



REPUBLIC OF KENYA



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**Madanji v Republic (Criminal Appeal E031 of 2025)
[2025] KEHC 10601 (KLR) (21 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E031 OF 2025**

A MABEYA, J

JULY 21, 2025

BETWEEN

BRIAN OMBUNGA MADANJI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. Robert
M. Oanda SPM delivered on the 18/02/2025 in Winam SPMC
Cr. Case No. E043 of 2024, Republic v Brian Ombunga Madanji)*

JUDGMENT

1. The appellant was charged with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the *Penal Code*.
2. The particulars of the charge were that, on the 9/01/2024 at United Mall in Kisumu central sub-county within Kisumu County the appellant broke and entered a Bata Shoe Shop and committed therein a felony namely stealing Kshs. 228,406/-, the property of Bata Shoe Kenya PLC.
3. The appellant pleaded not guilty and a full trial ensued. The prosecution case was founded on the evidence of six (6) witnesses. The defence was based on the appellant's sworn testimony as well as that of 2 other witnesses. The trial court found the appellant guilty of the offence and sentenced him to pay a fine of Kshs. 50,000 and in default serve one-year imprisonment.
4. Dissatisfied with that decision, the appellant filed his petition of appeal dated 28/02/2025 wherein he raised eight (8) grounds of appeal which may be summarized as follows: -
 - a. The learned trial court erred in finding that the prosecution had proved the charge of breaking into a building and committing a felony contrary to section 306 (a) of the *Penal Code* beyond



any reasonable doubt even though the evidence presented was circumstantial and did not meet the threshold for conviction.

- b. The learned trial court erred by failing to give reasons as to why the defence of the appellant was not acceptable.
 - c. The sentence imposed upon the appellant was manifestly harsh and excessive taking into account the age of the appellant and the fact that he was still a student.
5. The appeal was canvassed by way of written submissions. The appellant submitted that the prosecution failed to place any evidence directly linking him to the breaking into the shop and proceeded to misdirect himself by laying his judgment on the unconfirmed hypothesis.
 6. That the circumstantial evidence presented by the prosecution fell far short of proving the appellant's culpability as it failed to satisfy the principle of circumstantial evidence laid down in the case of *R v Kipkering Arap Koske* (1949) 16 EACA 135.
 7. On its part, the State submitted that its case was based on circumstantial evidence and that it proved its case against the appellant beyond reasonable doubt. That the sentence meted was very lenient as section 306 (b) of the [Penal Code](#) provides for imprisonment for 7 years and as such the court ought not to interfere with it.
 8. This being the first appellate Court, its duty is well spelt out namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach its independent conclusions and findings but at all times bearing in mind that it did not see the witnesses testify. (See *Okeno v Republic* [1972] EA 32.)
 9. At the trial, PW1 Shaban Kibet Samoei, the manager at Bata United Mall branch testified that on the particular day at 0830hrs, he was at work when he realized the money he had put in the drawer the previous day was missing. Following an audit, it was established that missing amount was Kshs. 228,406/-.
 10. It was his testimony that despite not seeing the appellant commit the crime, he suspected him as he had previously worked there as a casual and was captured by the CCTV around the mall at the time. That the CCTV captured the appellant entering the toilet only to leave an hour later.
 11. PW2, Leah Marango Masambaya, a cashier at the Bata Shop at United Mall testified that on the 10/1/2024, she reported to work and was informed that the shop had been broken into and money stolen. That on inspection they found that the ceiling board in the upstairs room had been interfered with.
 12. She testified that when they viewed the CCTV footage, they saw the appellant enter the male washrooms in the Mall and left after an hour at which time he had removed his jackets and his pockets were stuffed. That the previous night, they had closed the shop at 8.30pm and the CCTV showed the appellant enter the toilet at 8.45pm and leave at 9.41pm. That the Mall were doing repairs on the roof as there had been leakages.
 13. PW3, Zacharia Kungu Wachira, a security supervisor with Bata based at Limuru testified that he received a call about breakage into the Kisumu shop on the 10/01/2024 and that on inspection found that one of the panels of the ceiling was open and footsteps were seen. That the appellant was amongst the myriad of people captured by the CCTV footage and that they focused on him because he stayed in the toilet for 56 minutes.



14. PW4, No. 97529 Cpl. Benard Kiplagat processed a memory card with photos from the crime scene and prepared six photographs. He testified that none of the images showed a person breaking in and that the appellant was not in the photos.
15. PW5, No. 239268 CI Timothy Bett, developed 9 still images from the footage of CCTV advanced to him. He testified that the images showed someone dressed in black walking past the camera carrying an envelope. He testified that he did not see the person breaking into the shop.
16. PW6, No. 88502 Sgt. Everline Sabula, the investigations officer testified that when she received the report of the offence, she commenced investigations. She established that, the appellant gained entry into the said shop through the toilet roof aperture, walked through the ceiling and got into the store through its acoustic ceiling. That she did not dust the ceiling board for finger prints but connected the appellant to the incident going by the CCTV footage and the duration he had taken in the toilet. She testified that she was not aware of the ongoing repairs in the shop and further that they did not recover anything. That the management of the Mall informed them that the ceiling was intact.
17. When placed on his defence, the appellant denied committing the offence. He stated that on the particular date, he was at the Mall at 7pm as he had gone to meet one Diana. That while at the Mall, he went into the toilet where he met one Stacy, a friend who worked as a cleaner there with whom he conversed with. That his friend arrived and they went to a cyber to apply for college.
18. DW2, Stacy Adhiambo testified that on the particular date the appellant, who was her friend, came to the toilet where he took five minutes and after he finished they chatted for about 35 minutes before he left.
19. DW3, Diana Awuor Adhola, testified that on the particular day she arrived at the Mall between 8.30 - 9pm to meet the appellant and that they proceeded to a cyber to make an application then left for home at around 9.30pm.
20. It is based on the foregoing evidence that the trial court convicted and sentenced the appellant.
21. The first ground was that the trial court erred in convicting the appellant on circumstantial evidence yet the prosecution case was not proved beyond reasonable doubt. In the instant case, none of the prosecution witnesses actually saw the appellant commit the alleged offence. The prosecution relied on circumstantial evidence to link the appellant to the crime.
22. In *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the court had this to say on circumstantial evidence: -

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”
23. In the present case, the evidence presented linking the appellant with the offence was that he was captured by the Mall CCTV going into the toilet where he allegedly stayed for almost an hour. That as



such, he was able to access the ceiling where he crawled to the shop premises and gained entry through the shop's acoustic ceiling.

24. Section 111(1) of the *Evidence Act* provides that: -

“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 defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

25. The manner in which the circumstantial evidence is to be considered was explained by the Court in the case of *Mwangi & another v Republic* [2004] 2 KLR 32 as follows:

“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 except the hypothesis that he accused is guilty of the charge.”

26. After considering all the circumstances, the court must then ask itself whether the threshold has been met. That threshold was restated in *Sawe v Rep* [2003] KLR 364 where the Court of Appeal held that: -

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

27. In this case, none of the circumstances create a clear unbroken link to implicate the appellant as the one who committed the alleged offence. The fact that the appellant was caught on CCTV going to the toilet where he allegedly spent an hour is controverted by the testimonies of the appellant, DW2 and DW3. DW2's uncontroverted evidence was that the appellant spent 5 minutes in the toilet after which they spent the rest of the time chatting before the appellant was called to his meeting with DW3. DW3 testified that she met the appellant with whom they proceeded to a cyber then left for home.

28. The footsteps alleged to have been seen by PW3 were never established to be those of the appellant. PW1 testified that repairs were ongoing in the premises as there was a leakage on the roof and this creates a possibility that there was an opportunity for someone else other than the appellant to access the shop.



29. The investigation officer, PW6 testified that they did not dust the ceiling board for fingerprints to establish that it was the appellant who accessed it. Further, the testimonies of PW1 to 3 was that, the CCTV showed the appellant enter the toilet at about 8.45pm and come out at 9.41hrs. PW5 from the DCI, National Lab-Forensic who analyzed the CCTV footage, placed the events between 18.31hrs and 20.45hrs.
30. The record shows that, the CCTV was played in court. The record does not show the observation of the court when the appellant allegedly was seen entering the toilet and what time he came out. It is silent on that as was PW5 who analyzed it. All the prosecution was concerned was to place the appellant within the scene.
31. In the view of this court, the circumstantial evidence was not so strong as to only point to the guilt of the appellant. There still remains doubts as to whether, in the face of the defence that was mounted and that was unshaken, the appellant is the one who committed the alleged offence. That ground succeeds.
32. The second ground was that the trial court failed to give reasons for rejecting the appellant's defence. The defence presented by the appellant remained unshaken even under cross-examination. It painted a clear case of the appellant's rebuttal of the prosecution case. The trial court clearly did not give reasons why it held the appellant's defence to be an afterthought.
33. There was nothing to suggest that the appellant did not have a running stomach on the material day to have gone to the toilet. There was nothing to show that his witnesses lied or that there was no probability of having been with the appellant as they testified. In my view, a trial court must give reasons for rejecting any defence proffered by an accused person. It must give reasons why it has to prefer the evidence given against an accused as opposed to the rebuttal an accused makes.
34. When the totality of the evidence is considered, it is my view that the prosecution failed to prove its case against the appellant beyond any reasonable doubt. The doubt raised above should have been resolved in favour of the appellant.
35. In the premises, the appeal is hereby allowed, the conviction quashed and the sentence set aside. If any fine was paid, the same be refunded to him, or in the in the alternative he be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY, 2025.

A. MABEYA, FCI ARB

JUDGE

