



REPUBLIC OF KENYA



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**Kimaiyo v Republic (Criminal Appeal E002 of 2023)  
[2024] KEHC 16230 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16230 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E002 OF 2023  
JN KAMAU, J  
DECEMBER 19, 2024**

**BETWEEN**

**MAXWEL KIMAIYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon S. Manyura (RM) delivered at Hamisi in Senior Principal Magistrate's Court in Criminal Case No E062 of 2022 on 16th January 2023)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with three (3) others not before this court, on two (2) counts of the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code.
2. He was tried and convicted by the Learned Trial Magistrate, Hon S. Manyura (RM) who sentenced him to five (5) years imprisonment.
3. Being dissatisfied with the said Judgment, on 21<sup>st</sup> February 2023, he lodged the Appeal herein. His Petition of Appeal was dated 20<sup>th</sup> February 2023. He set out eight (8) grounds of appeal.
4. His Written Submissions were dated 14<sup>th</sup> December 2023 and filed on 13<sup>th</sup> May 2024 while those of the Respondent were dated 22<sup>nd</sup> August 2024 and filed on 27<sup>th</sup> August 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal and parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the charge sheet was defective warranting the interference of this court;
  - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

### I. Charge Sheet

9. Ground of Appeal No (1) was dealt with under this head.
10. Although the Appellant raised a ground of appeal with respect to the Charge Sheet, he did not submit on the same. Therefore, this court could not tell what was his contention regarding the Charge Sheet.
11. A perusal of the Charge Sheet contained all the necessary information to inform him of the offence that he had been charged with. The charges were read to him in a language that he understood, Kiswahili, to which he pleaded "Not guilty" whereupon the case proceeded to full trial. There was nothing to show that the plea taking process was flawed and/or that the Charge Sheet was not proper and/or valid.
12. In the premises foregoing, Ground of Appeal No (1) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

### II. Proof Of Prosecution's Case

13. Grounds of Appeal Nos (2), (3), (4), (5), (6), (7) and (8) of the Petition of Appeal were dealt with under this head.
14. The Appellant submitted that the Prosecution failed to adduce any evidence to link him stolen items and/or the crime scene. He argued that the Trial Court implicated him without a keen scrutiny of the evidence on record. He reproduced his defence evidence and was emphatic that the police carried out a search in his house and no stolen item was recovered from him.
15. He placed reliance on the case of *Maurice Okello & Another vs Republic Criminal Appeal No E017 & E014 of 2021* (eKLR citation not given) where it was held that where a case rested entirely on circumstantial evidence, such evidence had to satisfy that the circumstances from which an inference of guilt was sought to be drawn had to be cogently and firmly established, those circumstances had to be of a definite tendency unerringly pointing towards guilt of the accused and that the circumstances



- taken cumulatively had to form a chain so complete that there was no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.
16. He also relied on the case of *Mwangi vs Republic* [1983] KLR 327 where it was held that in order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference. He pointed out that walking with a person that one knows could not implicate one of a mistake done prior to the meeting and/or walking together in the same direction. He added that for the offence herein to have been proved there must have been proper visibility on the crime scene for one to be identified and/or an identification parade needed to be carried out which was not the case herein.
  17. In that regard, he relied on the case of *Hamisi Mungale Burehe vs Republic Criminal Appeal No 37 of 2013* (eKLR citation not given) where it was held that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification was positive and free from the possibility of error. He pointed out that no witness singled him out as having been found with any of the stolen items. He blamed the Trial Court for having found him guilty without direct evidence thereof. He urged this court to quash his conviction and set aside his sentence.
  18. On its part, the Respondent reproduced the evidence on record and submitted that it was trite law that in the absence of direct evidence linking the offenders to a crime, the court could rely on circumstantial evidence. It contended that during his cross-examination, the Appellant did not challenge the evidence of No 62149 Corporal John Kalamu (hereinafter referred to as "PW 9") that he (the Appellant) provided crucial information which led to the recovery of the stolen items. It argued that although no items were recovered from the Appellant, his knowledge of where the stolen items were linked him to the offence. It added that his defence was simply a denial and did not explain how he knew of the whereabouts of the stolen items. It was its case that it had proved its case beyond reasonable doubt.
  19. David Lusava Mwashu (hereinafter referred to as "PW 1") testified that on the material night of 22<sup>nd</sup> and morning of 23<sup>rd</sup> January 2022, one Moses, IEBC's youth, kept their gadget and battery at his workshop. On 23<sup>rd</sup> January 2022, he left as early as 6.00a.m. He headed to Soi Club for a meeting and he told one of his boys, one Patrick, that he would call him once the IEBC man came for their machine so that he could open for him to get the same. Between 7.30 am to 8.00 am, he got a call from the IEBC Clerk who informed him that he had found his shop open and it appeared to have been broken into. When the said clerk checked inside the shop, he discovered that the IEBC laptop was missing. He then asked the clerk to report the matter to the police.
  20. His further evidence was that later on, his worker found out that the compressor and the CCTV were missing. When he went back to his shop, he did a thorough check and realised that the monitor, keyboard, an electric power drill battery and charger were also missing. He sent out a word that anyone who would see those things to inform him.
  21. He recorded his statement at the police on 24<sup>th</sup> January 2022 and the police asked him to help ascertain who were involved in the said offence. A few days later, one boy, a school going child informed him that he had seen one Sammy with the bill charger. He gave the boy some money to buy the said charger so that he could identify whether it was his. When the boy bought the same, he confirmed that it was actually his charger. He communicated with the DCIO and arranged for the arrest of the said Sammy.
  22. On the day of arrest, Sammy ran away leaving a black bag behind which he identified as having been his bag that was in the shop on the material night. He also identified the black bag in court. The following day, he was called by the police to go and identify some of the recovered items. He went and identified



- the compressor. He gave them the receipt to prove purchase of the same. He pointed out that the air compressor, drill charger, monitor, keyboard and bag were all valued at 40,500/=.
23. Collins Mulusa (hereinafter referred to as “PW 2”) testified that he was the IEBC Voter Registrar Assistant. He confirmed that indeed their gadgets, a BVR kit and a laptop were stolen from PW 1’s shop on 23<sup>rd</sup> January 2022. He identified the same in court. He stated that he was called by John Muthui Katuku (hereinafter referred to as “PW 3”) who informed him of the missing items.
  24. PW 3 testified that he was a Voter Registration Clerk and that on 22<sup>nd</sup> January 2022, he took the BVR Kit to PW 1 shop and placed a battery on charger. PW 1 indicated that he would not be around the following morning but would leave a key with someone who would open for them the shop. On 23<sup>rd</sup> January 2022, he got a call from one Moses who informed him that the building was broken into and the items stored were missing. When he went to confirm, he found the computer, two (2) flash disk, USB hub, battery inverter and two (2) battery were missing.
  25. Sylvia Ngondi Maguyi (hereinafter referred to as “PW 4”) was PW 1’s wife. She testified that on 23<sup>rd</sup> January 2022 at around 10.00a.m, she was in church when one Japheth told her that a neighbor at their shop was looking for her. When she went to the shop, she found that the IEBC items, CCTV screen, decoder, door lock were missing and wires were hanging.
  26. No 77716 Sgt Ronald Kimsop (hereinafter referred to as “PW 5”) testified that on 23<sup>rd</sup> January 2022 at around 9.13am, he was at Cheptulu when he received a call from Inspector Edward Simiyu telling him that on the night/morning of 23<sup>rd</sup> January 2022, one house in Cheptulu trading centre had been broken into and IEBC items stolen. When he visited the crime scene, he found the metal door had been cut. He found out that IEBC Kits, laptop inverter, flash disks, USB and other accessories had been stolen. He later learnt that some people were arrested over the same and some items were recovered.
  27. Prisca Osotsi (hereinafter referred to as “PW 6”) and Thomas Nge’tich (hereinafter referred to as “PW 7”) were also IEBC’s officials. Their evidence corroborated that of PW 1, PW 2, PW 3, PW 4 and PW 5.
  28. Beatrice Njehi Anyumba (hereinafter referred to as “PW 8”) testified that on 23<sup>rd</sup> January 2022 at around 1400 hours, she was in her kiosk selling food when four (4) boys came in a motor cycle and a sack. They asked to be given food. They also asked that she keeps for them their luggage as they went for fuel. Her evidence was that they did not come back. On 6<sup>th</sup> February 2022, police came and asked her if they left any sack with her and when she gave them the luggage, the police found the machine inside.
  29. PW 9 was the investigating officer. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 8. He stated that during the investigations the Appellant was arrested together with his Co-Accused who offered information which led to the recovery of the air compressor at PW 8’s home and who confirmed that the same was taken to her shop by the arrested suspects. He produced the recovered air compressor, black bag, BVR Kit and Laptop as exhibits in this case.
  30. In his defence, the Appellant testified that he was a student at Koibarak Secondary School in Form two (2). He said that he was arrested on 5<sup>th</sup> February 2022 while heading home. He stated that one of his co-accused had told the police that he walked with him (sic). A search was conducted in his home but nothing was recovered. In his cross-examination, he stated that when his Co-Accused escaped, he was with him. He added that it was one of his Co-Accused who was found with the bag.
  31. Notably, Section 306(a) of the Penal Code prescribed has two (2) elements of the offence of stealing. These were breaking and entering into dwelling house or building and committing a felony.



32. The testimony of PW 1, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 9 confirmed that PW 1's shop was broken into and IEBC items and those of PW 1 stolen. PW 8 confirmed that the air compressor was recovered from her shop, having been left by four (4) boys of whom she identified one.
33. The Appellant did not deny knowing PW 1. In cross-examination he stated that when one Sammy ran away from being arrested, he was with him. The fact that he was a school going child did not exonerate him from the offence. The evidence on record linked him to the stolen items as PW 1 testified that he informed him that he knew where the charger was and when PW 1 gave him money to buy the same, he indeed bought the same.
34. He simply denied having committed the offence. He did not adduce evidence to establish the fact that he was not an accomplice in the offence and/or how he came to know who actually had the alleged charger. The totality of the evidence was that the Appellant was among those who broke into PW 1's shop and stole the items.
35. In the premises, Grounds of Appeal Nos (2), (3), (4), (5), (6), (7) and (8) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

### III. Sentencing

36. Grounds of Appeal Nos (1), (3) and (5) of the Petition of Appeal were dealt with under this head.
37. Both parties did not submit on the issue of sentencing. Section 306(a) and 306(b) of the Penal Code provides as follows:  
A person who:-
  - a. Breaks and enters a school house, shop, warehouse, store, office, counting house, garage, pavillion, club, factory or workshop or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor or a building which is adjacent to a dwelling house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
  - b. Breaks out of the same having committed any felony therein; is guilty of a felony and is liable to imprisonment for seven years.
38. The Appellant was sentenced to five (5) years imprisonment. That could not be said to have been excessive sentence. The Trial Court was lenient to have imposed on him a lower sentence at it had the option of sentencing him to seven (7) years imprisonment. This court did not find it prudent to disturb the same.
39. In the premises, Grounds of Appeal Nos (1), (3) and (5) of the Petition of Appeal were not merited and the same be and are hereby dismissed.
40. Going further, this court was mandated to consider the period that the Appellant spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
41. Section 333(2) of the Criminal Procedure Code provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code



Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).

42. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic*[2018]eKLR.
43. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
44. The Charge Sheet indicated that the Appellant was arrested on 5<sup>th</sup> February 2022. He was released on bond on 15<sup>th</sup> February 2022. He was remanded after being convicted on 16<sup>th</sup> January 2023. He was sentenced on 2<sup>nd</sup> February 2023. He therefore spent ten (10) days in custody before being released on bond and sixteen (16) days before he was sentenced after his conviction.
45. A perusal of the proceedings of the Trial Court showed that it did not take into account this period while sentencing him. This was a period that ought to have been taken into account.

### **Disposition**

46. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 20<sup>th</sup> February 2023 that was lodged on 21<sup>st</sup> February 2023 was not merited and the same be and is hereby dismissed. His conviction and sentence be and is hereby upheld.
47. For the avoidance of doubt, the period between 5<sup>th</sup> February 2022 and 15<sup>th</sup> February 2022 and the period between 16<sup>th</sup> January 2023 and 1<sup>st</sup> February 2023 be and are hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
48. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 19<sup>TH</sup> DAY OF DECEMBER 2024**

**J. KAMAU**  
**JUDGE**

