



**Kirigo v Republic (Criminal Appeal E096 of 2021)  
[2022] KEHC 10689 (KLR) (Crim) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10689 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E096 OF 2021  
LN MUTENDE, J  
JUNE 28, 2022**

**BETWEEN**

**FELIX NDERI KIRIGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an Appeal arising from the original conviction and sentence  
in Criminal Case No. 2776 of 2016 at Chief Magistrate's Court  
Makadara by Hon. H. M. Nyaga – CM on 29th September 2021))*

**JUDGMENT**

1. Felix Nderi Kirigo, jointly with others were charged with the offence of stealing goods in transit contrary to Section 268 (1) as read with Section 279 (c) of the [Penal Code](#).
2. Particulars of the offence were that on diverse dates between 5<sup>th</sup> and 6<sup>th</sup> day of November 2016 at unknown place within the Republic of Kenya, jointly with others not before court, stole 1,246 cartons containing assorted cosmetics products all valued at Kshs 2,353,760/- the property of Damaris Wangari Kariuki alias Mama Esther Kariuki from a motor-vehicle Registration Number KCG 482V Mitsubishi FH while the said property was in transit from Mombasa to Nairobi.
3. They were taken through full trial where two (2) of them were acquitted while the appellant and another were convicted.
4. According to facts as presented by the prosecution, the appellant and another, his co-accused, Stanley Kimani, were drivers of motor-vehicle Registration Number KCG 482V owned by PW3 Paul Gakuo Kiama; a vehicle that was leased to Take It Africa, a transport company. On 4<sup>th</sup> November 2016, the complainant Damaris Wangari Kariuki paid for a consignment through Equity Bank. On 5<sup>th</sup>



November 2016 PW1 Martin Mwangi Nduati, while in company of Mohammed, the proprietor of Shamocare Ltd caused the assorted cosmetics valued at Ksh. 2,353,760/- to be loaded on motor vehicle KCG 482V and the appellant and his co-driver left Mombasa. They were in constant communication with the complainant and they confirmed having arrived in Nairobi, but the goods that were not delivered as agreed. When the complainant went to report to Embakasi Police Station, she found a report of theft of goods having been made by Geoffrey Njogu Kihiko who was the appellant's co-accused. Investigations conducted resulted into the appellant and his co-accused being charged.

5. Upon being placed on his defence the appellant stated that having carried goods from Mombasa to Nairobi, upon arrival he got information that his child had an accident as he was scalded with hot water. He alerted Geoffrey Njogu Kihiko (his co-accused) who managed the company fleet who told him to give the truck to James Kania Maina (co-accused). Having been given his contact by Kihiko, he contacted Maina. They met and he handed over the truck to Maina and he went home to attend to his child. On the following day he was called by Kihiko who told him that the goods had not been delivered. They went and reported to the Police Station, Embakasi. The tracking record was not established as the system was down. In his testimony Kihiko stated that he directed the appellant to hand over the vehicle to Maina. But, Maina denied the allegations. He stated that he was in control of another vehicle and after he handed it over to the owner he went to Eldoret as he was not an employee of Take It Africa.
6. The trial court considered evidence adduced and reached a finding that it was not proven that keys were handed over to Maina as he was not an employee of the company at the time. It found that the appellant failed to diligently follow the protocols regarding handing over of the motor-vehicle. That he ought to diligently discharge his duties. It convicted and fined the appellant Kenya Shillings Two Hundred Thousand (Ksh 200,000/-) and in default he was required to serve two (2) years imprisonment. A further order was made requiring the appellant to compensate the complainant the value of the stolen goods, an order that was made without prejudice to the right of the complainant to sue for recovery of the value of the stolen goods in civil proceedings.
7. Aggrieved, the appellant through Kiama Kibathi & Co. Advocates proffered an appeal on the following grounds:
  1. That the learned Magistrate erred in law and fact in convicting the appellant when the element of the offence had not been fully proved.
  2. That the appellant's conviction in reliance on the suspicious evidence by the prosecution witnesses was unsafe and not capable to sustain a conviction hence the conviction was manifestly unsafe.
  3. The learned trial Magistrate erred in law in convicting the Appellants on unsatisfactory and contradictory testimonies of prosecution witnesses.
  4. The learned trial Magistrate erred in law by shifting the burden of proof from the prosecution to the accused.
  5. The learned trial Magistrate erred in law by failing to consider the alibi defence raised by the Appellant and which defence was not disputed by the prosecution.
  6. The learned Magistrate erred in law and fact when he convicted based on circumstantial evidence without taking into consideration principles applicable. .
  7. The learned Magistrate erred in law and fact when he failed to find that the prosecution's failure to avail critical evidence was an act of suppressing evidence.



8. That the learned Magistrate erred in law when he ignored the Appellant's submissions in their entirety.
  9. The learned trial Magistrate was openly prejudiced against the Appellant and that prejudice has resulted to injustice.
8. The appeal was disposed through written submissions. It was urged for the appellant that the actus reus of the offence of stealing and the intent to deprive the owner of the same were not proved. That the appellant was the last person to handle the goods, an act that was within his job description, but there was nothing to prove that he stole them.
  9. It was also argued that the appellant was convicted under Section 20 of the *Penal Code* but the elements of that provision of the law were not proved beyond reasonable doubt. That no evidence was presented before the court showing existing protocols of the company in question that the court referred to which the appellant alleged failed to diligently follow. That having handed over keys as instructed was what any reasonable person ought to have done. That no notice of the minor offence was given to the appellant which was prejudicial as stated in the case of *Ali Mohammed Hassani Mpanda vs. Republic* (1963) EA 294.
  10. That the conclusion by the trial magistrate that the appellant was the last person to handle the goods was sheer suspicion without corroboration which could not establish his guilt. That the prosecution failed to establish circumstantial evidence that won't give existence of an inference to be drawn that the appellant committed the offence and he was not found in possession of the stolen goods.
  11. That the Police failed to produce audited call log data for the appellant with the co-accused, the CCTV footage from the Petrol Station where the lorry carrying goods was parked or even tracking printout for the lorry to monitor its movements on the material day. Then the fact of the 4<sup>th</sup> Accused (Maina) having cut off communication only to be arrested two (2) years later was ignored by the court and being a new employee he did not understand the nature of the relationship between the 4<sup>th</sup> accused and his employer; and, that the alibi defence put was not challenged.
  12. The Respondent through Mutuma Mwereru, Prosecution Counsel urged that the appellant had the responsibility of ensuring that goods reached the client but it did not happen. That the allegation of having handed over the keys to Accused 4 (Maina) who had been laid off from Take It Africa was disapproved by evidence of witnesses. He called upon the court to dismiss the appeal.
  13. This being a first appellate court it is duty bound to analyze and evaluate evidence adduced at trial afresh so as to draw its own conclusions while bearing in mind that it neither saw nor heard witnesses who testified. This was stated in the case of *Okeno vs. Republic* [1972] EA 32, where the court stated as follows:

“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 v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - 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 courts' findings and conclusions; 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 v. Sunday Post [1958] EA 424”.



14. Stealing is defined by Section 268 (1) of the [Penal Code](#) as follows:
  - (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
15. The appellant was accused of contravening Section 279 (c) of the [Penal Code](#) that provides thus:

If the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;
16. It is not in dispute that the complainant paid for assorted cosmetic goods which were loaded by PW3 Geoffrey Wainaina Kariuki, items that were to be transported from Mombasa to Nairobi. According to PW1, he communicated with the appellant and his Co-driver, Stanley Mwangi Kimaru after they reached Nairobi and they agreed that the appellant was the one entrusted with the motor-vehicle and the consignment that he was to deliver to the complainant. Prior to arriving at Nairobi, the undisputed evidence was that, upon arrival at Mariakani weighbridge they re-distributed the cargo as the motor-vehicle had excess weight on one of the axles.
17. PW4 George Kimani Mbugua, alluded to having been called by the appellant requesting him to relieve him as he was travelling but he excused himself and referred him to Maina (Accused 4). He found the motor-vehicle KCG 482V Mitsubishi FH having been parked at Kobil Petrol Station but he did not check to confirm its status. That he encountered Maina at Kobil who confirmed having communicated with the appellant regarding delivery of documents.
18. Being a criminal case, the prosecution had the burden of proving the case beyond reasonable doubt. It was established that the goods in issue were in the motor-vehicle having been transported from Mombasa destined for the complainant's premises. It is not in doubt that the goods did not reach the destination and they have never been recovered. Therefore, the complainant was permanently deprived of them. The person who took them did it fraudulently without any claim of right.
19. Further, it is not in doubt that the appellant herein had the goods. His argument is that he asked his co-accused to deliver them as he gave a reason that he had an emergency. Geoffrey Njogu (PW4) stated that they agreed that he hands over the truck that carried the goods to Maina (Accused 4) who vehemently denied having taken over the truck from the appellant.
20. Although it is argued that the appellant gave the truck to Maina who denied the allegation, circumstances under which the handing over was done were not clear. The question arising is if it happened and Maina disappeared thereafter, who had the keys to the truck? How was it opened thereafter?
21. It was the argument of the appellant that his alibi defence was ignored. It is trite that an accused person who puts up an alibi defence by alleging that he could not have committed the offence as he was elsewhere does not assume the burden of proving the defence, what is expected of him is to create a reasonable doubt in the mind of the court. As correctly pointed out in the case cited by the appellant of [Victor Mwendwa Mulinge Vs. Republic](#) (2014) eKLR, the burden of proving the falsity of the defence of alibi lies on the prosecution.
22. The appellant adduced in evidence a birth certificate for Martin Wachira whose parent was indicated as Felix Nderitu Kirigo. Also produced was a case summary sheet indicating a child was admitted on 6/11/2016 and discharged on 18/12/2016 after the appellant had been arrested. This document does



not indicate time of admission and whether the appellant was at Central Provincial General Hospital then or on any other date.

23. The appellant did not raise the alibi defence at the outset, it come up at the defence stage. It has been stated that an alibi defence should be raised early enough to enable the prosecution to interrogate it. In the case of *Sukha Singh & Others* (1939) 6 EACA 14, the Court of Appeal stated that

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

24. It is argued that the State Counsel did not cross-examine the appellant on the issue of the alibi defence therefore it remained unchallenged. In the case of *Karanja Vs. Republic* 1983 KLR it was stated that:

“In a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought.”

25. In the course of investigations that were conducted by PW6 the appellant claimed that he had given the goods to Geoffrey Njogu (Accused1) Kihiko and James Kania Maina (Accused 4). What he did not state, however was the allegation that he was elsewhere following the report he had of his child who had suffered burns. The trial court did not make any observations on that question that was raised belatedly in the appellant's defence, and as an appellate court I must reconsider the evidence tendered.

26. There was a misdirection on the part of the trial court when it opined that the appellant failed to follow proper protocols as far as handing over the truck was concerned. The court reached the conclusion after reaching a finding that there was no proof that the appellant handed over the keys of the motor-vehicle to Maina.

27. The court is faulted for acting on suspicion evidence that was unsafe.

Evidence adduced established that the appellant was the one in custody of the goods that were in the motor-vehicle. Therefore evidence linking him to the offence was not direct but circumstantial. Principles applicable for circumstantial evidence to be relied on were stated in the case of *Abanga alias Onyango Vs. Republic* Criminal Appeal No. 32 of 1990 (UR) as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused



- iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

28. Looking at the chain of evidence, there is no prove that the appellant handed over the lorry and the goods to Maina. Section 111(1) of the *Evidence Act* provides thus:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

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- 3) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: [Rev. 2014] Evidence Cap.80 41 Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

29. It cannot be stated that the burden of proof shifted to the appellant.

The police explained that there was no CCTV camera at the Petrol Station, therefore, goods having been within his knowledge and of course his control, an explanation was required from him. The explanation he gave was not satisfactory therefore convicting him could not be stated to have been done upon mere suspicion. Circumstances that prevailed could only result into a conclusion that he was one of the individuals who stole the goods.

30. In the result, the case against him was proved to the required standard. Accordingly the appeal fails and is dismissed in its entirety.

31. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 28<sup>TH</sup> DAY OF JUNE, 2022.**



**L. N. MUTENDE**

**JUDGE**

IN THE PRESENCE OF:

Mr. Kiragu for the State

Court Assistant - Mutai

