



**Wesah & 2 others v Republic (Criminal Appeal 134 of 2023)
[2025] KEHC 1964 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 134 OF 2023
DR KAVEDZA, J
FEBRUARY 25, 2025**

BETWEEN

LEWIS WESAH 1ST APPELLANT

PATRICK KIOKO MAWEU 2ND APPELLANT

STANLEY KETER 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 28th September 2023 by Hon. S. Temu (SPM) at Kibera Chief Magistrate's Court Criminal Case no. 10 of 2378 Republic v Patrick Kioko Maweu and 3 others)

JUDGMENT

1. The Appellants were charged and after a full trial convicted of the offence of stealing contrary to section 268(1) as read with section 275 of the [Penal Code](#). The particulars of the case were that the appellants on 8th November 2021 at Philip International Auctioneers Yard along Kandara Road in Kileleshwa Area within Nairobi County jointly with others not before court stole 762 cartons containing electrical bulbs all valued at Kshs. 609,600 the property of George Njoroge Muiri. They were each sentenced to pay a fine of Kshs. 150,000 and in default to serve a sentence of one (1) year imprisonment.
2. Aggrieved, the appellants filed the present appeal challenging their conviction and sentence. In the appeal petition, the appellants challenged the totality of the prosecution's evidence against which they were convicted. Additionally, they contended that the learned magistrate erred in law and fact by ignoring the defence by the appellants. They urged the court to quash their conviction and set aside the sentence imposed.



3. One preliminary issue is that, according to the trial court's judgment, the second appellant, Patrick Kioko, who was previously the first accused, was acquitted. Therefore, his appeal is erroneous, as the learned magistrate found that the prosecution failed to prove any case against him. As per the trial court's order, this court hereby releases him, unless he is lawfully detained for another reason.
4. 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.
5. The prosecution called three (3) witnesses in support of their case. PW2, George Njoroge Muiruri, the manager of Philips Auctioneers, testified that on the material day, he received a call from a client named Mohamed, informing him that cartons from his company were being loaded onto a motor vehicle. Concerned, he contacted an employee, Alex, to confirm whether the gate to the auctioneers' premises had been locked. Upon confirmation, he instructed Alex to return to the premises to investigate. Alex then observed a pick-up vehicle, registration number KAJ 772B, leaving the premises. He followed the vehicle towards Kawangware and took photographs, which were produced in court.
6. PW2, accompanied by police officers, proceeded to the company premises, where they found the third appellant, Stanley, acting as a guard. Upon inquiry about Philemon's whereabouts, Stanley stated that he had gone to buy supper. When Philemon returned, both he and Stanley were arrested. The following morning, PW2 discovered that two keys granting access to containers and the main house were missing. Additionally, the padlock to the store had been swapped. Upon inspecting the containers, he found that 752 out of 1000 imported light bulbs, valued at Kshs. 609,000, were missing. He produced an invoice and an RTS transfer form from Equity Bank as evidence.
7. CCTV footage captured Philemon and Stanley moving the cartons. By the time investigators reviewed the footage, thirty cartons had already been recovered from a shop in Kawangware, opposite Equity Bank, and the shop owner had been arrested. Although the special initials "PGH" on the cartons had been rubbed off, serial numbers confirmed their identity.
8. PW1, Meshack Mamboleo Ombui, testified that on 8th November 2021, he was informed of the arrest of the third appellant, Stanley, who was employed as a guard at Philips Auctioneers. Upon proceeding to Kileleshwa Police Station, he found the manager of Philips Auctioneers and the arresting officer. He was informed that a pick-up vehicle had been observed leaving the auctioneers' premises at approximately 6:00 p.m. However, neither the movement of goods nor the vehicle's registration details had been recorded in the Occurrence Book (OB), contrary to established protocol.
9. Further investigations revealed that several M-Pesa payments had been made to the second appellant, Patrick, who was not an employee of the company, as well as to the company's gardener, Philemon. Law enforcement officers utilised Philemon to track down Patrick by instructing him to call and offer him purported goods for collection. Patrick initially accepted the offer, but upon realising the ruse, attempted to evade arrest. He was, however, apprehended and taken to Kileleshwa Police Station. PW1 subsequently recorded his statement that evening. Upon cross-examination, he conceded that the M-Pesa transactions did not specify the purpose of the payments and that the alleged theft had first been discovered by a client of the company.
10. PW3, PC Matthew Ndatho, the investigating officer, testified that on 8th November 2021 at approximately 9:00 p.m., PW2 arrived at Kileleshwa Police Station to report an alleged theft. Given that the suspected perpetrators were still at the scene, the officers proceeded directly to the premises



instead of recording the report. Upon arrival, they found Stanley, who opened the gate and was later joined by Philemon, the caretaker of the estate.

11. During interrogations, Philemon disclosed that Stanley and Patrick had conspired to steal bulbs from the containers, with Stanley facilitating access and Patrick handling transportation. However, the plan could not proceed without Philemon's involvement, as he held the keys to the store. Philemon further stated that Patrick had sent him Kshs. 2,000 as part of the scheme. Upon searching a shop to which Philemon had access, the officers recovered several cartons, which PW2 identified, though some were missing. The following day, Philemon lured Patrick by pretending there were more goods to collect, leading to Patrick's arrest as he attempted to flee.
12. On 16th November 2021, officers returned to the shop where the stolen cartons had been found and encountered the first appellant, Lewis, who claimed ownership of the shop. A search revealed 18 tampered cartons and additional bulbs on display. An inventory dated 16th November 2021 was prepared and signed by Lewis, who was subsequently arrested. PW3 produced this inventory, M-Pesa transaction records, photographic evidence of the pick-up loading process, and registration details linking the vehicle to James Makohani. Under cross-examination, he stated that the initial informer declined involvement, and witnesses recorded their statements on 17th November 2021.
13. The court was satisfied that the prosecution had established a *prima facie* case, and the appellants were put on their defence.
14. DW1, Patrick Kioko, the second appellant, testified that he had no knowledge of Philip Auctioneers and that Philemon had been his neighbour for one and a half years. On 8th November 2021, Philemon requested Kshs. 15,000 from him, which he sent later that evening. The following day, Philemon asked him to meet at Kenya High in Kileleshwa. Upon arrival, he encountered a single Subaru vehicle, from which three men in civilian clothing emerged. Believing them to be thugs, he attempted to flee but stopped upon seeing that one of them was armed, fearing he might be shot. He was taken to Kileleshwa Police Station without being informed of the reasons for his arrest. He denied ownership of the pick-up vehicle in question and stated that he did not know his co-accused.
15. DW2, Stanley Keter, the third appellant, stated that on 8th November 2021 at approximately 8:30 p.m., Philemon informed him that a customer had purchased goods. Philemon then opened the store and removed several boxes, which DW2 assisted in carrying to the gate. Later, PW2 arrived with police officers and inquired whether a vehicle had entered the premises, to which he responded in the negative. He was subsequently arrested and taken to the police station. He maintained that he was not found in possession of any stolen items.
16. DW3, Lewis Wesah, the first appellant, testified that he was an employee at Terminal One Electricals in Kawangware and produced supporting documents. He stated that on 16th November 2021, while awaiting customers at his shop, three men entered and inquired about a three-phase switch and a Chandaria light. As he retrieved the light, one of them attempted to enter the shop, but he refused entry without an official order. After searching the shop, the men handcuffed him and took him to the police station, where he was informed that the lights found in the shop were stolen property. An inventory of the recovered items was prepared at the station.
17. The appeal was canvassed by way of written submissions by the parties which have been duly considered. The appellants were charged with stealing contrary to section 268(1) of the [Penal Code](#) which provides that:



- 268(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.
18. Further, section 275 of the [Penal Code](#) prescribes the punishment for the offence of stealing if the charge is proved beyond reasonable doubt. It provides as follows:
275. Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.
19. To sustain a charge of theft, the prosecution must prove several key elements. Firstly, the property in question must be tangible and capable of being stolen. Secondly, the property must belong to another person or entity. Thirdly, there must be a fraudulent and dishonest taking or conversion of the property by the accused persons. Finally, the prosecution must establish that the accused persons intended to permanently deprive the owner of the property.
20. From the record, the movement of the cartons containing the bulbs was captured on CCTV footage, showing the loading of the bulbs onto the pick-up truck, which was registered to James Makohani. Additionally, PW2 testified that he found 752 bulbs missing, and further investigation revealed that the cartons containing the bulbs were found in a shop in Kawangware, where the first appellant, Lewis, was arrested.
21. Circumstantial evidence, including the missing keys to the storage containers, the testimony of Philemon about the arrangement between Stanley and Patrick, and the Mpesa transactions, further support the claim of fraud. The fact that the cartons were identified by their serial numbers, even after the imprinted initials had been removed, reinforces the theft. The recovery of the stolen goods in a shop and the arrest of the appellants at the location further establish their involvement in the theft.
22. This evidence meets the requirements for proving theft as defined in Section 268 of the [Penal Code](#) thus that the appellant fraudulently and dishonestly appropriated the light bulbs with the intent to permanently deprive the owner of the same.
23. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction against the first and third appellant is hereby affirmed.
24. On sentence, the appellants were each sentenced to pay a fine of Kshs. 150,000 each and in default to serve a sentence of one (1) year imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion. Subsequently, I see no reason to interfere with the sentence.
25. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.
- Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 25TH DAY OF FEBRUARY 2025

D. KAVEDZA

JUDGE

In the presence of:-

Mr. Mutuma for the respondent

Mr. Kinyanjui for the 3rd appellant (Lewis Wesah)

Appellant – present



Achode – court Assistant

