



**Republic v Ouma (Criminal Appeal E028 of 2022)
[2022] KEHC 16603 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E028 OF 2022
KW KIARIE, J
DECEMBER 20, 2022**

BETWEEN

REPUBLIC APPELLANT

AND

MICHAEL OTIENO OUMA RESPONDENT

(From the original judgment in Criminal case NO. E111 of 2020 of the Senior Resident Magistrate's Court at Mbita by Hon. Nicodemus N. Moseti—Senior Resident Magistrate)

JUDGMENT

1. Michael Otieno Ouma, the respondent herein, was charged with an offence of stealing contrary to section 275 of the [Penal Code](#).
2. The particulars of the offence were that on the 23rd day of October, 2020 at Gera village, Gembe West location in Mbita Sub County of Homa Bay County, intentionally and unlawfully stole a phone valued at Kshs 4, 000.00 the property of Billy Onyango Ouma.
3. The respondent was acquitted. The state was dissatisfied and appealed. The following grounds of appeal were raised:
 - a. That the trial magistrate erred in law and in fact by not taking into consideration and attaching the necessary weight to the evidence of the complainant and witnesses.
 - b. That the trial magistrate erred in law and in not finding and holding that the ingredients of the charge of stealing had been proved.
 - c. That the trial magistrate misapplied the law in arriving at a verdict of acquittal whereas the burden of proof for the offence had been proved beyond reasonable doubt.
4. The appeal was opposed by the respondent.



5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
6. There are two issues that require determination in this appeal. One, whether the ingredients of theft were proved to the required standards and two, whether sufficient evidence was adduced against the respondent.
7. Section 268 of the *Penal Code* defines theft as follows:

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.

8. The complainant testified that the respondent borrowed his phone to watch videos as he (complainant) played football. When he later asked to have his phone returned, the respondent said that he had given it to another person. He therefore went and reported to his parents.
9. When the respondent decided to “give out” the complainant’s phone to another person, this amounted to conversion. Since he has continued to deny the same, this proved the intention to deprive the complainant of his phone.
10. Kennedy Otieno Mbotto (PW2) is the complainant’s father. His evidence was that when the complainant reported about his phone, they went to the home of the respondent who admitted to have received the phone. He (respondent) said that he had given it to another young man and took them to that young man’s home.
11. It is trite law that a fact may be proved by the evidence of a single witness. The Court of Appeal in *Kiilu & another v Republic* [2005] 1 KLR 174 held:

"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."

The instant case was not on identification. In any case, the complainant’s evidence was corroborated by that of his father.

12. From the foregoing analysis of the evidence on record, I find that the prosecution proved their case to the required standards. I quash the order of acquittal by the learned trial magistrate and substitute it with finding that the respondent is guilty of the offence of stealing and I accordingly convict him of the offence.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

