



**Wambui v Republic (Criminal Appeal E021 of 2024)
[2024] KEHC 10195 (KLR) (16 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E021 OF 2024
JN ONYIEGO, J
AUGUST 16, 2024**

BETWEEN

MAGRET WAMBUI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon. R. Aganyo (P.M.)
delivered on 18.04.2024) in WAJIR PM'S court criminal case number E093 of 2023)*

JUDGMENT

1. The appellant herein was charged before Wajir PM's court in Criminal Case No. E093 of 2023 with two counts as follows:
2. Count I: Stealing contrary to section 268 as read with section 275 of the Penal Code. Particulars were that on 21.03.2023, at around 1830hrs in Township location Wajir East Sub County within Wajir County she willfully and unlawfully stole a mobile phone make Tecno POP (21) valued at Kes. 12,000/- the property of Caroline Kendi.
3. In the alternative, she was charged with handling stolen property contrary to Section 322(1) as read with Sub-Section (2) of the Penal Code. Particulars were that, on 22.03.2023 at around 1830hrs in Township location Wajir East sub County within Wajir county, otherwise than in the normal course of stealing, she was found in possession of a phone make Tecno POP 2 having reason to believe it to be a stolen property.
4. Count II: Malicious damage to property contrary to section 339 of the Penal Code. Particulars were that on 21.03.2023 at around 1830hrs in Township location Wajir East sub County within Wajir county, she willfully and unlawfully broke and damaged one phone make Tecno POP 2 valued at Kes. 12,000/- the property of Caroline Kendi.



5. She pleaded not guilty to both counts and the matter proceeded to full trial. Upon conclusion of the trial, she was found guilty and then convicted on both counts. She was subsequently sentenced on count 1, to serve a one-year jail term and on count II, to imprisonment for 2 years. The sentences were to run concurrently from 26.03.2024 when she was placed in custody upon her guilt being established.
6. Aggrieved by the said decision, she filed her appeal dated 10-06-24 citing the following grounds.
 - i. The learned magistrate erred in law and fact by convicting the appellant yet the case was not proved to the required standard.
 - ii. The learned magistrate erred in law and fact by introducing extraneous issues to the matter herein.
 - iii. The learned magistrate erred in law and fact by meting out harsh and excessive sentence.
7. The appeal was canvassed through written submissions.
8. The appellant urged that the prosecution did not shift the burden of proof as it was not proved that the appellant had the intention to permanently deprive the complainant of her phone and/or keep the phone permanently and hold it against the complainant's will. That the trial magistrate in convicting her relied on the complainant's evidence yet the same was not only unreliable but also inconsistent. The trial court was faulted for having failed to interrogate the evidence by the prosecution to test whether it could safely lead to conviction. Reliance was placed on the case of Abdalla bin Wendo & another vs Republic 20 EACA where the court found that a fact may be proved by a single witness evidence but the same does not lessen the need to test that evidence.
9. It was argued that the evidence by the defence was not controverted as the prosecution failed to avail the necessary witnesses to support its case. That the trial court had the duty to summon any person who could aid it reach a just determination but the same was not done. As such, the appellant urged that the determination reached by the trial court was not supported by evidence hence unsafe.
10. It was urged that the evidence by PW1 was not only contradictory but also inconsistent. That the contradiction was material as it remained unknown whether the incident occurred along the NHIF road in Wajir Township or at Twiga club. It was further contended that the complainant during the cross examination stated that she was the one who handed over the phone to the appellant and therefore elements of the offence of stealing could not have been inferred as the aspect of intent was not proved. To that end, support was drawn from the case of Philip Nzaka Watu vs Republic [2016] eKLR where the court found that prosecution's case should not only be cogent but also credible and trustworthy.
11. On sentence, the appellant contended that the same was not only excessive but also harsh in the obtaining circumstances. That in as much as sentencing is at the discretion of the trial court, the same went contrary to the principles provided for in the Judiciary Sentencing Policy 2016. While relying on the case of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003, this court was urged that it ought to interfere with the sentence by the trial court as the same was based on wrong principles and further, the court had overlooked some material factors.
12. In the end, the appellant prayed that the appeal be allowed, conviction be quashed and the sentence set aside.
13. The state through the prosecution Counsel Bedan Kihara, conceded to the appeal and as such, no submissions were filed.



14. In spite of the fact that the appeal herein was not opposed by the prosecution, the same does not mean that the court automatically grants the orders sought. It is trite that the same must be determined on its merits as the court reaches its own independent determination. [See Gideon Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR].
15. On appeal an appellant on a first appeal 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. See *Pandya vs R.*, [1957] E. A. 336). The first appellate court must itself weigh conflicting evidence and draw its own conclusions. See *Shantilal M. Ruwala vs R.*, [1957] E.A. 570). It is not the function of a 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 draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make due allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses testify. See *Peters vs Sunday Post*, [1958] E. A. 424 and *Okeno vs Republic* [1972] EA 32 at 36.
16. PW1, Caroline Kendi testified that she eked a living as a cloth dealer. That on 21.03.2023, she met a lady by the name Wangari who advised her to go sell her clothes at Twiga club. As the duo continued talking, the appellant herein approached them and started abusing her that she was a Malaya. She claimed that the appellant proceeded to take her phone, Tecno Pop 2 from her trouser pocket and left with it. She stated that the phone belonged to her as she had a cover pattern on the face of the phone as security.
17. She further produced a receipt which she obtained upon buying the said phone at Kes. 8,000/- on 15.08.2020. That she followed the appellant herein to her residence at Twiga club and requested her to return the phone to her but all in vain. She further told the court that, while there, the appellant took the phone and threw it to another woman thus causing the same to fall and break its screen. She was removed from the scene by Saddam, a watchman and later reported the incident to the police station. The phone was thus later recovered from the appellant herein.
18. PW2, No. 254047 PC Vincent Ogaro, the investigating officer recalled that on 22.03.2023, he was assigned the matter herein to investigate. That he conducted his investigations including visiting the scene of crime and confirmed that the appellant stole the complainant's phone and further damaged it. He stated that he recovered the said phone from the appellant and confirmed that the same belonged to the complainant.
19. DW1, Magret Wambui in her unsworn testimony stated that on 19.03.2023, she was at her place of work when the complainant visited the club and told her to sell her two beers. That the complainant joined the company of two men and upon finishing her drink, the said men declined to meet her bill thus leaving the complainant stranded. When her boss arrived, the complainant followed him but she did not get to hear what she told him. At that time, the boss came along with the complainant's phone and told her to hold the same till such time when the complainant honoured her bill of Kes. 300/-.
20. That at the time she was given the said phone, she noticed that it had a cracked screen. On 21.03.2023, the complainant visited the said club while drunk and caused commotion leading to her being removed from the scene by the watchman on duty. That after some time, PW2 a police officer called her with a view to enquiring if she had the complainant's phone. Having explained to pw2 that she was holding the phone as security for the unpaid bill, the officer directed her to take the phone to the station which order she complied with only to be arrested and accused of stealing the same phone.
21. DW2, Alphonse Musyoka, a casual worker recalled that on the material day, he saw the complainant enter the club when the appellant asked the complainant about a debt. As a response, the complainant caused commotion when the watchman suggested that the matter be reported to the police.



22. DW3, Amos Kimondo, a businessman and owner of the club/bar business stated that on 19.01.2023, he was at his place of work checking stock when one of his customers who had taken drinks but did not have cash to pay arrived. That her friends had disowned her by declining to pay for the said drinks which costed Kes.440/-. He stated that for the reason that he did not want to embarrass her, he allowed her to pay Kes. 140/- and thereafter left him with her phone. He stated that the said phone had two cracks on the screen and so, he gave the same to the appellant to hold it as security till the balance was paid by the complainant. That he later heard that the complainant had visited the bar seeking to have her phone back without paying the balance owed.
23. That she caused a lot of commotion leading to her being thrown out of the bar by the watchman on duty. On 24.03.2023, PW2 called the appellant telling her to report to the police station with the said phone so that she could be paid the amount owed of Kes.300/-. Upon the appellant complying with the said order, she was instead arrested and charged.
24. From the fore going and properly guided by the cited case law, the following issues arise for determination;
- i. Whether the offence of stealing was proved beyond reasonable doubt.
 - ii. Whether the offence of malicious damage to property was proved beyond reasonable doubt.
 - iii. Whether the sentence meted out was harsh in the obtaining circumstances.
25. In a criminal trial, the standard of proof is always beyond reasonable doubt. Mativo, J (as he then was) in Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR expressed himself as hereunder:
- “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 favorite 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.”
26. The appellant herein was charged with two counts. Count I was that of stealing which provides under section 268 as follows;
- A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property.



27. She was further charged with an alternative charge of handling stolen property which is provided for under s. 322(1) as read with 322(2). Sub-section (1) states that; 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.
28. Further, on Count II, she faced the offence of malicious damage to property contrary to section 339 of the Penal Code which provides that;
- (1) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.
29. According to pw1's evidence, it was the appellant who stole her phone and further damaged it. PW2 stated that he recovered the said phone from the appellant while at the police station. What is not in doubt is the ownership of the phone as it was admitted that the same belonged to PW1. What must be determined is the manner through which the phone came into possession of the appellant and further, whether the appellant maliciously damaged the said phone.
30. A review of PW1 evidence is to the effect that on 21.03.2023, she met a lady by the name of Wangari who advised her to go sell her clothes at Twiga club. As the duo continued talking, the appellant herein approached them and started abusing her that she was a malaya. She proceeded to take her phone, Tecno Pop 2 from her trouser pocket and left with it. That she followed the appellant to her residence at Twiga club and requested her to return the phone to her in vain. While there, the appellant took the phone and threw it to another woman thus causing the phone to fall and break its screen.
31. PW2 stated that upon conducting investigations, he found that the appellant stole the phone from PW1. Of importance to note is the fact that PW2's testimony on the recovery of the phone contradicted that of the appellant. This is against the evidence by PW1 who stated that the said phone was recovered from the house of the appellant while pw2 said on cross examination that the accused presented the phone at the police station. Who is telling the truth between the two?
32. On the other hand, evidence of the appellant was corroborated by the testimony of two witnesses as they maintained that the phone was used as a security hence not stolen as was alleged. The evidence of the prosecution was not corroborated and the court did not caution itself of the dangers of convicting based on the evidence of a single witness as laid out in the case of Abdallah Bin Wendo vr Republic (supra).
33. I am alive to the fact that a conviction can be based on the testimony of a single-eye witness as there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone. [See the Court of Appeal of Uganda in Okwang Peter vs Uganda Criminal Appeal No. 144 of 1999].
34. The above notwithstanding, this court is also alive to the fact that section 143 of *Evidence Act* (Cap 80) Laws of Kenya, 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. In the same breadth, in the case of Keter vs Republic [2007] 1 EA 135 the court held inter alia that the prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."



35. In the instant case, it is my belief and indeed conviction that this was a simple case where the prosecution could have adduced more witnesses/evidence to fully corroborate its case and fill in the gaps. The defence case is well corroborated, consistent and convincing. The defence real shook the prosecution case. I am convinced that the complaint by the complainant was malicious and made in bad faith with the intention of running away from paying the bill she had incurred in the club where the appellant was serving. In my assessment, the prosecution evidence available can not sustain any safe conviction in the circumstances of this case.
36. Having found as above, it would be an academic exercise to determine whether the sentence(s) meted out by the trial court was harsh or inappropriate in the given circumstances.
37. In the end the appeal succeeds as the conviction is quashed, the sentence(s) set aside and the appellant be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 16TH DAY OF AUGUST 2024

J. N. ONYIEGO

JUDGE

