



REPUBLIC OF KENYA



**Malit v Republic (Criminal Appeal E021 of 2025)
[2025] KEHC 12609 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E021 OF 2025
A MABEYA, J
SEPTEMBER 17, 2025**

BETWEEN

DICKSON OKANGE MALIT APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment, conviction & sentence of Hon. J. Wekesa SPM delivered on the 11/1/2025 in Nyando SPMC in Criminal Case No. E405 of 2021, R. vs Dickson Okange Malit, Samuel Obiero Omino, Cynthia Akinyi Okeno & Mary Monica Awino Owala)

JUDGMENT

1. The appellant and others not before Court were charged with the offence of conspiracy to commit a felony contrary to section 393 of the Penal Code. The particulars of the charge were that, on diverse dates between 25/7/2020 and 3/5/2021 in Kadibo division of Nyando sub-county within Kisumu county they jointly conspired to commit a felony namely stealing, and did steal, three hundred and forty-one (341) bales of mosquito nets valued at Kenya Shillings Seventeen Million and Fifty Thousand (17,050,000/-), the property of Kenya Government.
2. The appellant also faced an alternative charge of stealing by a person employed in the Public Service contrary to section 280 of the Penal Code. The appellant pleaded not guilty and a full trial ensued. The prosecution called twelve (12) witnesses while the accused gave sworn testimony.
3. In its judgment dated 11/2/2025, the trial court found the appellant guilty of the main and alternative charge, convicted and sentenced him to pay a fine of Kshs. 300,000/- and in default serve 4 years in jail on the main charge and to pay a fine of Kshs. 200,000/- and in default serve 3 years in jail in the alternative charge.
4. Dissatisfied with that decision, the appellant filed his petition of appeal dated 24/2/2025 raising six (6) grounds which can be summarized as follows;



- a. That the trial court erred in law and in fact in failing to find that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the appellant.
 - b. That the trial court erred in law and in fact in placing reliance on the incredible evidence of the prosecution and in failing to accord due weight to the evidence of the appellant.
 - c. That the trial court erred in meting out sentence that was grave and excessive in the circumstances.
 - d. That the trial court erred in failing to consider the appellant's mitigation.
5. The appeal was canvassed by way of submissions. The appellant submitted that none of the 12 prosecution witnesses adduced any evidence that there was a meeting of minds amongst the four accused with the sole motive of stealing the said mosquito nets thus failed to prove conspiracy as required under the main charge.
 6. That although he was an employee of Kisumu County, there was no evidence that was adduced to show that the said mosquito nets were supplied by KEMSA to Rabuor sub-county hospital where he worked.
 7. For the state, it was submitted that it proved its case against the appellant beyond reasonable doubt. That there was prove of an agreement between the co-accused through the evidence of PW1 -12. That the appellant organised a technical absence to go and do exams without handing over his duties and key to the store.
 8. That the appellant appeared on the date of distribution and met two of his co-accused and further refused to sign a crucial procuring document, S11 acknowledging the receipt of 356 bales of mosquito nets. That after meeting, the appellant and his co-accused proceeded to open the stores where the mosquito nets were and failed to report any shortages in the nets.
 9. On count 2, it was submitted that being in charge of the station at Rabuor, the appellant was required to account for the same which he did not and that he did not challenge the fact that 160 bales of mosquito nets were stolen.
 10. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence afresh, analyze the same and reach its own independent conclusion and findings but at all times bearing in mind that it did not see the witnesses testify. (See *Okeno v Republic* [1972] EA 32).
 11. Pw1, Judy Akoth Lucy, a Public Health Officer (PHO) working in Kisumu County, Nyando sub county testified that on 6/4/2021, they had a malaria stake holder meeting at Spice Afrique Alendu with the intention of undertaking a mass net distribution. That during the meeting, she was selected in an acting position and she selected ward coordinators to assist her in the distribution exercise.
 12. That the distribution was set for the 5th to 9th May 2021 when the ward coordinators would be in charge of redistribution from the holding centres to redistribution posts. That she was informed of deficits of nets on the 4/5/2021 by one Kevin Abiola Sedha which she tried to remedy by assigning him 30 bales of nets.
 13. That she learnt of rumours of stolen nets at Nyando and later established that a total of 341 bales were missing. She testified that the appellant was away on study leave during the time of distribution of nets and that one Triza Otieno was in charge of Rabuor during this time.



14. Pw2, Paul Masanga, testified that on 13/7/2020, while he was the acting sub-county MOH Nyando, they received nets from the Ministry of Health supported by the local malaria programme. That the nets were assigned to four sub-county holding posts including Nyangande, Rabuor, Awasi and Bunde.
15. That due to the Covid pandemic, the distribution programme was postponed to May 2021. That on 5/5/2021, he received information that some posts had not received adequate nets and that some nets had disappeared. That Rabuor had a total of 356 bales stored but 160 could not be accounted for. That during the time of distribution of the nets, the appellant had been on study leave.
16. In cross-examination, he testified that during the distribution exercise one Triza was in charge of the facility.
17. Pw3, Liliana Dayo, a PHO and County Malaria Coordinator testified that on 5/5/2021 at around 17.45hrs while in the office, she received information that people in Rabuor had not received nets and that nets had been stolen. That she called the appellant to confirm if the rumours were true but he informed her that he was not aware of the same as he was sitting for his exams in Nairobi.
18. That she undertook a meeting involving other officials including one, Madam Teresa who was in charge of the appellant's facility as she was to take over and established that 160 bales of nets were missing.
19. In cross-examination, she told the court that, despite being away on study leave, the appellant was in charge of Rabuor as at 5/5/2021 as there was no handing over. She testified that she was not aware that Triza was in charge when the appellant was away.
20. Pw4, Teresa Anyango Oyuga, a clinical officer testified that in January 2021, she was at Rabuor sub county hospital when her in charge, the appellant herein, was to go for further studies and approached her to hold act in his stead.
21. That from January 2021, she proceeded to undertake the appellant's role in an acting capacity as there had been no official handover. That on the 3/5/2021, when the mass distribution of nets was to commence, the appellant came to the hospital and they met together with the hospital accountant.
22. That later one, Cynthia Akinyi, a fellow PHO came in and requested to talk to the appellant and the two moved outside and spoke for some time then came back to the office. That the appellant then asked the accountant for the nets store key where they proceeded and where she left the appellant and Cynthia as the appellant had not handed over anything to her.
23. That the appellant returned and informed her that some nets were missing which left her surprised as the appellant was the only one with the key to the store. That another individual, Omino, the PHO Ahero came and called the appellant outside and later when she asked whether they could escalate the issue of missing nets, Omino told her not to.
24. That she did not know the quantity of nets in the store as the appellant never handed the same to her but that she was informed that around 150 nets had been stolen.
25. In cross-examination, she told the court that she never saw any consignment of nets leaving the facility and that the appellant was in charge when the nets were received at the hospital.
26. Pw5, Kevin Abiola Seda, the PHO at Ahero sub county hospital testified that they were to distribute nets in Nyando on the 3/5/2021 and so he proceeded to Rabuor where the nets were. That he met the appellant and one Omino at Rabuor. That the appellant opened the store and they counted the nets but when he asked the appellant to sign the S11 procurement form, the appellant declined as some



- nets were missing. On the following day, he returned to Rabuor and called one Triza to access the store. That Triza directed the facility Accountant to open the stores which he did and they proceeded to distribute the nets.
27. In cross-examination, he stated that Triza was in charge of the facility at the time of distribution.
 28. Pw6, David Ouma Ojunga, a clinical officer at Kisumu County & Referral Hospital testified that on 25/7/2020, KEMSA delivered mosquito nets for storage with 228 designated for Nyangande and 175 for Rabuor. That on 3/5/2021, he handed over the nets to Cynthia Akinyi & Samuel Owino, two PHO's and that he later learnt that there were bales of the same missing.
 29. Pw7, Nicholas Omondi Onako, a PHO in Nyando sub county hospital testified that on the 3/5/2021, he arrived for work at Rabuor sub county hospital at 8am where he saw two lorries one of which had nets being offloaded. That he later realized that some areas had received less nets.
 30. Pw8, Benard Onyango Ondito testified that he used to work at Rabuor sub county hospital as a security officer but he left in July 2021. On the 27/5/2020, one Omimo brought some nets to the hospital store, locked it then left with the store key. That he later learnt from one of the staff members that nets had been stolen. That he did not know what happened to the nets as the padlock to the store had not been interfered with.
 31. Pw9, George Ouma testified that he used to be the facility accountant at Rabuor sub county hospital. That on the 18/4/2021, he got keys from the appellant's wife which he kept in the appellant's office. That later on, a person from the County came asking for the key to the nets' store which he said he did not have but the individual informed him that the keys from the appellant was the key required. That this was reiterated by Triza who was the incoming in charge. That Triza and the County representatives used the key to open the store.
 32. In cross-examination, he stated that he surrendered the keys to the nets' store to Triza and a PHO. That at the time the appellant was away on study.
 33. Pw10, Samuel Lucy Aluoch, a security officer at Rabuor hospital testified that on the 25/7/2021, he went to the hospital in the evening and his colleagues informed him that nets had been brought to the hospital. That on the date when the nets were to be supplied, he saw Cynthia and Omimo taking them out. That he later learnt that some nets were lost. In cross-examination, he stated that the appellant was in charge at the time.
 34. Pw11, Joshua Otieno Olango, a security guard at Nyangande sub county hospital testified that on 4/5/2021 at 10.30am, a lorry came to the hospital near the nets' store and inside were Samwel Omimo and Cynthia who asked for the in charge. In cross-examination, he stated that the two came to collect the nets and further that he did not hear anything about lost nets.
 35. Pw12, No. 93497 Francis Manyoge of DCI Nyando, the investigating officer testified that on 6/5/2021, he was in the office with his colleague Corporal Alice Bere when he received a case of missing nets reported at Rabuor Police Station. They took over the matter and commenced investigations.
 36. They established that on 25/9/2020, KEMSA supplied 356 nets at Rabuor at which time the appellant was the in charge of the hospital and which the appellant received. That in May 2021 at Rabuor, 160 bales of nets went missing and in the course of the investigations, they established that the appellant had proceeded on study leave in January 2021 but had not handed over at the facility. That upon questioning, the appellant did not give satisfactory answer on the whereabouts of the nets.
 37. When placed on his defence, the appellant denied committing the offence charged and testified that, he had worked for the County Government of Kisumu as a Clinical Officer Health Records since 2015.



- That between 25/7/2020 and 3/5/2021 he was at Rabuor sub county hospital which he left in January 2021 to further his studies. That he was in school at Thika from 3/1/2021 to May 2021.
38. That he left Triza Atieno in charge of the hospital as he proceeded for his studies and that prior to his arrest, he did not know his co-accused. That he did not take part in the distribution of the nets.
39. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him accordingly.
40. The first count in which the appellant was charged, convicted and sentenced with was the offence of conspiracy to commit a felony contrary to section 393 of the penal code. The section provides that: -
- “ Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to the lesser punishment”
41. To establish a charge of conspiracy, the prosecution needs to lead evidence demonstrating that an accused with others, by his actions committed the offence with which he is charged. There must be a meeting of mind between an accused his other conspirators. (See Republic v Anne Atieno Abdul & others [2017] eKLR.)
42. There must also be a common intention by two or more persons to commit an offence as set out in section 21 of the Penal Code which provides that: -
- “ Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in prosecution of such purpose an offence is committed of such a nature that its commission was probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”
43. The standard of proof in criminal cases is proof beyond reasonable doubt and not on a balance of probabilities. This was the holding by Lord Denning in Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373 as follows:
- “ 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 is a doubt but nothing short of that will suffice.”
44. It is not in dispute that the appellant was the in charge at Rabuor sub county hospital between 25/7/2020 and 3/5/2021. That on 25/9/2020, KEMSA supplied nets to the said hospital. That by the time their distribution commenced on the 3/5/2021, the appellant had been on study leave since January 2021.
45. The state presented evidence, fronted by Pw4, that on the 3/5/2021 when the distribution of nets was to commence, despite being on study leave, the appellant came to the hospital and he saw her conversing with his co-accused before the trial court before they all proceeded to the nets store. That after opening the store the appellant came and informed her that there were some nets missing.



46. It is this evidence together with that of Pw5, who testified that the appellant refused to sign the S11 procurement forms on account of noticing missing nets, that the state majorly anchored its case on. The Investigating Officer testified that, he chose to arrest the appellant because upon questioning him, the appellant failed to give satisfactory answers on the whereabouts of the nets
47. Pitted against this testimony was the appellant's defence in which he denied committing the offences charged with. That he left Triza Atieno in charge of the hospital as he proceeded for his studies and that he did not take part in the distribution of the nets. This evidence remained unchallenged in cross-examination.
48. In submissions made to this Court, the state argued that the study leave by the appellant was a ruse to cover up for the stolen nets; that the fact that the accused met his co-accused at the hospital and spoke to them as testified by Pw4 was evidence of a conspiracy and that the appellant being the in charge of the hospital had to account for the missing nets.
49. I have considered the evidence afresh. The prosecution was expected to lead evidence demonstrating that the appellant together with his co-accused, by their actions or conduct, committed the offence with which they were charged. That there was a meeting of mind between the appellant and his co-accused.
50. The mere fact that the appellant and his co-accused were seen by Pw4, on the 3/5/2021, conversing outside the office cannot per se impute conspiracy. This only amounts to mere suspicion. It should not be lost that that mere suspicion is not enough to attach criminal liability.
51. It is worth to note that at the time Pw4 sought to attest that the appellant and his co-accused met, the key to the stores had earlier on, on the 18/4/2021, been surrendered to the facility accountant as is evident from the testimony of Pw9.
52. Pw10, a security guard at Rabuor hospital testified that he never saw nets leaving the compound during his tenure which spanned the entire period from when the nets were delivered to the premises by KEMSA to when distribution of the same commenced. In any event, there was no direct evidence by way of documentation to show that the landed nets in 2020 were 356 bales. It is curious that the documents of delivery and receipt of the alleged 356 bales of nets was never produced in evidence. The question is, could government stores be delivered and received without sufficient documentation? I doubt.
53. It is my view that the prosecution failed to prove beyond reasonable doubt that the alleged 356 bales of nets were delivered to the premises that the appellant was in exclusive control, that the appellant and his co-accused conspired to commit the offence that they were charged with.
54. The evidence on record does not support the conviction and sentencing of the appellant and I proceed to quash the appellant's conviction and sentence on this charge.
55. In Count 2, the appellant was charged with the offence of stealing by a person employed in the Public Service contrary to section 280 of the Penal Code.
56. The said offence provides that: -

“If the offender is a person employed in the public service and the thing stolen is the property of the Government, or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for seven years.”



57. From the record, it is clear that the state's case against the appellant under this charge was that he was the in charge of Rabuor hospital when the mosquito nets were delivered on the 25/7/2020. That he held that position until the 3/5/2021. That as such, he had to explain how 160 bales out of the 356 bales of mosquito nets delivered went missing.
58. It is well settled that the legal burden of proof in criminal matters never leaves the prosecution's backyard. In *H.L. (E) Woolmington v DPP* 1935 AC 462 PP 481, it was held: -
- “Throughout the web of the English criminal law one golden thread is always to be seen, that is, the duty of the prosecution to prove the prisoner's guilt... no matter where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. The trial magistrate erred in shifting the burden of proof on the appellant.”
59. None of the evidence presented by the prosecution pointed to the appellant as the one who stole the alleged bales of mosquito nets and at what time he carried out the theft. The mere fact that the appellant was in charge of the hospital was not enough evidence to prove that he stole the aforementioned nets.
60. The evidence adduced shows that the appellant discovered that the nets were stolen on the 3/5/2021 when he opened the store to enable those in charge of the distribution of the nets to gain access. The security guard manning the hospital gate, who was presented as a prosecution witness, similarly never saw any nets leave the compound at any time.
61. From the foregoing, it is my view that there were several doubts about the prosecution's case. The benefit of those doubts should have been decided in favour of the appellant.
62. I thus find that the prosecution similarly failed to prove its case against the appellant under this charge beyond reasonable doubt and I proceed to quash his conviction and sentence on the same.
63. In conclusion, it is my view that the conviction of the appellant was not based on sound evidence.
64. With the foregoing conclusion and finding, there arises no need to consider the other grounds of appeal.
65. In the premises, the conviction of the appellant is hereby quashed, the sentence set aside, and the appellant be forthwith set at liberty unless otherwise lawfully held if incarcerated or fine be refunded if paid.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF SEPTEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE

