



**Kipkoech & another v Republic (Criminal Appeal E027 of 2022)
[2023] KEHC 2500 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E027 OF 2022**

**RL KORIR, J
MARCH 28, 2023**

BETWEEN

PHILEMON C KIPKOECH 1ST APPELLANT

BENARD KIPRONO LANGAT 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Criminal Case Number 24
of 2020 by Hon. L. Kiniale in the Magistrate's Court at Bomet)*

JUDGMENT

1. The appellants herein were tried and convicted by Hon. L. Kiniale, Principal Magistrate for the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. The particulars of the Charge were that on the 2nd day of January 2020 at Bomet township, within Bomet County, the Appellants broke and entered a building namely the hardware of Norah Lasoi and stole 4 rolls of chicken wire mesh valued at Kshs 11,000/=, the property of the said Norah Lasoi.
2. The appellants pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called three (3) witnesses in support of its case.
3. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the accused and they were put on their defence.
4. At the conclusion of the trial, the appellants were convicted and sentenced to serve eighteen (18) months in prison.
5. Being dissatisfied with the Judgment, the accused appealed to this court on the grounds, reproduced verbatim as follows:-



- i. The Learned Principal Magistrate erred in law and misdirected herself by holding that the prosecution had proved their case beyond reasonable doubt.
 - ii. The Learned Principal Magistrate erred in law and fact in relying on the evidence of PW1 and PW2 to convict the appellants without considering that their evidence were contradicting.
 - iii. That the complainant did not proof ownership neither did she produce a receipt of ownership of the alleged recovered goods.
 - iv. The complainant did not proof ownership of the premises allegedly broken into.
 - v. The Learned Principal Magistrate erred in law and fact on relying on the evidence of PW1is was purely based on hearsay and PW2 did not disclose the person who was alleged to have informed them of the alleged break in and the watchman who was alleged to have been present at the scene and who is alleged to have seen the appellants breaking into the premises was never called as a witness.
 - vi. The Learned Principal Magistrate erred in law in failing to consider the evidence of the defence witnesses.
 - vii. The appellants’ defence was not given any due weight and consideration but was dismissed without any reason.
 - viii. The sentences imposed was harsh and excessive and that it was contrary to the law.
 - ix. The Learned Principal Magistrate erred in law by failing to exercise her discretionary power in imposing an option of a fine instead of eighteen (18) months considering the value of the alleged recovered goods of Kshs 12,000/=.
 - x. That given the circumstances of the case, the fact that the appellants are first offenders, the sentence of eighteen months was excessive.
6. This being the first appellate court, I have a duty to re-evaluate the evidence on record. The Court of Appeal in the case of *David Njuguna Wairimu v Republic* (2010) eKLR held that:-

“The duty of the first appellant court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so. Provided it is clear that the court has considered the evidence on the basis of the law and the evidence on basis of the law and the evidence to satisfy itself on the correctness of the decision”.

The prosecution’s case.

7. It was the prosecution’s case that the accused persons broke, entered and stole chicken wire mesh from a hardware within Bomet town. Norah Chelangat (PW1) testified that she was the owner of the hardware shop and that on the material day at around 10 pm she was called by the watchman, Peter Kirui who informed her that two people had cut the padlock and broken into the hardware shop. That she informed the DCI and then proceeded to the shop and when she reached there, she found 3 police officers and the 1st accused who had been arrested.



8. It was PW1's further testimony that she had been tipped off by the watchman of a planned break in. That she informed the police of the plan and further advised Leonard (PW2) to be on the lookout. It was PW1's further testimony that she saw the 1st and 2nd accused persons as there were security lights outside the hardware shop.
9. Leonard Koech (PW2) testified that PW1 was her boss and that he had worked for her for the last 5 years. That PW1 informed him of a planned heist at her shop and told him to stay behind and keep watch. PW2 further testified that at round 10 pm, 2 people came to the shop and broke in using pliers.
10. It was PW2's testimony that he was able to see them well as there was a security light. That one of the men (2nd accused) got out and that enabled him and a soldier called Peter to lock the 1st accused in the hardware shop. That they later got hold of the 2nd accused who was outside the shop and brought him in and shortly identified the chicken wire mesh the accused persons had removed.
11. No 73347 Cpl Joseph Ngumbi (PW3) testified that he was the investigating officer in the case. That on the material day, he received a distress call from PW1 who reported that her hardware shop had been broken into and that the culprits had been locked inside the shop by the watchman. That together with PC Kassim they proceeded to the hardware shop and arrested the two accused.
12. PW3 testified that they found the chicken mesh and a padlock which had been opened. That the accused persons had a master key which was recovered from them. PW3 further testified that the 1st accused had a mavin and the 2nd accused had a cap.

The appellants' case.

13. Philemon Kipkoech Cheruiyot (DW1) testified that on the material day he had attended a birthday party for a fellow boda boda rider. That when the party ended at 8 pm, they went to a hotel called Desayo where they found people fighting. It was his further testimony that as they watched the fight, they were arrested, beaten and taken to the police station and when they inquired the reason for their arrest, they were informed that they would know the following day in court.
14. DW1 testified that he did not know anything about this case and that he only saw the complainant in court.
15. Bernard Langat (DW2) testified that he was a boda boda rider and that he was arrested on the material day while coming back from a birthday party. That they were informed the following morning that they had been found with stolen things.
16. On 6th December 2022, I directed that the Appeal be canvassed by way of written submissions.

The prosecution's/respondent's submissions.

17. Mr Njeru, prosecution counsel made oral submissions in court and stated that the Appeal was opposed. That it had no merit as the Judgment of the trial court was well reasoned. Mr Njeru further submitted that there was no reason for this court to interfere with the Sentence as it was quite lenient. He prayed that the Appeal be dismissed.

The appellants' submissions.

18. It was the appellant's submission that the trial court failed to appreciate the doubts raised by the prosecution's witnesses as PW1 indicated that the appellants used a pliers to open the hardware shop while the investigating officer stated that the appellants opened the padlock using a master key. That



the court was under no duty to manage the prosecution's case but to weigh the scales of justice. They relied on *Burunyi & Another vs Uganda* (1969) EA 123.

19. The appellants submitted that the trial magistrate failed to write a comprehensive Judgment thereby occasioning a miscarriage of justice. That the impugned Judgment did not have the points for determination and the reasons for her decision. They relied on *Evans Mathenge Wachira vs Republic* (2014) eKLR and Section 169 of the *Criminal Procedure Code*.
20. It was the appellants submission that the trial magistrate failed to exercise her discretion of issuing a fine instead of a prison sentence. That the appellants were first time offenders and that the goods were recovered. It was their further submission that they were now remorseful and open to change having served 7 months in prison.
21. The appellants submitted that the trial magistrate disregarded their evidence thereby arriving at an unfair, biased verdict that was not in accordance with the law. They prayed that their sentences be quashed or in the alternative, they be sentenced to community service for the remainder of their sentence. They relied on *Mathew Kibichii Chirchir v Republic* (2019) eKLR.
22. I have gone through and considered the trial court's proceedings, the record of appeal dated September 22, 2022, the appellant's written submissions filed on September 15, 2023 and the Respondent's oral submissions in court. I sieve the following issues for my determination:-
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the defence places doubt on the Prosecution case.
 - iii. Whether the Sentence preferred against the accused was manifestly excessive, harsh and severe.

Whether the prosecution proved its case beyond reasonable doubt.

23. The accused were charged with the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the *Penal Code*. Section 306 of the Penal Code states that:-

Any person who—

 - (a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, 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.
24. The main ingredients in this offence are breaking into a building, entering and committing a felony. I associate myself with the findings of Odunga J (as he then was) in *Maurice Okello Kaburu & another vs Republic* (2022) eKLR, where he stated:-

“On the ingredients, the elements of the offence of breaking into a building and committing a felony as per the definition in section 306(a) of the *Penal Code* are breaking and entering. The section provides that;

 - a) a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or



- b) any building belonging to a public body, or
- c) any building or part of a building licensed for the sale of intoxicating liquor, or
- d) 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,
- e) and commits a felony therein.

It is clear that the various elements in a) to d) above are disjunctive hence satisfaction of any element combined with e) will lead to an accused person being found guilty. I agree with the holding in *Michael Maundu Wambua vs. Republic* [2006] eKLR, where Makhandia, J (as he then was) Court expressed himself as follows:

“With respect I do not buy the appellant’s interpretation of what amounts to “breaking”. The breaking must not necessarily result into some sought of damage. What is critical is gaining access into a store against the wish of the owner and or without his permission. In the instant case, the appellant gained entry into the store using a master key. By using the master key to access the store which was not his and without having sought or obtained the permission of the owner (PW1) to my mind amounts to breaking in. Simply put the appellant by his own machinations gained unauthorized access to the store. That act amounted to “breaking in.” In my view therefore the prosecution led sufficient evidence to show that the appellant broke into the store.”

25. PW2 testified that he had been informed by his employer (PW1) of a planned theft in her hardware shop. That his employer asked him to stay behind and keep watch. PW2 stated that he hid in the first floor of the hardware shop and at around 10 pm, two men broke into the shop using a pliers and removed chicken wire mesh. He further stated that together with Peter, a soldier with whom he hid, they managed to lock the two men in the offices.

26. Leonard Koech (PW2) identified the two men as the 1st and 2nd accused. He stated that he was able to identify them through the security light. The presence of the security light was confirmed and corroborated by PW1. In the Court of Appeal case of *Wamunga v Republic* (1989) KLR 426, it was stated:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

27. It was also held in *Nzaro vs Republic* (1991) KAR 212 and *Kiarie vs Republic* (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

28. When PW2 was cross examined by the accused persons, he stated that he saw the 1st accused (Philemon C Koech) earlier in the day in the hardware and confirmed seeing the 2nd accused (Benard Kiprono Langat) with the aid of the security light. PW3 who was the investigating officer testified that he found the 1st and 2nd accused when he reached the hardware shop. He thereafter arrested them. I am satisfied by the evidence on identification. The accused persons were positively identified by PW2 and PW3 who placed them at the scene of crime. They were arrested inside the shop and they had no explanation why they were there.



29. Regarding the break in, PW2 testified that the accused persons used a pliers to break in No 73347 (PW3) on the other hand testified that the accused persons broke into the hardware using a master key. I note the inconsistency regarding the tools that the accused persons used to break into the hardware. However, it is salient to note that both the master key and pliers were recovered at the scene of crime and were both presented at the trial court as exhibits. This contradiction in my view does not shake the veracity of the prosecution's case. I am guided by the Court of Appeal case of [Stephen Odiambo Onyango v Republic](#) (2019) eKLR, where it was stated:-

“We would reiterate as correct what the Court of Appeal of Uganda stated in *Twehangane Alfred v Uganda*, Cr App No 139 of 2001 regarding how we should treat inconsistencies in evidence:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

30. When PW2 and PW3 were cross examined by the accused persons, they confirmed that the accused persons had a pliers and a master key which they used to gain access to the hardware shop. I am satisfied by the evidence regarding the break in and I find that the accused persons gained illegal entry into PW1's hardware as they were found inside the said hardware shop.

31. PW2 stated that upon gaining entry into the hardware shop, the accused persons removed the chicken wire mesh. PW1 and PW3 corroborated this by stating that when they arrived at the hardware shop, they found the chicken wire mesh which had been set aside. It is reasonable to say that the accused persons had removed the chicken wire mesh with an intent to steal it. Had they not been caught, they would have most certainly made away with the chicken wire mesh. Theft falls within the scope of a felony. Felony is described in the [Black's Law Dictionary, 10th Edition](#) as a serious crime punishable by imprisonment for more than one year or by death. Examples which include burglary, arson, rape and murder.

32. One ground of the accused person's appeal was that the prosecution failed to disclose or avail the watchman who was alleged to have been hiding with PW2 as a witness. Section 143 of the [Evidence Act](#) states 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.

33. I am also guided by the Court of Appeal in [Julius Kalewa Mutunga v Republic](#) (2006) eKLR stated as follows:-

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

34. It is my considered view that it was not necessary for the prosecution to call or to avail the watchman as PW2 and PW3's testimony was sufficient. The Accused persons were identified as the ones who broke into the hardware and it was also proved that they were found in possession of the chicken wire mesh.



35. From the evidence presented and the analysis above, it is my finding that the prosecution proved its case to the required standard having satisfied the aforementioned principles of breaking and committing a felony.

Whether the defence places doubt on the prosecution case.

36. I have considered the appellants' defences in which they denied committing the offence. DW1 and DW2 both stated that on the material day, they attended a fellow boda boda rider's birthday party and that they were later arrested after leaving the party. That they did not know anything about this case.
37. The appellants had the opportunity to cross examine the prosecution's witnesses. Their cross examination however did not shake the prosecution's case. The appellants did not produce any witnesses that could corroborate their claims which makes their defences weak and unbelievable. Their defences which must be dismissed amounted to mere denials.

Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

38. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, (1954) EACA 270, pronounced itself on this issue of altering a sentence as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in *R v Shershowsky* {1912} CCA TLR 263 as emphasized in *Shadrack Kipkoech Kogo v R* Criminal Appeal No 253 of 2003 thus “Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevance factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”

39. Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:-

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

40. As already stated above in this Judgment, if one is convicted of the charge of breaking into a building and committing a felony, one is liable to serve a prison sentence of seven years. The trial court convicted and sentenced the appellants to serve eighteen (18) months in prison.
41. The appellants urged this court to exercise its discretion and either substitute the sentence with a fine or sentence the appellants to community service for the remainder of their terms. The appellants submitted that they had already served seven months of their sentence.
42. I have considered the appellants' submissions and I find that the penal section for the offence of breaking into a building and committing a felony, as stated earlier in this Judgment, does not provide for an option of a fine.
43. In mitigation, the 1st accused stated that he pleaded for leniency and fairness as he had children who depended on him. The 2nd accused pleaded for leniency.



44. It is my view that the appellants should serve a deterrent sentence so as to discourage others from engaging in theft. The Criminal Procedure Bench Book at page 116 provides that:-

The sentences imposed should be geared towards achieving the following objectives set out in the sentencing policy guidelines (paragraph 4.1):

- i. Retribution.
- ii. Deterrence.
- iii. Rehabilitation.
- iv. Restorative justice.
- v. Incapacitating the offender.
- vi. Denouncing the offence, on behalf of the community”.

45. The fact that the goods were recovered or that the goods were of low value should not in any way invalidate the criminal actions of the appellants. It is however a factor to be considered by the court in sentencing. The appellants submitted that they were first offenders and will thus benefit from the mercy of the court.

46. Accordingly, their convictions are upheld but their sentences are reduced from eighteen (18) months to twelve (12) months. The sentences shall run from the date of sentencing in the trial court which is May 5, 2022.

47. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF MARCH, 2023.

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the appellants, Ms. Kosgei for the appellants, Ms. Boiyon holding brief Mr. Njeru for the Respondent and Siele (Court Assistant)

