



**Duba v Republic (Criminal Appeal E013 of 2023)
[2023] KEHC 21349 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E013 OF 2023**

**JN NJAGI, J
JULY 27, 2023**

BETWEEN

GALGALLO WAKO DUBA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. S. K. Arome, PM, in Marsabit Principal Magistrate's Court Criminal Case No. E024 of 2023 delivered on 22/03/2022)

JUDGMENT

1. The appellant was charged in count 1 with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the [Penal Code](#). The particulars of the offence were that on the 11th day of January 2023 at Maikona location within Marsabit County he wilfully and unlawfully broke and entered Maikona Health Centre store and stole plumpy nuts nutrition supply from USAID donation.
2. The appellant was also charged in count 2 with burglary contrary to section 304 of the [Penal Code](#). The particulars of the offence were that on night of January 13, 2023 at around 2140 hour at Maikona location within Marsabit North Sub-County he wilfully and unlawfully broke and entered Maikona Health Centre store with intent to steal.
3. The appellant was tried of the offences and pleaded guilty to the two charges. He was sentenced to serve four (4) years imprisonment on count I and three (3) years imprisonment on count 2. Sentences were ordered to run consecutively.
4. The appellant being dissatisfied by the conviction and the sentence filed the instant appeal. He lists the following grounds of appeal:



- a. That the trial magistrate erred in both law and facts by failing to exercise any caution or vital safeguards prior to convicting him on his plea of guilty.
 - b. That he was not accorded a fair trial.
 - c. That the learned trial magistrate failed to consider his mitigation.
 - d. That the sentence meted was harsh and excessive having regard to the circumstances of the case.
 - e. That the consequence of pleading guilty to the charge was not explained to him.
5. This being a first appeal, the duty of the court is was set out by the Court of Appeal in *Okeno vs Republic* [1972] EA 32 that:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 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 finding and conclusion; 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 allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs Sunday Post* [1958] EA 424.”

6. The procedure for taking pleas is provided in section 207 of the *Criminal Procedure Code* to be as follows:

“

“ 207 The substance of the charge shall be stated to the accused person by the court,
(1) and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement.
(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary.
Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

7. The Court of Appeal in the case of *Adan vs R* (1973) EA 445 renditioned the provisions of the above section as follows:-

- (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.
- (ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.
- (iii) The prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.



- (iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.
 - (v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.
8. In this case, the court proceedings of January 17, 2023, indicate that the court read out the charge in a language that the appellant understood which was Kiswahili and the accused responded that the charges were true. The court went ahead to enter a plea of guilty to the charge. The prosecution then read out the facts of the case to the appellant who stated that the facts as read out by the prosecution were indeed correct. The court convicted him on his own admission.
- The prosecution thereupon informed the court that they did not have previous records for the appellant. The appellant then went ahead to mitigate that he was seeking for leniency from the court. That he would not repeat the offence.
- The court before sentencing the appellant called for a pre-sentencing report from the Probation Department. The same was availed to the court and its contents were explained to the appellant in Kiswahili language.
9. From the procedure adopted by the trial court, I find that the appellant was taken through a fair hearing and his rights to fair trial were not violated. The plea was taken in accordance with the procedure set out in *Adan v Republic (supra)*.
10. The facts of the case as given by the prosecution were that a lady by name of Talaso Siat visited Maikoma Health Centre to seek for medication. She heard a fall in the pharmacy room. She peeped through the window and saw the appellant holding a blue carrier bag. He was known to her before. She asked him what he was doing there but he did not respond. He ran away. She went to the nursing station and informed one Kame Isako who found that 1 ½ boxes of plumpy nuts were missing from the room the appellant had been seen. Kame informed the county nutritionist officer. The matter was reported at Maikona police station.
11. Further that on the January 13, 2023 at 9:40 am, a security officer with the said health centre was on duty when he heard a bang on the window. He checked and found the appellant trying to enter through the window. The accused told him that he had gone there to collect his shoes which he had left there. The chairman was called. He escorted the appellant to Maikona police station. The appellant was re-arrested and charged with the offences.
12. The charge in count 1 was breaking into the pharmacy store of Maikona Health Centre and committing a felony contrary to section 306 of the *Penal Code*. The section provides as follows:

"306. Breaking into building and committing felony

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."

13. Breaking is defined in section 303 of the [Penal Code](#) as follows:

"303. Definition of breaking and entering

- (1) A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.
- (2) A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building."

14. For the prosecution to prove that an accused person broke into a building, it has to adduce evidence that the person has gotten entry into the building by breaking any part of the building or has opened any part of the building so as to gain entry into the building. The facts given by the prosecution in regard to count 1 were that the woman called Talaso Siat heard something falling in the pharmacy room and when she peeped into the room she saw the appellant inside the room. The appellant then ran away. The facts did not disclose how the appellant had gained entry into the room. There was no evidence that he broke any part of the building so as to enter into the room. It was not stated the way he took to escape from the room. All that the facts disclosed is that the appellant was seen inside the room but it was not disclosed as to how he entered into the room or how he got out. There was thus no evidence of breaking into the room. The facts given by the prosecution did not disclose an offence of breaking into a building and committing a felony.

15. All the same, the appellant admitted to have stolen the bumpy nuts from the health centre. Though the prosecution failed to prove the ingredient of breaking into a building, the question is whether the appellant could be convicted of the offence of stealing though not charged with it.

16. Section 179 of the [Criminal Procedure Code](#) provides as follows:

"179. When offence proved is included in offence charged

- a. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it
- b. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

17. The offence of breaking into a building and committing a felony has a combination of two offences – breaking into a building and committing a felony. In this case the charge of breaking into a building was not proved but the charge of stealing was proved. The offence of stealing is a complete minor offence to that of breaking into a building and committing a felony.



18. Section 275 of the [Penal Code](#) provides as follows:-

"Any person who steals anything capable of being stolen is guilty of the felony termed and is liable, unless owing to the circumstances of the theft on the nature of the thing, stolen some other punishment is provided, to imprisonment for three years."

19. It is my finding that the appellant can be convicted of the offence of stealing contrary to section 275 of the [Penal Code](#) though not charged with it. I find the accused guilty of the offence of stealing contrary to section 275 of the [Penal Code](#) and convict him accordingly. The conviction of the trial court in count 1 is set aside and substituted with a conviction for the offence of stealing contrary to section 275 of the [Penal Code](#).

20. In count 2 the appellant was charged with the offence of burglary and stealing contrary to section 304 of the [Penal Code](#). The section provides as follows:

"304. Housebreaking and burglary

(1) Any person who—

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for 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."

21. The facts given by the prosecution in regard to count 2 were that on the January 13, 2023 at 9:40 am, a security officer was on duty at the said health centre when he heard a bang on the window. He checked and found the appellant trying to enter through the window. The accused told him that he had gone there to collect his shoes which he had left there. The chairman was called. He escorted the appellant to Maikona police station. The appellant was re-arrested and charged with the offence.

22. Section 304 of the [Penal Code](#) under which the appellant was charged in count 2 relates to breaking into a dwelling house. The facts given in the case were that the appellant was seen trying to enter into the health centre store through the window. The health centre store is not a dwelling house. More so the facts indicated that the offence was committed at 09:40 am and not at night as stated in the charge sheet. The particulars of the charge were therefore at variance with the charge. In any case no evidence of proof of entry into the store was offered as it was not stated as to whether any part of the appellant's body had entered into the building. There was contradiction as to the time the offence was committed with the charge sheet stating that it was committed at night while the facts disclosed that it was committed during the day. It is my finding that the charge in count 2 was defective. Consequently there was no offence disclosed in count 2. The conviction in count is quashed and the sentence thereof set aside.



23. I now turn to consider the sentence in respect to count 1 where the court has substituted the conviction to stealing under section 275 of the [Penal Code](#).
24. The maximum sentence for the offence of stealing under section 275 of the [Penal Code](#) is 3 years imprisonment. I have considered that the appellant pleaded guilty to the charge. He was a first offender. He mitigated that he will not repeat the offence. The pre-sentence report indicated that he was aged 22 years. I have further considered that the appellant has already served over six months of the sentence. The items stolen did not seem to be of much value. I am of the view that the sentence served is sufficient for the offence committed. I order that the appellant be released from prison forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 27TH JULY 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ngigi for Respondent

Appellant – present in person

Court Assistant – Jarso

14 days R/A.

