penal code provides:

“possession”—

 - a. be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;
 - (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.
25. The evidence proves that he was found in possession within the meaning of Section 4 of the Penal code.
26. The data details in the flash disks led the police to the real owners. PW2 was called by the police and she confirmed that PW1 prepared a curriculum vitae for her; PW3 identified his flash disk at the police station. PW1 also identified his eye glasses. Therefore, failure to adduce receipts or any further description by the complainants was not fatal to the case. The period between the theft and the recovery was not remote.
27. Knowledge that the goods were stolen is also a key ingredient. In *Tembere -Vs- Republic* (1990) KLR 393, the court listed the ingredients of Handling Stolen Goods as follows:

“...One of the important elements of the charge of handling is that the accused must know or have reason to believe that the goods were stolen.....Another vital element of the charge of handling is that the accused must dishonestly receive or retain etc.”
28. The evidence was that the appellant led police, PW3 and PW5 to Menelik road where they went to the bush and recovered passports which were also identified by PW1. The passport was part of the items he lost on the night of 15/3/2021. The appellant could not account for the items recovered from his house, further hiding some in the bush proves that he knew that the property was stolen at the time he received and retained them.
29. The prosecution having proved possession and the requisite knowledge beyond doubt, the evidential burden shifted to the appellant to show how he came into possession of the stolen goods.



30. In *Paul Mwita Robi -Vs- Republic KSM Criminal Appeal No. 200 of 2008*, the Court of Appeal held that:

“Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.”

31. It is alleged by the appellant that he was forced to append a thumbprint sign but he did not assert that the inventory was not prepared following recovery of the items from his house. Therefore, the appellant did not explain how he came to be in possession of the flash disks and eye glasses and Identity cards identified by PW1 and PW4.

32. With regard to Count 3, the appellant faced the charge of Handling stolen property contrary to section 323 of the Penal Code. The stated provision of the law enacts that:

Person suspected of having or conveying stolen property

Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.

33. The offence created by Section 323 of the Penal Code is failing to account for possession of property suspected to be stolen or obtained unlawfully not handling stolen property. The statement of the offence was erroneously framed; and, the particular of the offence do not support the offence envisaged in such an offence.

34. It is apparent that items recovered include some nine cellphones and the court rightly found the explanation given not satisfactory. However, the prosecution failed to appreciate that the question of handling stolen property would require proof of ownership of the items purportedly retained. It was incorrect for the court to rely on the doctrine of recent possession.

35. In a nutshell, the court erred in law and fact in its finding that the appellant was not able to explain as expected under Section 323 of the Penal Code for the offence as framed did not capture the ingredients of the envisaged offence.

36. This is a case where the court issued orders of forfeiture which is recognized as a punishment that can be considered by the court under Section 24 of the Penal Code. In *Peter Igeria Nyambura -Vs- Director of Public Prosecutions* [2018] eKLR Nyakundi J listed key elements of forfeiture process, the court held that the prosecution had to discharge the burden of proof as follows -

“What do I see as the key elements in an application by the state seeking forfeiture in a criminal proceeding[s]”

The state must establish the requisite nexus between the property and the offence;

The court’s determination may be based on evidence already on record including any plea and or adduced evidence accepted by the court as relevant;

If the court seeks to forfeit a specific property a notice of the order must be sent to any person who reasonably might appear to be a potential claimant with standing to contest the forfeiture in the proceedings.



This is more so when in practical terms the seized property would be in the hand of an agent, employee, or servant of the person with proprietary interest or right.”

37. Prior to forfeiting an item, the court is obligated to issue a notice to the claimant to tender evidence establishing ownership and hence show cause as to why the item should not be forfeited. This was not the case in the instant case which made order irregular.
38. On the question of legality of the sentence; the default sentence was illegal and failed to consider the provisions of Section 28(2) of the Penal Code which sets the default imprisonment terms where fines are meted out by the court. The default imprisonment term for the fine of Ksh 500,000/= is 12 months.
39. Section 322 of the Penal Code does not provide for the option of a fine; however, the court having exercised discretion, it was bound by Section 28(2) of the Penal Code. For that reason, the default sentence meted out was excessive.
40. In the upshot, the appeal on conviction on Count 3 succeeds, the conviction is quashed and sentence set aside. The appeal on sentence for the alternative to Counts 2 and 3 succeeds partially, to the extent that the conviction is affirmed, but, the default sentence meted out is set aside, and substituted by the order as follows:

Count I - To pay a fine of Ksh, 500,000/ and, in default to serve 12 months imprisonment.
Count II – To pay a fine of Ksh, 500,000/ and, in default to serve 12 months imprisonment.

Sentences to run consecutively from the date of sentence, the 20th December,2021, the appellant having been out on bond during trial.
41. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 31ST DAY OF JULY, 2024.

L. N. MUTENDE
JUDGE

