



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi & another v Republic (Criminal Appeal E122 & E135 of 2023  
(Consolidated)) [2025] KEHC 1293 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1293 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E122 & E135 OF 2023 (CONSOLIDATED)  
CJ KENDAGOR, J  
FEBRUARY 20, 2025**

**BETWEEN**

**JOSEPH NGARI MWANGI ..... 1<sup>ST</sup> APPELLANT**

**ROBERT KARANI GITHAKA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against conviction and sentence in Githongo Law Courts Criminal Case No. E034 of 2021, delivered on 26th June, 2023 by Hon. E. W. Ndegwa (SRM))*

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants were charged with the offence of stealing goods on transit contrary to Section 279(c) of the *Penal Code*. The particulars of the offence are that the Appellants, on the 18<sup>th</sup> day of January, 2021 at about 10:00 hours in Chaaria, Gaitu West Location in Imenti Central Sub County within Meru County, jointly with others not before court stole 1150 bales of Ajab wheat flour valued at Kshs.1,794,000/= the property of Ephantus Wachira Githaka from a trailer reg. no. KCV 990T (ZF 8611) while the said property was in transit from Mombasa to Meru.
2. The 2<sup>nd</sup> Appellant solely faced an alternative charge of handling stolen goods contrary to Section 322 (1) (2) of the *Penal Code*, which particulars of the offence are that Appellant on the 25<sup>th</sup> day of January, 2020, at about 2200 hours in Kirinyaga Sub-County within Kirinyaga County, otherwise than in the course of stealing dishonestly retained 266 bales of Ajab wheat flour valued at Kshs.399,000/= knowingly or having reasons to believe it to be stolen goods.
3. Following the trial, the Appellants were found guilty of the main charge and each sentenced to seven years' imprisonment. Dissatisfied with the conviction and sentence, they appealed to this Court and



submitted the present appeals on the grounds outlined below. The two appeals were consolidated, and Appeal E122 of 2023 is the lead file.

4. The 1<sup>st</sup> Appellant contends that the learned trial magistrate failed to appreciate that PW1's failure to employ a conductor as part of the crew compromised the security of the cargo. The facts evidence as presented by the prosecution was marred with material discrepancies and inconsistencies. Further, he meticulously dispensed his duty under Section 111 (1) of the *Evidence Act* by raising a plausible defence that was not considered.
5. The 2<sup>nd</sup> Appellant similarly contended that the learned magistrate erred in both fact and law by sentencing the Appellant to serve 7 years without proof that the exhibits belonged to the Complainant. He pleaded that there were discrepancies in the dates of the alleged offence, the investigation was inadequate, and the learned trial magistrate provided no compelling reasons for dismissing his defence.
6. The 1<sup>st</sup> Appellant submitted that PW1 was obsessed with making a profit and neglected the need for a conductor. In his defence, he maintains that the motor vehicle had mechanical problems throughout the transit, causing the journey to take an unusual five (5) days from Olonguruine to Mombasa to Meru, of which the Complainant was constantly appraised.
7. According to the 1<sup>st</sup> Appellant, the vehicle developed another mechanical problem when he reached Chaaria, where he got injured in the process and was aided by good Samaritans to the hospital. Further, the company manager who called the local police to secure the consignment however upon arrival the same had been looted by members of the public.
8. The Appellants emphasised that there were significant contradictions in the prosecution's case, particularly regarding the date of the motor vehicle inspection. They pointed out the discrepancy in that the Complainant claimed it took place in Meru on 19<sup>th</sup> January, 2021, while the investigating officer stated that the inspection occurred in Nairobi, and the NTSA inspector asserted that he conducted the inspection at Chaari Police Station.
9. The 1<sup>st</sup> Appellant acknowledged that the Safaricom communication data shows he was in contact with the 2<sup>nd</sup> Appellant, but asserts that the sole purpose was related to an employment opportunity at Kiegoi Tea Factory. Furthermore, he points out significant inconsistencies in the testimonies regarding the events in question. Specifically, the subject property was reported stolen on 18<sup>th</sup> January, 2021, yet PW6 testified that he delivered it on 6<sup>th</sup> October, 2021. He cited the authorities in *Ramanlal Trambaklabbhatt vs Republic* (1957) E.A 332, *Odhiambo vs Republic* (2005) 1 KLR.
10. The Respondent, at the time of making this determination, had not yet filed its submissions.

### **Determination**

11. It is the duty of the first Appellate Court to carefully examine and analyze afresh the evidence presented from the trial Court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See *Pandya vs. Republic* (1957) EA 336).

### **Whether the prosecution established its case against the appellants beyond reasonable doubt?**

12. The Appellants were charged and convicted under Section 279 of the *Penal Code* which provides various classes of theft. In particular Section 279 (c) under which they were convicted provides as follows;



- a. 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.
13. For a conviction under the above proviso to stand therefore there should be proof that:
- a. Goods of some value were stolen;
  - b. From a vessel, vehicle or place of deposit used for conveyance or custody of goods; and
  - c. The goods were in transit from one place to another.
14. These ingredients must be read together with definition of the offence of stealing is defined by Section 268 (1) of the *Penal Code* as;
- a. 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. I have weighed the grounds of appeal against the trial evidence on record. The first Appellant was employed as a driver by the complainant herein. On 18<sup>th</sup> January, 2018, the first Appellant was driving trailer KCV 990T (ZF 8611) while transporting Ajab flour bales, of which it was established that 1150 bales had been stolen.
16. From the outset, it is undisputed that the bales of Ajab Wheat Flour belonging to PW1, were stolen from the subject motor vehicle while in transit from Mombasa to Meru.
17. The 1<sup>st</sup> Appellant claimed that he was involved in an accident while driving the subject vehicle; specifically, he was rescued by good samaritans and rushed to hospital, at which point the vehicle's consignment was stolen. Nevertheless, he failed to produce any medical documentation to verify whether he had indeed been involved in an accident and injured as alleged.
18. PW4, Richard Thiongo, a motor vehicle inspector at NTSA, assessed and produced a certificate of examination of the subject vehicle and revealed that no pre-accident defects were noted and no visible damage on the vehicle. This suggests that it was in good condition prior to the theft incident.
19. The allegations put forth by the 1<sup>st</sup> Appellant about an accident was designed to obscure the truth. During the investigations, PW3 – the investigating officer, requested Safaricom to retrieve the 1<sup>st</sup> Appellant's communication records. The resulting data revealed a pattern of communication between the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.
20. The investigating officer detailed that leads directed officers to the Kamuiru area. This emerged from intelligence indicating that 'Ajab flour' was being sold at unusually low prices and was linked to the 2<sup>nd</sup> Appellant, which raised suspicions. The officers ambushed the 2<sup>nd</sup> Appellant at his house, adjacent to which was a storehouse full of Ajab flour, for which no sufficient explanation was given.
21. The 2<sup>nd</sup> Appellant claimed that he had purchased the 266 bales of Ajab flour from individuals along Kiegoi - Kamuru road where a trailer had been involved in an accident.
22. PW3 testified that the second batch of the consignment was recovered on 6<sup>th</sup> December, 2021 in the Mikinduri area, following a tip-off. The bales had been stored in two rented houses, and one David Karanja, who had also rented property there, voluntarily provided information to the police after being questioned, during which he positively identified the 2<sup>nd</sup> Appellant as the individual who had stored the flour in the houses.



23. PW3's investigations and testimony were corroborated by PW6, John Muriithi, a driver, who testified that he received a call from PW7, Lewis Munene, his employer, on 22<sup>nd</sup> November, 2021 to drive his lorry to ferry some goods from Mikinduri to Mugaya. He complied and picked up a consignment of wheat flour, which he then dropped off to the 2<sup>nd</sup> Appellant.
24. The 2<sup>nd</sup> Appellant confirmed that on the morning of 17<sup>th</sup> November, 2021, he was in contact with the 1<sup>st</sup> Appellant but on distinct matters to the instant. This notwithstanding, he confirmed that they thereafter remained in constant communication as they maintained a close working relationship.
25. In my view, the defence presented by the Appellants in the trial Court does not exculpate them from liability. The facts put forth by the prosecution witnesses expose an orchestrated scheme involving the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, with a clear nexus of events that culminates in their culpability.
26. With regard to the discrepancies and inconsistencies in the prosecution witnesses' testimonies, I find neither is sufficiently curtailed to prejudice the appellants in any way. In fact, as was held in Philip Nzaka Watu v. Republic [2016] eKLR, it must not be lost that:
  - a. "...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses."
27. I have regarded the aforementioned discrepancies as alleged, and I consider them inconsequential insofar as they neither threaten the veracity of the prosecution witnesses' testimonies nor prejudice the Appellant's defence.
28. After this Court's appraisal of the evidence on record, I find no fault with the learned trial magistrate's decision. The prosecution witnesses' testimony is adequate, as corroborated by the exhibits on record, and the offence of stealing goods in transit against the Appellants has been proven beyond reasonable doubt.
29. The prosecution proved that the Appellants unlawfully stole 1,150 bales of Ajab flour belonging to the Complainant without any claim of right. They are both guilty of the main charge; I make no findings regarding the alternative charge.
30. The prescribed sentence under Section 279 (c) of the *Penal Code* is fourteen years' imprisonment. The learned trial magistrate, in exercising his discretion, sentenced each of the Appellants to a term of seven (7) years. The Appellants had been in custody for two months before they were admitted to bond. Both Appellants were first offenders, and the pre-sentence reports were very positive regarding their character and community ties. Given the circumstances of the case, mitigation, the presentence report, and considering the objectives of sentencing as outlined in the Judiciary Sentencing Guidelines, I find that the sentence itself is severe. I set it aside, substituting it with a sentence of two years' imprisonment. The sentence shall commence from the date it was passed at the lower Court.
31. I uphold the conviction and set aside the trial Court's sentence, substituting it with a sentence according to paragraph 30 above. Consequently, the appeal is partly allowed, but only in relation to the reduction of the sentence.

It is so ordered.



**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE PLATFORM ON THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Joseph Ngari Mwangi 1<sup>st</sup> Appellant

Robertu Karani Kithaka – 2<sup>nd</sup> Appellant

For Respondent – Ms Arunga

