



REPUBLIC OF KENYA



KENYA LAW
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**Masinde v Republic (Criminal Appeal E145 of 2024)
[2025] KEHC 768 (KLR) (3 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E145 OF 2024
DR KAVEDZA, J
FEBRUARY 3, 2025**

BETWEEN

KENNEDY MASINDE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. W. Lopokoyit (S.R.M) on 31st October 2024 at Kibera Chief Magistrate's
Court Criminal Case no. 970 of 2016 Republic vs Kennedy Masinde & 2 Others)*

JUDGMENT

1. The appellant was charged jointly with two others not before this court with two counts of offences: Breaking into a building and committing a felony contrary to section 306(a) of the penal code. The particulars of the offence are that on diverse dates between 1st September 2015 to 17th February 2016 at Jamuhuri show ground in Dagoretti sub-county within Nairobi County jointly with others not before the court broke and entered into a building namely the store of one Anne Wanja Maina and committed a felony namely theft of 200 bags of maize valued at KShs. 480,000/= the property of Anne Wanja Maina.
2. In count II, the offence of conspiracy to commit a felony contrary to section 393 of the penal code. The particulars of the offence are that on the diverse months between 1st September 2015 to 17th February 2016 at Jamuhuri showground in Dagoretti sub county within Nairobi County jointly and others not before court conspired together to commit a felony namely stealing of 200 bags of maize valued at Kshs. 480,000/= the property of Anne Wanja Maina.
3. After a full trial, the appellant was convicted and sentenced to compensate the complainant of Kshs. 480,000 in default to serve one-year imprisonment. In count II, an order of probation for a period of 1 year.



4. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his appeal he challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
5. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
6. The prosecution's case in brief was as follows: The complainant Anne Wanja Maina and the appellant were business partners engaged in the supply of maize. The appellant was responsible for sourcing maize from upcountry and delivering it to the complainant's store in Nairobi. In 2016, the complainant noticed a recurring issue with a shortage of maize in her store, as well as missing items. Despite attempting to install CCTV cameras to catch the culprits, her efforts proved unsuccessful. Eventually, one of the workers of the appellant came forward and disclosed the ongoing thefts.
7. The complainant discovered that the appellant had conspired with her workers and other casual laborers to steal maize bags from her store. The thieves had created a hidden passage behind the store, through which they would remove maize bags and load them onto their lorry. They would then resell the same maize back to the complainant when unloading at her store. Realizing the extent of the scheme, the complainant reported the matter to the police, triggering an investigation.
8. The crime scene was visited, and photographs were taken as part of the evidence-gathering process. Furthermore, mobile money transactions of the appellant and his co-conspirators revealed significant amounts of money exchanged between them, particularly on the days they were allegedly delivering maize to the complainant. This financial evidence raised suspicions about the legitimacy of the deliveries, prompting the police to arrest and charge the appellant and his accomplices.
9. The evidence gathered by the prosecution, including the testimonies of the witnesses and the financial records, painted a clear picture of a well-orchestrated scheme to defraud the complainant. The mobile money transactions were particularly crucial in connecting the accused individuals to the alleged thefts. With the combination of direct witness accounts, physical evidence from the scene, and financial data linking the accused to the crime, the prosecution sought to prove beyond a reasonable doubt that the 3rd accused and his accomplices were involved in a fraudulent conspiracy to steal from the complainant.
10. In his defence, the appellant gave a sworn statement and called one witness, Isaac Wanjala (DW2). The appellant testified that he supplied maize to the complainant from 2015 to 2016, but she failed to pay him approximately Kshs. 6 million for the maize. When he confronted her with the outstanding debt, the complainant filed this case, leading to his arrest and charges. He denied ever being found with stolen maize and pointed out that the complainant's store was under tight security with CCTV cameras. The money he sent to workers was repayment for a loan they had borrowed from him. He further claimed that Patrick, a witness for the prosecution, was fired by him and fabricated the case against him. Additionally, the 3rd accused stated that he sued the complainant in civil court for non-payment and was awarded a decree, but has not received the payment.
11. DW2 testified that he worked with the appellant as an offloader and confirmed that the appellant had been supplying maize to the complainant, with the last delivery made in 2016. He stated that they had not been paid for those deliveries. DW2 also asserted that there was no break-in at the complainant's store, noting the area was well-secured with a perimeter fence and security guards.



12. I have considered the evidence and the submissions on record. I find that the issue in this appeal is whether the prosecution proved their case beyond reasonable doubt.
13. The complainant testified that she stored maize in her premises for milling purposes, and provided storekeeping records detailing the quantity of maize bags in her possession. This was corroborated by PW2, PW4, and the accused and his witness. Photographic evidence, presented by PW4, further confirmed the maize storage. While the complainant's records were corroborated, her testimony regarding the break-in and theft was hearsay.
14. The issue of the theft was addressed by PW2, who was an eyewitness. PW2 testified that he worked with the appellant in supplying maize to the complainant, a fact confirmed by the defence. He stated that during deliveries, he observed the appellant and other workers switch off the CCTV cameras, access the store through a hole they had made in the wall, and steal maize. This explained the complainant's recurrent shortages. PW4 corroborated this by visiting the scene and confirming the hole, which was concealed with car tyres, as described by PW2. Photographs of the store and the hole were produced in evidence.
15. The appellant attempted to discredit PW2's testimony, claiming that he was fired, leading to a grudge. However, the defence did not elaborate on the nature of the dispute. The testimony of PW2 remained unchallenged and was corroborated by photographic evidence, strengthening the prosecution's case.
16. Regarding the conspiracy allegations, the complainant testified that the appellant conspired with her workers to steal maize when she was absent. PW2 confirmed this collaboration, noting that the workers aided the appellant in stealing maize. PW4's investigation revealed the mobile phone numbers of the appellant and workers involved, with evidence of financial transactions between them. Safaricom confirmed these mobile money transfers, which showed large sums of money being exchanged, some sent by the appellant to the others. While the appellant claimed these were loan repayments, he failed to explain other transactions. The mobile money data, while circumstantial, supports the conspiracy and theft claims when combined with other evidence.
17. The appellant also referenced a civil case involving the complainant and the himself but the standard of proof in this criminal case differs, and this Court cannot rely on the findings of a separate matter. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind the prosecution proved beyond reasonable doubt the offences charged. The conviction on both counts of offences is affirmed.
18. On sentence, the appellant was sentenced to compensate the complainant Anne Wanja Maina the sum of Kshs. 480,000 in default to serve one-year imprisonment. In count II, an order of probation for a period of 1 year.
19. In the sentencing proceedings, the trial court considered that the appellant was a first offender, the presentencing report, and the appellant's mitigation before imposing the sentence. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed.
20. Upon reviewing the sentence imposed, it is clear that the court did not specify whether the appellant would serve probation in addition to or after completing the default sentence. This lack of clarity renders the sentence vague and undermines its purpose. A clear and definitive sentence is crucial to ensure the appellant understands the terms of the punishment and that the sentence serves its intended objectives of deterrence, rehabilitation, and justice.



21. In the premises, I hereby make the following orders:

- I. In Count one, the compensation order of Kshs. 480,000 in default to serve twelve (12) months imprisonment is substituted with an order of compensation of Kshs. 480,000 to the Complainant Anne Wanja Maina.
- II. The compensation of Kshs. 480,000 shall be paid in instalments to be agreed between the appellant and the victim/complainant under the guidance of the Probation Officer.
- III. In Count two, the order of probation for a period of one (1) year is maintained.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Waita for the Appellant

Mutuma for the Respondent

Achode Court Assistant

