



REPUBLIC OF KENYA



**Republic v Onyeko & another (Criminal Appeal 8 of 2018)  
[2023] KEHC 24567 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24567 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL 8 OF 2018  
A. ONG'INJO, J  
OCTOBER 30, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**JOSEPH ONGERI ONYEKO ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER KAMAU CHEGE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. D Mochache (SPM), on 26th January 2018 in Shanzu Senior Principal Magistrate's Court Criminal Case No. 700 of 2013, Republic v Joseph Onger Onyeko and Christopher Kamau Chege)*

**JUDGMENT**

**Background**

1. The Respondents, Joseph Onger Onyeko and Christopher Kamau Chege, were charged with the offence of breaking into a building and committing a felony contrary to Section 306(a) of the [Penal Code](#).
2. The Particulars of the offence are that Joseph Onger Onyeko and Christopher Kamau Chege on 7<sup>th</sup> July 2013 at KK Security Building in Bamburi in Kisauni Sub-County within Mombasa County jointly with others not before the court broke and entered the strong room of KK security and stole Kshs. 3,925,000/= USD 341,623 and 2,250 Sterling Pounds the property of KK Security Kenya Limited.
3. In the first alternative, Joseph Onger Onyeko was charged with the offence of handling stolen property contrary to Section 322 (1) of the [Penal Code](#). The particulars are that on 7<sup>th</sup> July 2013 at KK Security Building in Bamburi in Kisauni Sub-County within Mombasa County jointly with others not before



- the court otherwise than in the course of stealing dishonestly retained USD 10,000 and Kshs. 30,000 having reason to believe that it was stolen property.
4. In the second alternative, Christopher Kamau Chege was charged with the offence of handling stolen property contrary to Section 322 (1) of the *Penal Code*. The particulars are that on 7<sup>th</sup> July 2013 at KK Security Building in Bamburi in Kisauni Sub-County within Mombasa County jointly with others not before the court otherwise than in the course of stealing dishonestly retained USD 140,000 having reasons to believe it to be stolen.
  5. The respondents were acquitted for no case to answer. The trial magistrate concluded that the CCTV footage produced did not show any accused person and they were therefore not identified properly. That the evidence that a signal was received indicating that there were persons in the bank at the members' premises lacked corroboration from the CCTV footage. That there having no eye witness, evidence of identification was of paramount importance.
  6. The appellant being aggrieved by the ruling delivered on 26<sup>th</sup> January 2018 preferred the appeal herein on the following grounds: -
    1. That the learned trial magistrate erred both in law and fact by failing to consider that there was proper identification of the accused persons.
    2. That the learned trial magistrate did not appreciate that the evidence by the prosecution was consistent and corroborative hence the respondent's ought to be put on defence.
    3. That the learned trial magistrate misdirected herself on the value of expert opinion in determining the ingredients of the offence by not taking into account the evidence given by the said expert especially on the issue of identification and placing the respondents to the scene of crime.
    4. That the learned trial magistrate erred in law by disregarding clear, consistent and credible evidence of the prosecution which proved a prima facie case against the respondents.
  7. The Appellant prayed that the ruling be reversed and/or set aside and the accused persons be placed to their defence.
  8. This appeal was canvassed by way of written submissions. The appellant's submissions are dated 8<sup>th</sup> March 2022 and the respondent's submissions are dated 19<sup>th</sup> September 2022.

### **Analysis and Determination**

9. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze 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 to satisfy itself on the correctness of the decisions.”



10. After considering the grounds of appeal, records of the trial court and the submissions, issue for determination is whether the trial magistrate properly acquitted the accused persons under Section 210 of the CPC.
11. The prosecution called 14 witnesses and it was incumbent upon the trial magistrate to analyse and evaluate the evidence of each and everyone of those witnesses and give reasons why their evidence did not have sufficient weight to place the respondents on their defence. Evidence that the 1<sup>st</sup> respondent was arrested at the scene and monies in US Dollars, Sterling Pounds and Kenyan Shillings recovered, was evidence which in the view of this court would have required him to answer to the allegations raised by the prosecution. The finding of a big box of money and a hole drilled in the premises leased by the respondent's into the complainant's strong room with money scattered all over needed to have been discussed by the magistrate.
12. Being that the ruling by the trial magistrate was determining the trial, it ought to have summarized the evidence on record, identified issues for determination, analysed/evaluated the evidence vis-a-vis the laws and authorities, made a decision thereon and the reasons for the decision. These important aspects are missing in the very brief ruling where this court finds that the material before the court was sufficient to warrant the respondents being called upon to answer to the charge of breaking and committing a felony.
13. The finding of the trial magistrate in acquitting the respondents under section 210 of the CPC is therefore set aside. The respondents have a case to answer and are therefore placed on their defence.
14. This case is remitted to the Chief Magistrate at Shanzu for hearing of the defence case. Mention on 2<sup>nd</sup> November 2023 before Hon. Omido Chief Magistrate.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 30<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:** -

Ogwel- Court Assistant

Mr. Ngiri for the Appellant

Mr. Ananda Advocate for the Respondents

Ms. Jerono Advocate for Interested Party

Respondents present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Mr. Ananda Advocate: I pray for a copy of the judgment

**Order:** Copies of judgment supplied to appellant for free and to respondent and interested party upon payment of copying charges.

**Ms. Jerono Advocate:** The effect of the judgment- does it affect ruling for release of the currencies? On 25.10.2018, there was a decision in H. C. Revision No. 8 of 2018. Those orders were not set aside. As far as interested parties position is concerned, the orders stand.



**Order:** In consideration of the judgment of the court herein, the orders releasing exhibits in the trial court are hereby set aside until the trial magistrate hears the defence and delivers a judgment that will give a judgment as to who is entitled to the exhibit which is money and/or an application will be made and canvassed before an order is made.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**30.10.2023**

