



**Nusu v Republic (Criminal Appeal E091 of 2021)  
[2023] KEHC 252 (KLR) (Crim) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 252 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E091 OF 2021  
LN MUTENDE, J  
JANUARY 19, 2023**

**BETWEEN**

**EVANS MAINGI NUSU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the original conviction and sentence in Criminal Case No. 3401 of 2018 at the Chief Magistrates' Court Makadara by Hon. A.R. Kithinji - CM. on 20th August, 2018)*

**JUDGMENT**

1. Evans Maingi Nusu, the Appellant, was charged in the Subordinate Court alongside two (2) others with three (3) counts:
  - (i) Conspiracy to commit a felony contrary to Section 393 of the *Penal Code*. Particulars of the offence being that on the December 7, 2018, at Pangani Palace, in Starehe Sub-County, within Nairobi County, jointly with others not before court, conspired to commit a felony, namely burglary and stealing of Kshs Six Million, Safe keys. padlock, assorted clothings, and three goggles, the property of Christine Nyareso Makone.
  - (ii) Burglary and Stealing Contrary to Section 304 (2) of the Penal Code as read with Section 279(b) of the Penal Code. Particulars of the offence being that on the December 7, 2018, at Pangani Palace, in Starehe Sub-County, within Nairobi County, jointly with others not before court, broke and entered the dwelling house of Christine Nyareso Makone with intent to steal therein and did steal from therein Kshs Six Million, Safe keys. padlock, assorted clothings, and three goggles, the property of Christine Nyareso Makone.



- (iii) A charge that should have been an alternative to the second count; of Handling Stolen Goods Contrary to Section 322(1)(2) of the Penal Code. Particulars of the offence being that on the December 22, 2018, at Kamarock Estate, in Kayole Sub-County, within Nairobi County, otherwise than in the course of stealing, dishonestly received or retained a muffin, 3D goggles. Hair container Stylinec dreds 250ml, knowing or having reason to believe it to be stolen goods.
2. Having been taken through full trial, the appellant was acquitted of Counts I and III, but, convicted for the offence of Burglary and Stealing. In the result, he was fined Ksh 500,000/- and, in default, he was required to serve three (3) years imprisonment. In addition, he was ordered to compensate the complainant the stolen amount of Ksh 6,000,000/-, compensation that was to take precedence.
  3. Aggrieved, the appellant proffered this appeal on grounds that the trial court erred in law and fact: by convicting the appellant in the absence of evidence to connect him to the commission of offences charged; for failing to find and hold that the prosecution had not proved their case against the appellant beyond reasonable doubt. That the court misdirected itself both in law and fact for relying on circumstantial evidence to convict the appellant which circumstantial evidence had not met the legal threshold for acceptability and admissibility; and, that the court convicted despite the fact that the appellant's alibi was not displaced.
  4. The Respondent opposes the appeal on grounds that this court lacks jurisdiction to determine the matter because the appellant sought review in Miscellaneous Criminal Application No E349 of 2021 in which Chepkwony J pronounced herself on November 9, 2021, where the sentence was reviewed to allow the appellant pay the fine before compensating the complainant. That a court of concurrent jurisdiction having determined the issue, any reprieve lay with the appellate court.
  5. The brief background of the matter was that the Complainant and her family members were away from home having travelled between 3<sup>rd</sup> and December 4, 2018, respectively. They returned home to find the house having been broken into. Some items that had been kept inside the Safe were alleged to have been missing. These were stated to include cash money, Ksh 6,000,000/- then, the safe keys, padlock, assorted clothes and goggles.
  6. That on the December 7, 2018, the appellant who was known at the Pangani Palace where the complainant resided, as he used to visit her daughter, gained access to the house through trickery, despite having been initially turned away by security personnel. He left the house the following day, at 6.30 am while carrying a bag and the identity card he left at the security desk was for another person who was jointly charged with him but acquitted.
  7. The matter was reported to the police and following investigations carried out, it was established that a Closed-Circuit Television (CCTV) camera was installed at the premises. Cybercrime experts were included in the investigation team and the appellant was identified on the footage as the one who entered the house. He was tracked, traced and arrested. A search carried out at the house of the appellant resulted into the recovery of goggles, blue bag that was stated to have contained the money, hence charges being brought against and his co-accused.
  8. Upon being placed on his defence the appellant gave an unsworn testimony where he denied having committed the offence. He stated that on the December 16, 2018, a search was conducted at his house by the police who took some of his items and shared with the complainant who confirmed ownership of them. He was arrested and asked where he was on the 7<sup>th</sup>, 8<sup>th</sup>, and December 9, 2018, and he indicated that he was at the University of Nairobi, but, passed through his friend and colleague, Alex's place. This information led to the arrest of Alex.



9. Further, he explained that he used to coach the complainant's daughter who had dropped out of school and whom he rejected and the entire family was bitter with him hence the fabrication of the matter. He argued that there was no proof of existence of the Kshs 6,000,000/- That the CCTV did not show him either entering the apartment or handling the money; and, that the CCTV footage was manipulated.
10. The trial court considered evidence adduced and reached a finding that the appellant did enter the house and stole the Kshs 6,000,000/- Hence the conviction.
11. The appeal was canvassed through written submissions. It was urged by the appellant that there was no evidence to link him to the commission of the offence. That the testimony on the blue bag was vague speculative and PW1's evidence was that the blue bag was recovered from the house of the appellant, however, this evidence was displaced by the Investigating Officer who testified that the bag was found at the complainant's bedroom. That the case involved three accused persons but the Investigating Officer did not record an inventory on the items recovered. That the police did not establish nexus between the exhibit and the appellant. That there was no eye witness who saw him commit burglary. That the security guards manning the entry to the complainant's house did not witness and further did not identify the appellant as the person they saw on the date in issue.
12. That circumstances favoring positive identification were lacking and an identification parade was not conducted to clear the air on the true identity of the person seen. That the complainant and her daughter had a grudge with him causing them to falsely implicate him in a bid to settle their personal scores. That the footage extracted from the CCTV was in colour but what was viewed was in black and white, therefore, evidence was manipulated; and, the appellant's unsworn defence that the same was manipulated was not displaced.
13. That the footage was extracted from an electronic gadget or a device mounted on the alleged building but neither the owner of the building nor caretaker were summoned to record their statements or give testimony. That the guards did not watch it or identify it in court. That the complainant also did not view its contents. Therefore, there was no definite finding that the appellant was the person in the CCTV footage and the prosecution deliberately omitted to call the Caretaker to confirm if the footage was from Pangani Palace.
14. That there were other circumstances which weakened the chain of evidence thus inferring his innocence. That the person who was brought to break the door to the complainant's bedroom as stated was not investigated or summoned to testify.
15. Further, that the court shifted the burden of proving the defence of alibi to the defence and that this was a misdirection on its part as it is for the prosecution to bring additional evidence to displace the alibi within the provisions of Section 309 of the CPC.
16. That the appellant filed Revision Case No E349/2021 challenging the order on compensation and thus sentence was successfully challenged and the appellant was allowed to pay the fine. That the conviction was not determined in the revision. That the sentence had curtailed the appellant's right to pay fine.
17. The Respondent argued that the High court does not have jurisdiction to make any determination of the appeal as the same was heard and a determination made on review by a court of concurrent jurisdiction. Reliance was put on the case of [\*Robert Kinyua Nyaga vs Republic\(2020\) eKLR\*](#) where it was noted that:

' It is trite law that a convicted person ought to choose either to file a revision or an appeal but he cannot do both or one after the other.'



18. Further, it was urged that should the court clothe itself with jurisdiction to determine the appeal, there was sufficient evidence of the CCTV that showed that the appellant was at the premises on December 7, 2018, and, spent there a night, and, left the following day with a bag that he did not have when he entered the house. That two guards confirmed that he visited the premises and insisted on staying despite the owners being away. The allegation that he was with his co-accused was not confirmed by him. And, that the sentence meted out was too lenient.
19. The issue of jurisdiction is a preliminary point of law that must be determined in the first instance for where the court lacks jurisdiction but determines a matter the entire proceedings are a nullity.
20. Article 50(2)(q) of the Constitution provides thus:

Every accused person has the right to a fair trial, which includes the right—

  - (q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
21. Section 361(7) of the of the CPC provides as follows:

An order made by the High Court in the exercise of its revisionary jurisdiction or a decision of the High Court on a case stated shall be deemed to be a decision of the High Court in its appellate jurisdiction.
22. The Constitution provides for a right to a convicted person to appeal or seek review to the High Court. (Emphasis mine). I place special importance to the phrase because 'or' is used to link the alternatives, the Appeal or Review.
23. Article 165(6) of the Constitution provides thus:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
24. Section 362 of the Criminal Procedure Code(CPC) provides as follows:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
25. By the provision of the law, when a party invokes the relief of revisional jurisdiction, the court exercises supervisory jurisdiction to determine and rectify errors, omissions or illegalities on the face of the record, jurisdiction that is limited. In an instance where a party elects to appeal the appellate court has a wider jurisdiction which allows it to interrogate evidence, the manner which discretion was exercised in interrogating the law and facts; and, to go into the merits of the trial court's decision.
26. It is not disputed that the appellant filed revision where his sentence was revised. An excerpt of the Ruling by Chepkwony J is as follows:
  - ' 17. That the Applicant was properly charged and tried within the confines of the law is not in issue. It is also not in issue that the Applicant was found guilty, convicted and sentenced within the jurisdiction conferred upon the court by statute. The Applicant was convicted and sentenced for the offence of burglary



and stealing contrary to Section 304(1)(b) and (2) of the Penal code. Section 304(1) of Penal Code. Section 304(1) of the Penal Code provides:-

(1)

(b) 'Any person who-

Having entered any building, tent, or vessel used as a dwelling with the intent to commit a felony therein, or having committed a felony in any building, tent or vessel, breaks out thereof; is guilty of the felony termed house breaking and is liable to imprisonment to seven years'.

(2) If the offence is committed in the night, it is termed burglary and the offender is liable to imprisonment for ten years'.

18. The offence of burglary for which the Applicant was convicted attracts a sentence of ten (10) years imprisonment. The Applicant was sentenced to a fine of Kshs 500,000/= and in default serve three years imprisonment.

19. The sentence meted against the applicant was within the law and the trial Magistrate exercised his discretion as provided for under Section 26(3)(1) of the Criminal Procedure Code in sentencing the Applicant to pay a fine. Section 26(3)(1) of the Criminal Procedure Code provides that;-

'A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment'

Provided that;-

i. Where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment.'

20. The trial Magistrate then ordered that the Applicant pays to the complainant Kshs 6,000,000/= as compensation, which again was within his discretion as provided for under Section 175(2) of the Criminal Procedure Code that:-

'A court which-

a) Convicts a person of an offence or, on appeal, revision or otherwise confirm the conviction; and

b) Finds, on the facts proven in a case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this Section as 'the injured Party),

May order that convicted person to pay to the injured party such sum or it considered could justly be rewarded as damages in civil proceedings brought by the injured party against the conviction in respect of the civil liability'.

21. All that a trial Magistrate is expected to do in such circumstances is to ensure he/she exercises the said discretion judiciously. And even if it were not, it would



not be a matter for this court to determine on application for revision. This power to order for compensation of victims of a crime is also provided for under Section 23 of the *Victim's Protection Act* which states that:-

- (1) A victim has a right to restitution or compensation from the offender and the enforcement thereof in accordance with this Act.
  - (2) Subject to any limitations and conditions set out in this Act, the victim has a right to compensation by the offender for-
    - (a) Economic loss occasioned by the offence;
    - (b) Loss of or damage to property;
    - (c) Loss of user over the property;
    - (d) Personal injury;
    - (e) Costs of any medical or psychological treatment; and No. 17 Right to compensation Award of compensation by Court. Compensation or restitution orders not part of a sentence
    - (f) Costs of necessary accommodation suffered an offence. transportation and or incurred as a result of
  - (3) A victim has the right to restitution of any property or right to property of which the victim is deprived as a result of an offence in respect of which the victim is entitled to the rights and remedies specified in this Act. (4) A compensation order made against a convicted offender may be enforced as a judgment in civil proceedings.
22. However, Section 25 of the same Act provides that compensation or restitution orders are not part of a sentence. Section 25 of the Victim's Protection Act goes on to provide that the enforcement of an order of compensation or restitution should be governed by the Civil Procedure Rules.
23. It is clear from the proceedings before the trial court that when the sentencing of the Applicant was legally proper and within the confines of the law, and the trial Magistrate within his powers in issuing an order for compensation, there was an error in the order that 'the issue of fine to be addressed after the complainant is compensated'. This is because it renders the time when the sentence would start running uncertain as it is not definite when the Applicant would fully compensate the complainant, in view of the amount being such a colossal sum and Applicant being a student at the University.
24. The order by the trial Magistrate directing that the issue of fine to be addressed after complainant has been compensated is clearly an error which has caused and if left to subsist could continue subjecting the Applicant to undue suffering and injustice. I proceed to order the same reversed and set aside as per the provisions of Section 382 and 364(2) of the Criminal Procedure Code.



25. Consequently, the sentence against the Applicant be and is hereby upheld. It is also directed that the complainant in the Makadara Chief Magistrate's Case No 3401 of 2018, be at liberty to enforce the recovery of the sum of Kshs 6,000,000/= ordered as compensation to be paid to him by the Applicant as a civil debt.'
27. What is in issue is therefore, whether the appellate jurisdiction of the court is lost once the party exercises revision option.
28. The Petition of appeal herein is dated the October 12, 2021, but, was received by the court registry on October 14, 2021. The Ruling by the court indicates that the application for revision was dated the October 12, 2021. This means that the appellant, without any reasonable justification, did not make a choice to file either an appeal or Revision, but, decided to take the action by filing both an Appeal and Revision while hoping for a desired result that was favorable to him at the time. Had the court been aware of existence of the appeal, most probably, the court would have noted that the court, being a High Court should not reverse any order where an appeal lies.
29. The Petition of appeal filed herein seeks quashing of conviction and setting aside the sentence. As afore stated, Revisional jurisdiction is invoked pursuant to what is provided by Statute. The law is clear, it does not provide that an applicant can file both Revision and Appeal. In the case of *Kiwala vs Uganda (1967) EA 758*, the Court of Appeal held that:
- ' Once a case has been revised by the High court becomes functus officio and that the revision is final unless there is an appeal to the court of appeal'
30. In this regard, the appellant sought revision of sentence where the court of concurrent jurisdiction held that the sentence was proper save for the illegal order requiring the appellant to compensate the Respondent the sum stated to have been stolen. It was deemed that the applicant moved the court on revision to determine what he was dissatisfied with. The court at paragraph 25 held that: 'Consequently, the sentence against the Applicant be and is hereby upheld.' Therefore, this court being of similar jurisdiction cannot purport to act by unsettling the order as it is functus officio.
34. The upshot of the above is that an appellant who files Revision and obtains any order, cannot thereafter invoke the jurisdiction of the court on appeal. In the result, the appeal is dismissed.
35. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**L. N. MUTENDE**

**JUDGE**

