



REPUBLIC OF KENYA



KENYA LAW
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**Kageliza v Republic (Criminal Appeal E003 of 2025)
[2025] KEHC 7981 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E003 OF 2025
AN ONGERI, J
JUNE 9, 2025**

BETWEEN

CHRISTAGEL KAGELIZA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. C. K. Kithinji
(PM) in Voi Criminal Case No. E037 of 2023 delivered on 15th August 2023)*

JUDGMENT

1. The Appellant was charged with several counts including burglary contrary to Section 304(2) of the [Penal Code](#), stealing contrary to Section 279(b) of the [Penal Code](#) and having suspected stolen property contrary to Section 323 of the [Penal Code](#).
2. The Appellant was charged with an alternative count of handling suspected stolen goods contrary to Section 322(1)(2) of the [Penal Code](#).
3. The first two counts of burglary and stealing were alleged to have taken place at Maweni area in Voi Subcounty within Taita Taveta County on the night of 6th and 7th January 2023 at the home of Stanslous Mbaga Mwambi.
4. The third count of having suspected stolen property took place on 10th January 2023 upon being arrested by PC Titus Kamau, a police officer who allegedly found the Appellant in possession of a Ramtons Fridge white in colour, a blue 4 by 6 mattress vitafoam, a brown TV stand and one ocean smartphone reasonably suspected to have been stolen or unlawfully obtained.
5. The alternative count of handling stolen property is also alleged to have occurred on 10th January 2023 at Maweni Area Voi Sub County within Taita Taveta County where it was alleged that otherwise than



- in the course of stealing, the Appellant dishonestly retained one television make Vitron 24” and one white iron box make Ramtons knowing or having reason to believe the same to be stolen goods.
6. The Appellant pleaded not guilty to the charges. The prosecution called a total of four (4) witnesses.
 7. The prosecution evidence in summary is that PW1 SOPHIE SHIGADI arrived at her house at 4p.m from Kazi Mtaani and found her house had been broken into.
 8. PW1 said the padlock was broken and when she entered the house, she found her Vitro TV 24 inches missing and also her blanket from the bedroom.
 9. PW1 went outside and she inquired from her two neighbours Clemence and Maina Lydia if they had seen someone coming out of her house.
 10. PW1 said another neighbour told her he had seen someone walking away towards Maweni with a TV and a blanket. PW1 went to Maweni but did not see the person. She reported to the police.
 11. PW1 said after one week, one Chris called her and told her the suspect had been traced.
 12. PW1 went to the suspect’s house. The suspect said he had sold the TV to the Appellant in this case. In January 2023, PW1 was called to go and identify her TV at the police station. She saw the Appellant in the cells.
 13. PW2 Stanslaus Mwambai who resides at Mwakingali B said that on 6th July 2023 he went to watch a football match.
 14. When PW2 went back to his house at Maweni where he was living at that time, he found his house had been broken into and his iron box, mattress, Airtel phone and flash disk were missing.
 15. PW2 reported to the police. He said found his white Ramtons iron box at the police station.
 16. PW2 said police told him they recovered the iron box at the house of the Appellant whom he knew as Mary.
 17. PW3 No. 112412 PC Titus Kamau attached to Voi Police Station investigated this case. he said he received information from an informer that the Appellant was purchasing stolen property.
 18. PW3 went to the house of the Appellant and he recovered the following items:-
 - i. One blue mattress (4x6”).
 - ii. One brown TV stand.
 - iii. One white Ramtons iron box.
 - iv. One white fridge.
 - v. One smartphone black in colour make ocean.
 19. PW3 said the Appellant did not give an account on how he obtained the goods. He said they were identified by PW1 and PW2. PW3 said the Appellant did not give an account on how he obtained the goods. He said they were identified by PW1 and PW2. PW3 charged the Appellant in court.
 20. PW4 No. 80995 PC Julius Kamau investigated this case and charged the Appellant. PW4 said it was one Brian who broke into the house of PW1 and stole PW1’s goods.



21. In her defence the Appellant said that she is a business lady who resides at Maweni. The Appellant said on 10th January 2023, while at her place of work cooking potatoes, police officers went there and told her to accompany them to the police station to clarify some issues.
22. At the police station, the Appellant was locked in the cells. She was then taken to her house where her TV stand, mattress, TV stand, fridge and black phone make ocean were carted away. She said her Auntie gave her the fridge.
23. The Appellant called her Auntie Nancy Adisa Alwanda (DW2) who said she gave the Appellant the fridge. DW2 said she had two fridges and she gave the Appellant one to use. DW2 produced the receipt as an exhibit.
24. The trial court found the Appellant guilty as charged and convicted her on Count I burglary contrary to Section 304 (2) of the [Penal Code](#) and Count II stealing contrary to Section 279(1)(2) of the [Penal Code](#) and Count III having suspected stolen goods contrary to Section 323 of the [Penal Code](#).
25. The trial court sentenced the Appellant to four (4) years imprisonment on Count I, three (3) years imprisonment on Counts II and III. The sentence in Count I and II were to run concurrently and the three years in Count III was run consecutively.
26. The Appellant has appealed to this court on the following grounds:-
 - i. That the appellant is a first offender.
 - ii. That the appellant has a young family of two children who fully depend on her whereas one staying with his ailing grandmother and the other is with her in prison.
 - iii. That the learned judge erred in law by failing to appreciate that the Appellant's defense was cogent and believable but proceeded to dismiss the same.
 - iv. That the sentence imposed on her was both harsh and excessive since the learned Magistrate failed to consider the Appellant's mitigation, facts and circumstances unique to the case.
 - v. That the prosecution failed to prove by producing witnesses to testify in court in offences count 1 and count 3 in the matter.
 - vi. That the time the appellant spent in remand custody was not considered in her sentence.
 - vii. That further grounds shall be adduced at the hearing of this appeal.
27. The parties filed written submissions as follows:- the appellant submitted that there were no eye witnesses who came and testified in court that they saw her breaking into the houses.
28. She also argued that she was charged with burglary but the investigating officer testified that Brian Mulwa was the one who broke in and stole in the said house.
29. She further argued that Stanlous Mbagha claimed that the iron box was his yet he produce nothing as proof of the same.
30. It was the appellants contention that actually it was her rights that were violated by the police as that unlawfully entered her house and took her items which she had receipts for.
31. The appellant thus urged the court to find that the prosecution did not prove the offences she was accused of to the required standards.



32. The prosecution alternatively submitted that the appellant was charged with the offence of burglary but ought to have been charged under section 304 (a) (b) since the offence occurred during the day.
33. The prosecution argued that section 382 of the *Criminal Procedure Code* however cured the error in that the same does not occasion failure of justice.
34. The prosecution argued that the sentence should remain since the charge was proved save that the offence occurred during the day the sentence that was imposed is appropriate. On count 2 they argued that the appellant was properly convicted after they proved the same to the required standard.
35. This being a first appeal, the duty of the first appellate court is as follows; The Court of Appeal in *Okeno vs Republic* [1972] EA 32 held that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see *Peters vs Sunday Post* [1958] EA 424.

36. The issues for determination in this appeal are as follows;-
 - i. Whether the prosecution proved the guilt of the Appellant to the required standard.
 - ii. Whether the Appellant was positively identified.
 - iii. Whether the sentence meted on the Appellant was excessive.
 - iv. Whether the appeal should be allowed.
37. On the issue as to whether the prosecution proved its case, I have re-examined the evidence before the trial court. I find that PW1 said it was a man who broke into her house.
38. The man who was identified as Brian absconded. I find that the Appellant was not identified as the one who broke into the houses of PW1 and PW2 and stole the goods.
39. I find that the Appellant was wrongly convicted in counts 1 and 2 of burglary and stealing.
40. On the third count of having suspected stolen goods, the Appellant called DW2 Nancy Adisa Alwanda who produced a receipt of the fridge. She said she gave the fridge to the Appellant.
41. The Appellant maintained that the brown TV stand, white ramtons ironbox and black smartphone make ocean are hers.
42. However, there is evidence the items were stolen from the houses of PW1 and PW2.
43. There is evidence that the person who stole the goods sold them to the Appellant. The suspect was charged in court and he absconded.
44. I find that the Appellant was rightly convicted with having suspected stolen goods contrary to Section 323 of the *Penal Code*.



45. The Appellant having been found with the goods which were positively identified by PW1 and PW2 failed to explain how she got them.
46. I accordingly uphold the conviction on Count III.
47. Having carefully considered the evidence on record, the submissions by both parties, and the applicable law, this Court finds that the prosecution failed to prove the charges of burglary (Count I) and stealing (Count II) against the Appellant beyond a reasonable doubt.
48. There was no direct evidence linking the Appellant to the breaking and entering of the complainants' houses, nor was she identified as the perpetrator of the theft.
49. The trial court erred in convicting her on these counts, and accordingly, the convictions and sentences for Counts I and II are hereby set aside.
50. However, regarding Count III (having suspected stolen property contrary to Section 323 of the [Penal Code](#)), the prosecution established that the Appellant was found in possession of goods reasonably suspected to be stolen, which were positively identified by the complainants.
51. The Appellant failed to provide a credible explanation for how she acquired these items, and her defence, though partially corroborated by DW2 regarding the fridge, did not account for the other recovered items. Consequently, the conviction on Count III is upheld.
52. In light of the Appellant's mitigation, her status as a first offender, the time already spent in custody, and the fact that she has young dependents, it is in the interest of justice that the sentence imposed by the trial court on count III be reviewed.
53. The appeal is accordingly partially allowed.
54. The convictions and sentences for Counts I and II are quashed and set aside.
55. The conviction for Count III is upheld, but the sentence is reduced to the time already served.
56. The Appellant shall be set at liberty immediately unless held for other lawful cause.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF JUNE, 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Millicent

