



REPUBLIC OF KENYA



KENYA LAW
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**Orende v Republic (Criminal Appeal 106 of 2023)
[2024] KEHC 11516 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 106 OF 2023
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

ABRAHAM OCHWAD ORENDE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 30th August 2023 by Hon. E. Riany (S.R.M) at Kibera Chief Magistrate's Court Criminal Case No. E320 of 2020 Republic vs Abraham Ochwad Orende & Another)

JUDGMENT

1. Linda Igamihi Musalia and Abraham Ochwad Orende were charged with two counts of offences: stealing contrary to section 268(1) as read with section 275 of the [Penal Code](#) and conspiracy to commit a felony contrary to section 393 of the [Penal Code](#). After a full trial, the first accused Linda Igamihi Musalia was acquitted of all charges while the second accused now the appellant was convicted. The appellant was sentenced to pay a fine of Kshs 300,000 in default to serve one year and six months imprisonment in Count I, and Kshs 300,000 in default to serve one year and six months imprisonment in Count II. The sentences were to run consecutively. Being aggrieved, he challenged the conviction and sentence on appeal.
2. In his petition of appeal, the appellant raised nine (9) grounds which have been coalized into the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted. The appellant argued that the trial court failed to consider his defence. The appellant complained that the sentence meted out was harsh and excessive. He urged the court to quash his conviction and set aside the sentence.
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 that



was 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 called seven (7) witnesses in support of their case. Jang Joe Tong (PW1) PW1 and his wife Chui Sung Rim (PW3) lived at Sapphire Apartments. On the night in question, after returning from dinner, they found their home ransacked. PW1 was shocked, as only he and his wife had keys. Several valuables were stolen, including a Rolex watch, a gold Cartlin watch, gems, a laptop bag, cash (Kshs 190,000), and cards. The total loss amounted to Kshs 3.8 million.
5. PW1 reported the matter to the residence manager, Linda Igamihi Musalia, who helped review the CCTV footage. Part of it was missing, but the remaining footage showed three intruders entering the house. Linda advised him to report to the police. PW1 couldn't provide receipts for the stolen items, as they were bought years ago.
6. Simon Echenje Okato (PW2), PW1's driver, recalled being told of the robbery the next morning. PW3, PW1's wife, confirmed the house was intact earlier that day but was ransacked when they returned from dinner.
7. Roshik Ouma (PW4) head of the security company at Nextgen Mall, testified that around 5 pm on the day of the theft, he saw a WhatsApp message reporting the burglary. He called Linda, the residence manager to arrange a meeting to review the CCTV footage, but part of it was missing and could not be retrieved. He confirmed both Linda and the appellant had access to the CCTV servers, though the appellant was not trained to use them.
8. Soli Kiluta (PW5) was the head of the security company where the appellant supervised the guards at Sapphire Apartments. On that fateful day, the appellant called him to inform him of the burglary. He also stated that his company does not train its employees to work with CCTV footage, but only to fill the books in which the details of the apartments' visitors are recorded.
9. Kepha Otieno (PW6) a technician testified that PW5 informed him of the theft and instructed him to retrieve the CCTV footage the following morning. After reporting to the appellant, PW6 was told to delete any suspicious footage. He discovered that the playback for the day of the incident had already been deleted. However, some footage remained, showing three to four individuals walking towards PW1's apartment. He averred that he had trained Linda Musalia in handling CCTV footage and that anyone who could playback the footage could delete it, thus he believed that she was the one responsible for the missing footage. When the police arrived, the footage was handed over to them who also confirmed that part of the footage had been deleted.
10. The investigating officer PW7, Inspector Sally Kimei, was informed of the theft at Sapphire Apartments while on duty. Upon arrival, she found the apartment in disarray, with clothes scattered on the floor. She called in crime scene personnel to document the scene and returned the next day with DCI officers to review CCTV footage, only to find it tampered with. Three days later, she recorded statements from Linda Musalia and PW6. PW5 later confided that the appellant had instructed PW6 to delete suspicious footage, which PW6 refused.
11. PW7 confirmed the theft occurred around 6 pm, with stolen goods valued at Kshs 3.8 million. When asked for receipts, PW1 explained that he had purchased the items abroad years ago and could not produce them. PW7 also noted that visitors who had checked in the day of the theft left early the next morning with bags, but their names were not recorded, suggesting a link to the first accused Linda, as all visitors had to pass by her desk.
12. Linda Igamishi Musalia testified that she was preparing for a Zoom meeting when PW1 reported the theft. She accompanied him to the apartment and later retrieved CCTV footage with the appellant and



- caretaker. She observed masked men and a woman leaving the apartment with a laptop bag, but part of the footage, including the lift area, was missing. A technician confirmed they were unavailable to repair the issue. The next day, she provided a flash drive to record the remaining footage for the police.
13. The appellant recounted the hearing of the burglary through an intercom and suggested PW1 report it to the police. He stayed with the DCI team at the scene until late, returning the next day to review the footage with PW5, PW6, and the police. He stated that footage showed a woman, whom he identified as PW1's wife, waving at three men leaving the apartment, none of whom were recorded in the visitors' log.
 14. DW3 and DW4, both guards, confirmed seeing the appellant heading to Sapphire Apartments after being alerted to the theft. DW4, assigned to the night shift, added that no guards were allowed to hold apartment keys.
 15. The appellant also challenged the totality of the prosecution's evidence against which he was convicted. He contended that the prosecution did not prove the case beyond reasonable doubt. In addition, the ingredients of the offence of stealing were not established in Count I.
 16. The elements of stealing are as set out in section 268 of the *Penal Code* below:
268.
 - (1) 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.
 - (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say -
 - (a) an intent permanently to deprive the general or special owner of the thing of it;
 - (b) an intent to use the thing as a pledge or security;
 - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
 - (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
 - (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if, at the time of the conversion, the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.



- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.
17. The appellant was also convicted for the offence of Conspiracy to commit a felony contrary to section 393 of the *Penal Code* Cap 63 Laws of Kenya. The said section provides as follows;
- Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.
18. The standard of proof in criminal cases is proof beyond reasonable doubt and not on a balance of probabilities. This was the holding by Lord Denning in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 as follows:
- “That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence, of course, it is a doubt but nothing short of that will suffice.”
19. It is not in dispute that the appellant was a supervisor at a security company that guarded the complainant’s premises. During the period of employment, the complainant’s premises was robbed and valuable commodities were stolen. The stolen items were never recovered and CCTV footage possible showing alleged perpetrators tampered with. The fact that property stolen from the complainant’s premises was stolen is not in doubt. The question that remains to be answered is whether the appellant conspired with others to steal the complainant’s property.
20. The evidence presented in court strongly implicates the appellant in a coordinated theft, carried out with his knowledge and in collusion with others. The appellant's actions during the incident are particularly telling. He instructed PW6 to delete any suspicious CCTV footage, which clearly suggests his awareness of the crime.
21. Further, it was established that a screen at the gate allowed guards to monitor activity, yet no report of the robbery was made. This raises serious doubts about whether the robbery was truly external. Moreover, access to the building required registration at the security desk, but no records were provided to account for those entering the premises during the incident.
22. The deleted footage, combined with the appellant’s access to the building and control over the equipment where the footage could be erased, places the appellant at the center of the crimes committed. This evidence demonstrates his involvement and knowledge of the theft. His defence failed to dislodge the otherwise cogent circumstantial evidence on record. The only logical conclusion was that the evidence given by the appellant was not credible and was rightly dismissed by the trial court. His conviction for the offences charged was, therefore, safe and is affirmed.
23. On sentence, the appellant was were sentenced to pay a fine of Kshs 300,000 in default to serve one and a half years imprisonment in counts I and II respectively.
24. Under Section 275 of the *Penal Code*, any person convicted for the offence of stealing is liable to imprisonment for 3 years. On the other hand, a conviction for the offence of conspiracy to commit a



felony attracts a sentence of not more than 7 years. In the present case though, the trial court opted to impose fines.

25. In that case, the learned trial magistrate ought to have imposed the default sentences pursuant to Section 28(2) of the *Penal Code*. Under the provision, where the fine imposed exceeds Kshs 50,000/ = the default sentence must not exceed 12 months imprisonment. It follows then that the sentences imposed were illegal which represents an irregularity in the sentences.
26. In the end, the sentence of a fine of Kshs 300,000 in default to serve one and a half years imprisonment in count I is substituted with a fine of Kshs 300,000 in default to serve 12 months imprisonment. In count II, the sentence of payment of a fine of Kshs 300,000 in default to serve one and a half years imprisonment is substituted with a sentence of payment of a fine of Kshs 300,000 in default to serve 12 months imprisonment. The default sentences shall run consecutively from the date of the appellant's conviction.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2024.

D. KAVEDZA

JUDGE

In the presence of:

Pamba for the Appellant

Maroro for the Respondent

Achode Court Assistant

