



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kirungi v Republic (Criminal Appeal E014 of 2020)
[2025] KEHC 8713 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E014 OF 2020
EM MURIITHI, J
JUNE 19, 2025**

BETWEEN

WANJIKU KIRUNGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The accused person was charged for Stealing contrary to Section 268 as read with Section 275 of the *Penal Code* Cap 63 Laws of Kenya. The particulars were that on the 13th Day of November, 2018 at Wamumu village in Mwea East, Sub County within the County of Kirinyaga the two accused persons jointly with others not before Court stole 34 bags of Paddy rice valued at Ksh246,000/= the property of Elishiba Wanja Macharia.
2. Consequently, the appellant was arrested and charged with the afore-stated offence. The appellant denied the charge by pleading not guilty on 27.11.2018. Pre-trial was conducted and the matter was certified ready for hearing.
3. The prosecution case was adduced by 6 witnesses whereas the accused persons tendered unsworn defence with no witness(es). The appellant was found guilty and convicted by the trial court. She was sentenced to pay a fine of kshs 50,000 or serve 6 months' imprisonment.
4. The appellant was dissatisfied with the decision of the trial court. Consequently, he lodged this appeal which is premised on the following grounds:
 1. The Learned Magistrate erred in law and in fact in failing to find that the prosecution had not proved the charge of stealing contrary to section 268 as read with section 275 of the Penal code beyond reasonable doubt as required by the law.



2. The Learned Magistrate erred in law and in fact in relying on uncorroborated, contradictory, inconsistent and non-credible evidence of the prosecution in convincing the appellant.
3. The Learned Magistrate erred in law and in fact in shifting the burden of proof from the prosecution to the defense thereby occasioning miscarriage of justice.
4. The Learned Magistrate erred in law and in fact in convicting the appellant of the offence of stealing yet the legal ingredients for the said offence had not been proved.
5. The Learned Magistrate erred in law and in fact in not ensuring that the fundamental rights of the accused enshrined in Article 50(m) of *the constitution* of Kenya were observed hence the appellant was not afforded a fair trial.

Prosecution Case

PW1- Elishiba Wanja Macharia

5. She was the complainant. She told Court that on 13.11.2018 at about noon she was in a rice field no. 3314 W2 Wamumu. PW1 had been called by her husband Stanley Macharia Kirungi (PW2) to inform her that their rice was being harvested.
6. PW1 testified that after leasing the land she planted rice which was still in the rice field.
7. Upon arrival at the field, PW1 saw a harvester on the land and the two accused persons were there together with a group of men.
8. One man took bags of rice to a lorry KCK 127E which left with the rice that had been harvested.
9. PW1 then called PW2 and she trailed the lorry that was headed to Ngurubani. PW2 joined in and he also saw the lorry that was ferrying the rice. PW2 also saw the 1st accused person in the lorry with a driver (PW3). PW1 had alerted members of the public that the rice was hers.
10. PW1 and PW2 went to Wang'uru Police Station and reported. It was PW1's evidence that an agricultural officer went to the rice field and took photographs. The damage was assessed at Ksh246,000/= which was from the 1 acre of the rice field that had been harvested.
11. In cross-examination by the accused persons PW1 stated that she never knew the two accused persons before the incident.

PW2 - Stanley Macharia Kirungi

12. He stays in Mutithi He is a rice farmer and a driver.
13. He knew the two accused persons. The 1st accused is a cousin to the person who leased to him the rice field, John Irungu.
14. He had a written agreement in kikuyu MFI-1 (a) dated 29.12.2017 and the translation was MFI-1(b).
15. The affidavit of surrender was MFI-2. PW1 together with PW2 had paid Ksh75,000/= for the lease.
16. PW2 told Court that he had been called by the land owner John informing him that rice was being harvested.

PW3- Anthony Mwaniki

17. He is a lorry driver. He stays in Ngurubani.



18. On 13th November, 2018 at 10 a.m he went to work at Ngurubani KCK 127D. The 1st accused approached him and told him that she had rice she wanted transported. He charged her Kshs 2000 for fuel. She was alone. He never saw the 2nd accused (Wanjiku Kirungi).
19. PW3 confirmed to have ferried 21 bags of rice from the rice field to Nice where PW3 offloaded the rice, and he was paid by the 1st accused.
20. On the way, PW3 noticed a vehicle that was trailing them and he stopped. He informed the person that the rice belonged to the 1st accused who argued with the person then they left.

PW 4 – John Irungu

21. PW4 did tell court that on 13.11.2018 he saw tractor harvesting rice from Unit 2 which was his land. The 1st and the 2nd accused persons were there and since PW4 had leased the land to PW2, he called PW2 to inform him.
22. PW4 acknowledged the agreement MFI-I(a) and he also showed Court minutes of 29.06.2016 from N.I.B MFI-4 to demonstrate that he had inherited the land from his late father. That his late father had done the Affidavit of surrender MFI-2 in favor of PW4.
23. Later at about 4.00 p.m PW4 was called to Wang'uru Police Station to record his statement which he did.
24. In cross-examination by the two accused persons PW4 did confirm that he inherited the land about 3 acres from his late Father. He was not served with any Court order regarding the land. PW4 was also not aware of any time that the 2nd accused was in charge of the land.

PW5- Priscilla Mwangi

25. He is the Agricultural Officer in charge of Wamumu ward. PWS produced her report dated 19.11.2018 as P. Exhibit 3.
26. In the report PW5 stated that 1 acre of well managed land would have yielded a harvest of 34 bags of rice. Rice straws on the 1 acre had been moved.
27. At the time rice was retailing at Ksh7,000/= per bag totaling to Ksh238,000/=. Straws from 1 acres was Ksh8,000/= therefore the total cost of harvest was Ksh246,000/=.
28. PW2 did not know about any family dispute over the land and how the land had been subdivided.
29. They had leased 1 and 1/2 acres from John Irungu (PW4) for the seasons 2018/2019 and 2017/2018.

PW6- The Investigating Officer

30. He stated that he carried out investigations after PW1 and PW2 reported the matter at Wang'uru Police Station. PW6 did record the statements and it was evident that the land had been leased to PW2 by PW4 as per the agreement produced by PW6 as P. Exhibit1 (a) and the translation P. Exhibit 1(b).
31. There was the affidavit of surrender of ownership of land P.Exhibit 2 and the Minutes from N.I.B P. Exhibit 4.
32. The rice holding belonged to PW4 as exhibited in the Official Receipts for water charges P Exhibit S.
33. PW6 told Court that the two accused persons had no documents to prove ownership over the land that is why they were charged in this case.



34. In cross-examination by the two accused persons PW6 confirmed that he never recovered the rice that the two stole.
35. Both accused were placed on their defence.

Defense Case

36. The 1st accused herein stated that she is a farmer. That together with the 2nd accused they planted the rice that it is alleged they stole on 25.07.2018. That they had the consent from the manager together with the farmers changes.
37. That they had an order from Kerugoya High Court therefore the decision from N.I.B was a fraud since land could not have been allocated twice. That the land belonged to Kariuki Mai (Deceased).
38. This was the same account given by the 2nd accused in her defence. That Kariuki Mai (Deceased) was the father to 2nd accused's mother and father to John Irungu (PW4).
39. That the 1st accused got land from their mother and the 2nd accused had been in charge of the land since 1996 until the time Richard died.
40. The 2nd accused did not understand why PW1 came to Court yet they were not on her land.
41. Both accused persons had no document or witnesses to support their defence.
42. The sole issue for determination in this case is whether the two accused persons jointly with others not before Court stole 34 bags of Paddy rice valued at Ksh246,000/= the property of Elishiba Wanja Macharia.

Appellant submissions

43. The appellant submits that from the evidence adduced as stated above none of the prosecution witnesses adduced any evidence linking the appellant and the offence. The Prosecution miserably failed to prove its case beyond reasonable doubt. Accordingly, the trial court erred in law in finding that the prosecution proved its case, in convicting and sentencing the appellants. Such is a case which ought to have been pursued in a civil court and not through a criminal process.
44. Looking at the nature of the offence and the kind of evidence that was adduced, it is fair and reasonable to conclude that, the findings by the trial court were not based on evidence, or were as a result of misapprehension of the evidence, and were on the basis of wrong principles.

Respondent submissions

Whether the respondent proved the essential ingredients of the offence of Stealing

45. In the case of *Katana Kitsao V Republic* [2003] Eklr, P.M. Tutui Commissioner of Assize stated as follows in a paragraph worth quoting in extenso: "The main ingredient for a charge of stealing is "taking anything capable of being stolen fraudulently or without claim of right".
46. The respondent was able to prove that the appellant stole the 34 bags of paddy rice together with the co-accused as well as others not before court.



Whether there were any gaps and discrepancies in the evidence tendered by the respondent

47. This court in the case Philip Nzaka Watu — Vs Republic [2016] eKLR held that:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena 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. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”(Our emphasis)

48. A wholistic reading of the testimony of Pwi, Pw-2, Pw-3, Pw-4, Pw-5 and Pw-6 as well as the appellant’s testimony will show that there were no discrepancies on the evidence tendered before the trial court. Even if there were any, they humbly submit my lord that, minor or trivial discrepancies do not affect the credibility of a witness and cannot vitiate a trial.

Whether the respondent proved its case beyond reasonable doubt

49. In the case Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR citing Miller v Minister of Pensions (1947) 2 ALL ER 372 - 373 per Lord Denning:

“That degree is well settled. it needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. if the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

50. Having established the ingredients of the offence of stealing, it is their humble submissions that the respondent has proved its case beyond reasonable doubt.

Issue

51. Whether the respondent proved the essential ingredients of the offence of Stealing

Analysis

52. On the first appeal to this Court by virtue of the principles in Okeno v R {1972} EA 32 the appellant’s appeal is one on matters of Law and facts.

“All this has been explained time and time again that the appellate Court is mandated to analyze and re-evaluate the evidence adduced before the trial Court, independently, to draw its own conclusions of course without overlooking or disregarding the findings made by the trial Court and bear in mind that unlike the trial Court it does not have the advantage and opportunity of hearing and seeing witness testify.”

53. The offence of stealing has been defined under Section 268(1) of the *Penal Code* which provides that: “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.”

54. It's instructive to point out the provision of Section 275 of the [Penal Code](#) which sets out the penalty for stealing as follows: “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.”
55. In the case of *Katana Kitsao v Republic* [2003] EKLRL, the court (P.M. Tutui Commissioner of Assize) observed that “The main ingredient for a charge of stealing is “taking anything capable of being stolen fraudulently or without claim of right”.
56. PW1 testified that she was called by her husband and when she arrived at the rice field, she saw the combine harvester on the land. It was her evidence that the 2 accused persons were seen harvesting the rice leading the same in the lorry or driving away with the rice.
57. The appellant submits that the lessee had also leased the same parcel of land to the accused persons and the complainant was unaware.
58. However, PW2 has a written lease agreement with the owner of the land PW4. Further, he told the Court that he had been called by the land owner John informing him that rice was being harvested.
59. PW6 told Court that the two accused persons had no documents to prove ownership over the land that is why they were charged in this case.
60. PW3- he testified that the 1st accused approached him and told him that she had rice she wanted transported. He charged her kshs 2000 for fuel. She was alone. He never saw the 2nd accused (Wanjiku Kirungi).
61. In their defence, the 1st accused testified that she acquired the land from their mother and the 2nd accused (appellant) had been incharge of the land since 1996 until the time Richard died. The 2nd accused did not understand why PW1 came to Court yet they were not on her land. Both accused persons had no document or witnesses to support their defence.
62. In *Miller v Minister of Pensions* (1947) 2 ALL ER 372 - 373 Lord Denning said of the standard of proof beyond reasonable doubt in criminal cases as follows:

“ Miller v Minister of Pensions {1947} 2 ALL ER 372, the Court held at page 373:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
63. The Prosecution/respondent was able to proof that the appellant took the 34 bags of paddy rice together with the 1st accused person from the land which the complainant had leased and planted. There is no evidence tendered to prove that the appellant owned the land.
64. In full section 268 of the [Penal Code](#) defines theft as-

“268. Definition of stealing



- (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.
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
 - (a) an intent permanently to deprive the general or special owner of the thing of it;
 - (b) an intent to use the thing as a pledge or security;
 - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
- (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

[[Act No. 1 of 2009](#), Sixth Sch.]”

65. By definition, which requires an act of taking an intent permanently to deprive the general or special owner of the thing of it, an owner of property cannot steal his property. So the Accused who claimed the rice belonged to them, have the burden to prove this fact so as to bring the case within the exception of section 268 of the [Penal Code](#).



66. In this regard, Section 111 of the *Evidence Act* provides for burden of proof on the accused in certain cases, as follows:

“ 111. Burden on accused in certain cases.

1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

2. Nothing in this section shall—
 - a. prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
 - b. impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
 - c. affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”
 1. This burden on accused was not discharged on the evidence given by the appellant and the co-accused in the trial court. Upon weighing the evidence before the Court as a whole, as guided by *Okethi Olale v. R (1965) EA 555*, the Court finds that the prosecution has proven the charge of theft against the accused/appellant.
 2. The appellant’s defence that they too had leased the parcel of land does not avail them because section 273 of the *Penal Code* proscribes theft by a



person who may have an interest in the thing capable of being stolen, as follows:

“273. Theft by person having an interest in the thing stolen

When any person takes or converts anything capable of being stolen, under such circumstances as would otherwise amount to theft, it is immaterial that he himself has a special property or interest therein, or that he himself is the owner of the thing taken or converted subject to some special property or interest of some other person therein, or that he is lessee of the thing, or that he himself is one of two or more joint owners of the thing,



or that he
is a director
or officer of
a corporation
or company
or society
who are the
owners of it”

Orders

69. Accordingly, for the reasons set out above, the Court finds that there is no merit in the appeal, and it is dismissed.

Order accordingly.

DATED AND DELIVERED ON THIS 19TH DAY OF JUNE 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for the DPP.

Mr. Nyaga Gitari for the Accused.

