



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oginja v Republic (Criminal Appeal E005 of 2023)  
[2025] KEHC 1586 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1586 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E005 OF 2023  
DK KEMEL, J  
FEBRUARY 7, 2025**

**BETWEEN**

**FREDRICK OKOTH OGINJA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon. JP Nandi  
(SPM) in Bondo Criminal Case No. E410 of 2022 delivered on 18/10/2022)*

**JUDGMENT**

1. The appeal herein arises from the conviction and sentence of Hon. JP Nandi dated 18/10/2022 in Bondo SPM Criminal Case No. E410 of 2022 wherein the Appellant was placed under Probation for a period of twelve months. The Appellant had faced two counts. The first count was stealing contrary to Section 268 as read with Section 275 of the *Penal Code* with the particulars being that on diverse dates between 20<sup>th</sup> June 2022 and 26<sup>th</sup> June 2022 at unknown hours at Mahaya Sub Location in Rarieda Sub-County within Siaya County, jointly with others not before the court stole 15 rolls of chain link wire worth Ksh 54,000/= and U-nails (7 kgs) worth Ksh1,750/= all valued at Ksh55,750/= the property of Jack Ouko Ogony.

The second count was malicious damage to property contrary to Section 339 (1) of the *Penal Code* with the particulars being that on diverse dates between 20<sup>th</sup> day of June 2022 and 26<sup>th</sup> day of June 2022 at unknown hours at Mahaya Sub Location in Rarieda Sub County within Siaya County, jointly with others not before the court willfully and unlawfully destroyed a fence made of chain link wire by chopping off the barbed wires and cutting them into pieces whose approximate value is Ksh184,250/= the property of Jack Ouko Ogony.

2. Being aggrieved by the conviction and sentence, the Appellant lodged his Petition of Appeal dated 21/11/2022 wherein he raised the following grounds of appeal:



- i. That the Honourable magistrate erred in fact and law by convicting the Appellant on insufficient evidence.
- ii. That the Honourable Magistrate erred in fact and law in finding that the prosecution's evidence was truthful yet the same was littered with contradictions, outright lies and half-truths which created a lot of doubt which should have been resolved in favour of the Applicant.
- iii. That the Honourable Magistrate erred in not considering the provisions of the Evidence Act and the Penal Code thus culminating in a wrong finding against the Appellant.
- iv. That the Honourable Magistrate erred in convicting the Appellant on a defective charge thus prejudicing the Appellant.
- v. That the Honourable Magistrate erred in not holding that the Appellant had no burden of proof while the prosecution failed to discharge the burden as expected in law.
- vi. that the Honourable Magistrate was biased in his decision making.
- vii. That the decision was against the weight of the evidence.
- viii. That the Honourable Magistrate did not consider the contradictions in the prosecution's case and thus arrived at an unjust decision.

The Appellant therefore prayed that the appeal be allowed and that the conviction be quashed and sentence set aside.

3. This being the first Appellate court, its duty is well spelt out namely, to evaluate the evidence tendered before the trial court and subject it to an independent analysis and arrive at its own independent conclusion as to whether or not to uphold the decision of the trial court. This court must take cognizance of the fact that the trial court had the advantage of seeing or hearing the witnesses as they testified. See *Okeno Vs. R* [1972] EA 32.
4. The Respondent called five witnesses in support of its case.
5. PW1 Jack Ouko Ogonny stated that he is the complainant and that his worker alerted him of the incident and that he advised him to go to the police and file a report. That he rushed home on 27/6/2022 and confirmed that indeed his fence chain link wire had been stolen. He produced the purchase receipt as an exhibit.

On cross examination, he stated inter alia; that he had bought the land and was in the process of securing title thereto; that his worker did not see the perpetrators committing the offence but only saw a person carrying the chain link on a motor cycle.

6. PW2 Michael Ochieng Odeny testified that he visited the complainant's land and found the fence chain link stolen and that he alerted him and who instructed him to report to the area chief. That again on 26/6/2022 while visiting the farm, he spotted a rider by the name Ogaja riding a motor cycle registration Number KMF V 392N while carrying a chain link and that he tried to pursue him to no avail. That he reported to the police which led to the arrest of the said Ogaja and the seizure of the motor cycle which he identified in court (Exh. 2) as well as the photographs showing the damaged fence (Exh.3).

On cross examination, he stated inter alia; that he had known the Appellant as "Ogaja"; that he did not see the persons who damaged the fence; that he saw the Appellant carrying the chain link on a motor cycle on 26/6/2022; that he could not catch up with the Appellant as he was then walking on foot.



7. PW3 Brian Ogaja testified that the Appellant is his brother. That on 26/6/2022 the Appellant requested him to allow him use his motor cycle on an errand and that he gave him the motor cycle registration Number KMFV 392N.
8. PW4 Jackline Akinyi Ndolo testified that she is the assistant chief of Mahaya Sub Location and that she visited the scene and established that half of the complainant's chain link had been stolen. That one roll of chain link wire was recovered from a bush near the scene after the arrest of Appellant. On cross examination, she stated that she did not witness the incident.
9. PW5 Joseph Ogony Osigo testified that he visited the scene and confirmed that the complainant's chain link wire had been stolen.
10. PW6 No. 111525 Barasa Syakito Isaiah testified that he investigated the case and visited the scene on the two occasions and took photographs as well as recovering the motor cycle that was alleged to have been used by the Appellant in ferrying the stolen chain link. He produced the motor cycle and photographs as exhibits 2 and 3 respectively.  
On cross examination, he stated inter alia; that he visited the scene in company of other officers; that no tool was recovered from the scene.
11. The prosecution closed its case. The trial court later ruled that a prima facie case had been made against the Appellant who was subsequently placed on his defence. The Appellant opted to remain silent in defence.
12. The Appeal was canvassed by way of written submissions. It is only the Appellant who complied by filing submissions dated 5/5/2024.
13. I have considered the evidence tendered before the trial court and the submissions filed herein. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond any reasonable doubt.
14. It is noted that the Appellant had been charged with two counts namely, stealing contrary to Section 275 of the *Penal Code* and malicious damage to property contrary to section 339 (1) of the *Penal Code*. It is not in dispute that there was no direct evidence showing that the Appellant was seen committing the offence. It is only the evidence of the complainant's employee (PW2) to be considered herein. The said witness stated that he saw the Appellant carrying chain link wire on 26/6/2022 and that he tried to chase after him in vain but he later alerted the authorities which led to the arrest of the Appellant and seizure of the motor cycle registration Number KMFV 392 N. PW2 stated that the Appellant was then ferrying the chain link wire not far from the scene. It is instructive that the stolen chain link wire was not recovered from the Appellant. The Assistant Chief (PW4) stated that one roll of chain ink wire was alter recovered in a bush near the scene but his was after the Appellant was arrested. The police did not pursue the same and hence the fact that no alternative charge of handling stolen goods under Section 322(2) of the *Penal Code* was not preferred against the Appellant. Therefore, the Respondent's case was hinged entirely on circumstantial evidence.
15. Circumstantial evidence was aptly described in the Court of Appeal Case of Sawe Vs. R (2003) KLR 364 when it held that in order to justify on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other explanation upon any other reasonable hypothesis than that of his guilt. The court went further to hold that in the event that there is strong suspicion towards an accused, then the said suspicion must be water tight and leave no doubt about his guilt. The court went on to add that even if the suspicion could be strong, the same cannot be a basis for inferring guilt which must be proved beyond any reasonable doubt through evidence.



16. The burden of proof in criminal cases is upon the prosecution to discharge and which must be beyond any reasonable doubt. PW2 was the sole witness relied upon by the prosecution in its case. The only thing that this witness spoke of is the fact that he saw the Appellant herein riding motor cycle registration Number KMFV 392N and that he tried to pursue him in vain. The Assistant Chief (PW4) accompanied police officers to the scene where photographs were taken. They also visited the home of the Appellant and impounded the motor cycle in question. It is noted that no recovery of the stolen chain link wire was made. Hence, it is the evidence of PW2 alone, to be considered. Indeed, PW2 claimed that upon seeing the Appellant, he tried to give chase on foot but could not as he did not have capacity to compete with a motorcycle. It is instructive that it was around 7.00 Am and that the villagers were already out of their homes. The said PW2 did not even raise alarm and call out to the villagers to intervene in the matter. Had he done that, then the stolen items could have been recovered and the suspect called upon to explain how he came to be in possession of such an item. According to PW2, it was his view that the chain link wire ferried by the Appellant must have emanated from the scene of crime. I find this was just a supposition on his part and that he suspected the Appellant to have been responsible for the two incidents. The Assistant Chief (PW4) stated that PW2 informed her that he did not see the person who destroyed the chain link wire and also that he was not sure whether the chain link that the Appellant was allegedly seen ferrying was the same chain link wire that was destroyed and or stolen. It is clear to me that the Appellant was blamed for the offence merely because he was allegedly seen riding a motor cycle with a roll of chain link wire. It is trite law that suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence. I find the evidence of the sole witness (PW2) was not sufficient to sustain a conviction against the Appellant in view of the glaring doubts. The benefit of such doubt should have been resolved in favour of the Appellant in any event. The Court of Appeal in the Case of Mwangi & Another vs R (2004) 2KLR 32 on circumstantial evidence held:

“In a case depending on circumstantial evidence, each link in the action must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis that the accused is guilty of the charge.”

It is trite that before convicting a person based on circumstantial evidence, a court must ensure that there are no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proof is always on the prosecution to prove the guilt of an accused beyond any reasonable doubt.

17. From the foregoing, it is clear that the Appellant was convicted for the two offences based solely on the fact that he was suspected to have been behind the damage of the fence and theft of fence chain link wire. There was doubt created and which should have been resolved in the Appellant's favour. The conviction arrived at by the trial court was therefore in error and must be interfered with. The fact that the Appellant opted not to tender any evidence in defence should not be read or construed in a negative way since it is one of the options provided for under Section 211 of the *Criminal Procedure Code*. In any event, the duty to prove his guilt beyond any reasonable doubt remained on the prosecution to discharge.
18. As the issue of conviction has been resolved, I find an analysis of sentence becomes moot.
19. In the result, it is my finding that the appeal has merit. The same is allowed. The conviction by the trial court is hereby quashed and the sentence set aside. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.



**DATED AND DELIVERED AT SIAYA THIS 7<sup>TH</sup> DAY OF FEBRUARY 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

N/A Fredrick Okoth Oginja....Appellant

Almonda for Mwambi.....for Appellant

M/s Kerubo.....for Respondent

Ogendo.....Court Assistant

