



**Duba v Republic (Criminal Appeal E037 of 2024)
[2025] KEHC 6546 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E037 OF 2024**

**FR OLEL, J
MAY 14, 2025**

BETWEEN

KULA DUBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being An Appeal from the Conviction and Sentence of Hon Christine Wekesa (SPM)
Delivered in Marsabit Criminal Case No E037 Of 2024 Dated 25Th October 2024)*

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of Burglary, contrary to section 304(2) and stealing contrary to section 279(b) of the penal code. The particulars were that on the 20th day of June 2023 at around 0345hrs at North Horr township in North Horr sub county within Marsabit county, jointly broke and entered into a building used as a general shop owned by Kame Budha.
2. The appellant denied the charge leveled against him, and during trial, the prosecution called four (4) witnesses who testified in support of their case, while in defence the appellant gave sworn evidence and called one witness to support his case. The trial magistrate did consider all the evidence adduced and found the Appellant guilty of the offence of burglary and stealing. He was then sentenced to serve a term of four (4) years imprisonment.
3. The Appellant, being dissatisfied by the conviction and sentence, filed his petition of Appeal and raised the following grounds of Appeal that;
 - a. The learned Trial Magistrate erred in matters of law and fact by failing to note that the prosecution gave doctored facts without noting that it was detrimental to the Appellant.



- b. That the learned trial magistrate erred in law and fact by failing to note that the investigations done by the investigating officer was shoddy to that effect.
- c. That the learned Trial Magistrate erred in law and in fact by failing to note that the witnesses who testified failed to link the appellant to the crime as claimed.
- d. That the learned Magistrate erred in law and fact by failing to take into account, while sentencing, the time spent in remand as required under 333(2) of the [Criminal Procedure Code](#).

B. Facts At Trial

4. PW1 Kame Budha, the complainant, testified and stated that on 20.06.2024 at about 3.45 am, she was asleep when she was woken up by disturbing noise emanating from her shop. She went to check on what was going on and was surprised to find that the door to her shop had been broken into, and burglars were therein ransacking her shop. She quickly locked the door from outside and called on neighbours to assist her. The said burglar was arrested, tied up, and the police were called to re-arrest him.
5. She positively identified the accused as one of the persons she found red-handed stealing from her shop and confirmed that he was a person well known to her as they resided in the same Manyatta. PW1 also confirmed that she lost Kshs 40,000/=, which the accused stole from the shop. Under cross-examination, she reaffirmed her evidence and further stated that the cash stolen was not recovered because the appellant gave it to his accomplice.
6. Later, PW1 was recalled and identified the crowbar and three broken silver padlocks, which were recovered at the incident scene. Under further cross-examination, she confirmed that it was the appellant who broke the said padlocks and gained entry into her shop, where she found him red-handed and with the assistance of her neighbours, had him tied with ropes on his arms and legs. She also confirmed that she found the appellant inside the shop and locked the door from outside, leading to his arrest.
7. PW2 Boru Baraka Abuda testified that PW1 was his sister, who operated her shop at Mayatta Sesi. He recalled that on 20.06.2024 at about 4.00 am, PW1 urgently summoned him to her shop, and upon arrival found that the appellant had been arrested inside their shop and tied on both his hands and legs. He further confirmed that the appellant was a person well known to him as they were from the same Manyatta. They had also recovered an iron bar and three broken padlocks at the scene of the crime. Under cross-examination, PW2 reiterated his earlier evidence and confirmed the appellant's arrest within PW1's shop.
8. PW3 Guyo Barako also confirmed that he resided at Manyatta Sesi, within North Horr, and confirmed that on 20.06.2023 at about 3.50 am, PW1 came and woke him up. She informed him that she had found burglars in her shop and needed assistance. They went to the scene and found the metal bar and broken padlocks outside the shop door. Together with PW2, they confronted and forcefully arrested the appellant, whom they later escorted to the police station.
9. PW3 confirmed that he knew the appellant as they were neighbours within the same manyatta. Under cross-examination, he confirmed that the appellant had broken the shop padlocks and gained access into the shop, where he was arrested. He also confirmed that they forcefully arrested the appellant and, in the process, the appellant had bit his fingers and he had to seek medical attention for the injury sustained.



10. PW4 P.C Meshack Mawere confirmed that on 20.06.2023 at about 4.00 am, he was asleep at his house, within the police lines, when two people came and woke him up. They informed him that a shop had been burgled within the manyatta, and a suspect had been arrested. He called his colleague P.C. Nyerere, and they accompanied the complainants to the scene, where they found that the appellant had been arrested at the scene. He was a person well known to him and PW1 also narrated to them what had occurred leading to his arrest.
11. They also recovered a long metal bar, which had been used to break into the shop, and three broken padlocks. He identified all the said items and produced them as Exhibits before court. Under cross-examination, PW4 confirmed that the recovered padlocks which were all broken, but they did not recover any money from the appellant. He further confirmed that the appellant was not a first offender, as there were several other cases that he was investigating involving the said appellant.

C. Defence Case

12. The appellant gave sworn evidence and stated that he was a resident of North Horr and worked as a matatu turn boy operating between North Horr and Marsabit. He recalled that on the material morning, his colleague Sale Boru had called him and requested him to assist passengers to board his public service vehicle. He arrived at the Mayatta and found that several people, including his colleague “Boru” who informed him that a person known as “Adano Sales” had been arrested for house burglary.
13. It was his further evidence that the public were meting out mob justice on the victim, and they attempted to intervene to stop them from harming him. This in turn, infuriated PW1, who told the charged crowd that he too was involved in the said burglary. He was arrested by the charged crowd, but his friend Sale Boru intervened and advised the crowd that he was the one who had called him to assist in getting passenger’s to board his public service motor vehicle. After his release, he proceeded with his assignment, but did not travel to Marsabit as he was feeling unwell. Later that evening, at about 7.00 pm, while relaxing at his house, he was surprised to be arrested by the police on allegations that he was involved in a crime he never committed.
14. The appellant insisted that the charges against him were false and trumped up. He faulted the prosecution for failing to take photographs of the scene of crime, presenting the rope used to tie him, and he noted that two of the padlocks presented before the court were not broken. He also denied owning the iron bar produced before the court, which was allegedly used to break into the shop padlocks. Finally, he also challenged the prosecution’s assertion that he had stolen a sum of Kshs 45,000/= and wondered why the same was not recovered from him, yet the prosecution witnesses had alleged to have apprehended him at the scene of crime.
15. Under cross-examination, the appellant confirmed that he did not have call logs in court to prove that he spoke with Sale Boru that morning and reiterated that the culprit who had broken into PW1’s shop was Adano Sora Katello. He thus urged the court to dismiss the case put forth against him.
16. DW2 Sales Boru confirmed that he operated a public service vehicle from North Horr township to Marsabit town and would make the first trip early in the morning. On the material morning, he had called the appellant and requested him to help him arrange goods and passengers for the early trip to Marsabit. While preparing for his trip, he was informed by Guyo Barako, that the accused and Adan Sora had been arrested while stealing from inside a shop and had tried to forcefully escape.
17. At that point, the passengers who had already board his public service vehicle became impatient and demanded that they leave for Marsabit town. He therefore left and was later informed that the accused



had been arrested. He concluded by stating that he was not at the scene of crime, when the incident occurred.

18. At the close of the defence case, the trial Magistrate did consider all the evidence tendered, and found the appellant guilty of the offence of burglary and stealing. He was convicted under section 215 of the criminal procedure code and after mitigation sentenced to serve a prison term of four (4) years.

D. Submissions

19. The Appellant did orally submit before court and stated that he had stayed in custody for one year and four months and requested that this period be reduced from the sentence passed based on the provisions of Section 333(2) of the *Criminal Procedure Code*. He also prayed for leniency.
20. The state, on the other hand, conceded that the accused ought not to have been charged with the offence of burglary as he had broken into a shop and not a building used for a dwelling house. The correct charge ought to have been breaking into a building and committing a felony under section 306 of the penal code. Be that as it may, this could be remedied by section 187 of the criminal procedure code, which gave the court latitude to convict an accused of an offence, though he was not charged with it.
21. Secondly, the state submitted that the Appellant was found red handed while inside the shop he had broken into and was locked therein by PW1 before being arrested by members of the public. The investigating officer also went to the scene of crime and re-arrested the appellant at the scene. The evidence presented before the trial court was therefore overwhelming and they thus urged the court to uphold the Appellant's conviction under section 187 of the *Criminal Procedure Code*.

E. Analysis And Determination

22. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by the Court of Appeal, decision in *Kiilu & Another V Republic*, [2005] 1 KLR 174, stated thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

23. Also in *Peter's vs Sunday Post* (1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its conclusions. Only then can it be decided whether the magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.
24. Having considered the entire record of Appeal, the petition/grounds of appeal as raised and the submissions of the parties, I find the following as issues for determination;



- a. Whether the evidence adduced by the prosecution was sufficient to convict the Appellant.
 - b. Whether the sentence meted out was sufficient under the circumstances.
25. PW1 caught the Appellant red-handed, after he had broken into her shop and locked him therein before calling on members of the public to help her arrest him. PW3 who was the amongst the first responder to PW1's shout for help also confirmed this fact. The appellant put up a fight/ resisted arrest, and even bit PW3 on his fingers using his teeth. PW2 and PW4 corroborated this evidence, and the iron bar used to break into the shop and the broken padlocks, too, were produced as evidence.
 26. The prosecution's case was without a shadow of doubt proved beyond reasonable doubt, save for the fact that the accused was wrongly charged with the offence of burglary contrary to section 304(2) of the penal code. Instead, he ought to have been charged with the offence of breaking into a building and committing a felony under section 306 of the penal code, as he did break into a general shop and not a building used as a dwelling house.
 27. Be that as it may, as correctly pointed out by the prosecution, this court has the latitude based on section 187 of the criminal procedure code to still convict the appellant under the right provision of the penal code as the offence he was charged with falls under chapter XXIX of the penal code (Cap 63). Reliance is placed on *Wario Vrs Republic (Criminal Appeal E011 of 2023) KEHC 21789 (KLR)*, where the court held that

“The appellant can therefore be convicted of the offence breaking into a building and committing a felony although not charged with it. It is my finding that the appellant was not guilty of the offence of burglary and stealing under section 304(2) and 279(b) of the penal code, but was guilty of the offence of breaking into a building and committing a felony contrary to section 306(a) of the penal code. I therefore convict the appellant of the offence of breaking into a building and committing a felony contrary to section 306(a) of the penal code. I accordingly set aside the conviction for the offence of burglary and stealing and substituted it with the offence of breaking into a building.”
 28. I therefore set aside the Appellant's conviction of the offense of burglary and stealing under sections 304(2) and 279(b) of the penal code and convict him of the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal code.
 29. On sentencing, the maximum sentence for the offence of breaking into a building and committing a felony is imprisonment for a period of seven (7) years. The Appellant was sentenced to serve a term of four (4) years, and submitted that the trial magistrate had erred in failing to consider the one year and four months he had already spent in remand. He prayed that this period be considered and his sentence be reduced accordingly.
 30. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at an appropriate sentence. The Court of Appeal *Thomas Mwambu Wenyi Vs Republic (2017) eKLR* cited the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharashtra* at paragraphs 70-71, where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is the imposition of appropriate, adequate, just, and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime.



The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence

31. In Republic vs Scott (2005) NSWCCA 152, Howie J, Grove & Barn J J it was stated;

“There is a fundamental and immutable principle of sentencing, that is, sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

32. Section 333(2) of the criminal procedure code provides that;

Subject to the provisions of section 38 of the *Penal Code* (Cap 63), every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

33. While it is true that the Appellant was in custody for a period of one year and four months before he was sentenced, the sentencing proceedings clearly show that during mitigation, he asked the trial magistrate to consider the said period and pleaded for leniency. The trial Magistrate considered his request but also noted that the Appellant was not a first offender and thus decreed that a deterrent sentence must be passed, as similar offences were rampant within this region. Therefore, there is no basis for him to seek a reconsideration of his sentence on similar grounds.

Disposition

34. Having considered all the issues raised herein, I hereby find that this appeal lacks merit and the same is dismissed.

35. Right of Appeal 14 days

36. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MARSABIT THIS 14TH DAY OF MAY 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 14th day of May 2025.

In the presence of;

Present in Court - Appellant



Mr. Otieno - For O.D.P.P

Jarso - Court Assistant

