



REPUBLIC OF KENYA



KENYA LAW
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**Elijah & 2 others v Republic (Criminal Appeal 90 of 2023)
[2024] KEHC 3547 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 90 OF 2023
DR KAVEDZA, J
APRIL 15, 2024**

BETWEEN

FANUEL MURUNDO ELIJAH 1ST APPELLANT

PATRICK MURIUKI KARUGA 2ND APPELLANT

DENISON NDUNG’U MWAURA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. E. Riany (SRM) on 26th April 2023 at Kibera Chief Magistrate’s Court
Criminal Case no. E1240 of 2021 Republic vs Fanuel Murundo Elijah & 2 others)*

JUDGMENT

1. This case revolves around an alleged instance of theft perpetrated by an employee entrusted as a caretaker in the absence of the employer. Acting in collaboration with others, the perpetrators purportedly orchestrated the theft of valuable goods amounting to millions of shillings. The evidence unveiled during court proceedings indicates a meticulously planned and executed operation involving several individuals linked to the complainant’s premises.
2. The appellants were charged and convicted on two counts of offences. In count I, they were each charged with the offence of conspiracy to commit a felony contrary to Section 393 of the [Penal Code](#). In count II, they were charged with the offence of stealing contrary to Section 275 of the [Penal Code](#). The 2nd appellant faced an alternative count of handling stolen property contrary to section 322(1)(2) of the [Penal Code](#). In count I, they were each sentenced to pay a fine of Kshs. 2,000,000 in default to serve 4 years imprisonment. In count II, they were sentenced to pay a fine of Kshs. 1,000,000 in default to serve 2 years imprisonment.



3. Being dissatisfied, the appellants filed an appeal dated 19th June 2023, challenging their conviction and sentence. In their appeal, they raised eight (8) grounds which have been coalized as follows: They challenged the totality of the prosecution's evidence against which they were convicted. They argued that the trial court failed to consider their defence. They maintained that the trial court imposed illegal sentences contrary to section 28(2) of the *Penal Code*. In addition, the sentences imposed were harsh and excessive. They urged the court to quash the conviction and set aside the sentences imposed.
4. As this is the appellants' first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose v Republic* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence.
5. The prosecution called five (5) witnesses in support of their case. Jackson Kadara Angaruti, (PW1), told the court that he observed several instances of items being removed from Headquarters Inn between March 2021 and April 2022. He recounted incidents involving the removal of seats and gym equipment, facilitated by the caretaker, Jose whom he identified as the 1st appellant. A yellow pickup with KAX registration and a small black car came where the goods were loaded. PW1's testimony suggested a pattern of suspicious activity, including the loading of items onto vehicles and the involvement of individuals associated with the complainant. Despite his attempts to clarify the situation and contact the 1st appellant, discrepancies remained regarding the whereabouts of the missing items.
6. Sylvia Wanjiru Meri, a businesswoman, testified about the events surrounding the incident. She told the court that she operated a business at Headquarters Inn, including a gym and accommodation, which she had temporarily closed due to COVID-19. During the closure, she only retained the caretaker Jose (the 1st appellant). Despite requests, On March 8, 2021, the 1st appellant abruptly left due to his mother's death, leaving her the keys to the premises.
7. The following week, the complainant went to the premises and discovered numerous items missing from the gym. Her neighbours reported seeing items being loaded onto vehicles at the premises. The caretaker claimed the security guard arranged the removal of the items promising a return the following week before becoming unresponsive. CCTV footage was tampered with, and missing items were later found at a bar owned by the 2nd appellant. Payments to Jose were registered under the name Fanuel Murundo the 1st appellant confirming it was his real name. Despite assurances from the caretaker, no forced entry was observed at the premises, indicating collusion in the theft.
8. Jobson Shikali, (PW3) engaged in the transport business, testified that he owns an Isuzu truck with registration number KCD 142X. He was contracted by his friend the 3rd appellant to transport property from Langata to his residence in Githogoro in January and February 2021. The cargo included beddings, table chairs, a treadmill, and other gym equipment. PW3 made two trips, one on January 21, 2021, and another on February 20, 2021. Upon arrival at the pickup location, he was made to wait for the 1st appellant, who was in charge. The property were loaded onto his truck, which he then transported. He was paid Kshs 4,000 for the first trip and Kshs 6,000 for the second trip. The stolen items, valued at Kshs 18,240,000, included various gym equipment, furniture, kitchenware, electronic appliances, and construction materials. This extensive list detailed the substantial loss incurred due to the theft.



9. Shadrack Lugalia,(PW4) a mason, testified about his work at the complainant's site in February 2021. He recounted how he would collect keys from the guard to access the construction site where they were building stalls. On his first visit, he found the 1st appellant and the guard removing televisions from the building, with four already taken out. There was a covered canter-lorry with registration number KCD 142X, into which items were being loaded, including around 20 drinking glasses. When he finished work around 5:00 PM, the lorry was no longer there. The following day at 7:00 AM, he saw the same group of people carrying beds, with one person calling out to the 3rd appellant to hurry up. About six brownish beds with mattresses were being loaded. Upon inquiring if they were relocating, he was informed that there were ongoing renovations.
10. PC Jacob Kapelpus (PW5) and his team investigated stolen goods, finding a lorry linked to Mwaura Ndungu's residence and a pickup associated with Patrick Muriuki's bar. Stolen items were identified at Muriuki's bar, leading to his arrest. M-Pesa transactions connected Ndungu to the lorry's owner, Jobson Shikalu. The lorry, registered under Lucy Wanja Nganga, was confirmed by its driver to have been hired by Ndungu. Further investigations revealed multiple transactions between Ndungu and the lorry owner. These findings facilitated the arrest of the 1st appellant.
11. After the close of the prosecution's case, the appellants were found to have a case to answer and were put on their defence. The 1st appellant gave sworn evidence and testified that Fanuel Elijah Murundo testified that he worked for the complainant in 2019, serving as a foreman for about a month. He recounted an incident where the complainant was arrested at the parking lot, making her unreachable by phone, which led to his inability to pay the workers. Eventually, in August 2019, the complainant settled the workers' dues. Later, in December 2019, he resumed work for her. However, in 2020, due to COVID-19, work ceased, except for guards and permanent employees. In August 2020, he was tasked with renovation work in Zimmerman, followed by demolition work in Runda in November 2020. The complainant, whom he knew as Jose. In February 2021, when the complainant informed him that items had been stolen, he advised her to file a report. However, he was subsequently arrested. He maintained his innocence.
12. Patrick Muriuki Karuga, the 2nd appellant stated that he manages a hardware store and also handles accounts part-time. On June 13, 2021, he received a call from Njeri, a barmaid at Reke Mari Bar, informing him of a situation at the bar where he used to manage accounts. Upon arrival, he encountered a woman and approximately five men gathered around a table. They inquired if he was the bar owner, to which he clarified that he only handled stock. Subsequently, he was arrested and taken to a carwash where a pickup truck was being cleaned. Later, he was taken to the DCI office, where he observed a pickup truck unloading seats. He asserted that the bar was not his but belonged to the late John Nganga Gitau.
13. Lucy Wanja Nganga (DW1) told the court that the 2nd appellant worked for him and her late husband John Njoroje Gitau. His role was to do stock-taking. She told the court that she never knew the origin of the items recovered.
14. Francis Njoroje(DW2) witnessed the 2nd appellant's arrest. He maintained that he used to see the 2nd appellant at the bar doing accounts.
15. The 3rd appellant, Denison Ndungu Mwaura, stated that he became acquainted with the 1st appellant in 2020. He visited Runda around noon and encountered police officers and a crowd. The 1st appellant, Fanuel, asked him to find individuals to demolish a wall, for which he was compensated before leaving. A month later, Fanuel requested him to sell materials from the site, such as iron sheets and cement, which he did gradually, sending the proceeds to Fanuel. They did not meet again



afterward. Subsequently, he was contacted by individuals posing as customers and then arrested. He clarified that he had never visited Langata.

16. The appellants were charged with the offence of Conspiracy to commit a felony contrary to section 393 of the Penal Code Cap 63 Laws of Kenya. The said section provides as follows;

“ 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 that lesser punishment.”

17. The appellants were also charged with stealing contrary to section 268(1) of the Penal Code which provides that:

268. (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.

18. Section 275 of the Penal Code prescribes the punishment for the offence of stealing if the charge is proved beyond reasonable doubt. It provides as follows:

275. 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.

19. 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.”

20. It is not in dispute that the 1st appellant was an employee of the complainant where she operated a gym and accommodation business. During the period of employment, the complainant's businesses were robbed and valuable commodities were stolen. The stolen items were transported on the behest of the 3rd appellant and the stolen items were found at the 2nd appellant's premises.

21. The fact that property stolen from the complainant's premises was stolen is not in doubt. The question that remains to be answered is whether the appellants conspired to steal the complainant's property.

22. The evidence presented in court paints a clear picture of systematic theft orchestrated by the caretaker, the 1st appellant, in collusion with others. Witness testimonies, including those of (PW1) detailed instances of suspicious activity at Headquarters Inn, with items being removed and loaded onto vehicles, specifically KAX pickup suggesting a coordinated effort. The testimony from Jobson Shikali (PW3) reveals the involvement of the 3rd appellant, who hired transport services to move stolen goods, indicating premeditation and organization in the theft scheme. The extensive list of stolen items, valued



- at a significant amount, underscores the scale of the operation and the substantial loss incurred by the complainant.
23. Shadrack Lugalia's (PW4) testimony provides further evidence of the caretaker's involvement, as he witnessed the removal of items from the building site by the 1st appellant and others. Additionally, PC Jacob Kapelpus (PW5) and his team's investigation uncovered links between the stolen goods, individuals, and locations, leading to arrests and further strengthening the prosecution's case.
 24. Although the 2nd appellant denied being involved, stolen goods were found in the bar where he managed/worked. His witness gave evidence that Lucy Wanja told the court that the premises where some of the stolen goods were recovered were owned by her late husband. However, the yellow pickup registration No. KAX 827P was used to transport the stolen goods that belonged to her. During the trial, she filed an application for the release of the motor vehicle which had been impounded during investigations claiming to be her sole source of income. At the time, the vehicle was operated by the 2nd appellant. The only logical conclusion, made was that the defence evidence given by the 2nd appellant was not credible. This is in addition to the fact that 2nd appellant's witness claimed to not know how the goods got to her premises.
 25. In summary, the evidence presented in court points towards a well-planned and executed theft operation involving multiple parties associated with the complainant's premises. Witness testimonies, CCTV footage, transaction records, and investigative findings collectively establish a compelling case against the appellants. Their conviction for the offences charged is affirmed.
 26. On sentence, the appellants were each sentenced to pay a fine of Kshs. 2,000,000 in default to serve 4 years imprisonment in count I. In count II, they were sentenced to pay a fine of Kshs. 1,000,000 in default to serve 2 years imprisonment each.
 27. Under Section 275 of the *Penal Code*, any person convicted for the offence of stealing is liable to imprisonment for 3 years. On the other hand, a conviction for the offence of conspiracy to commit a felony attracts a sentence of not more than 7 years. In the present case though, the trial court opted to impose fines. In that case, the learned trial magistrate ought to have imposed the default sentences pursuant to Section 28(2) of the Penal Code. Under the provision, where the fine imposed exceeds Kshs. 50,000/= the default sentence must not exceed 12 months imprisonment. It follows then that the sentences imposed were illegal which represents an irregularity on the sentences.
 28. In the end, the sentence of a fine of Kshs. 2,000,000 in default to serve 4 years imprisonment in count I is substituted with a fine of Kshs. 2,000,000 in default to serve 12 months imprisonment. In count II, the sentence of payment of a fine of Kshs. 1,000,000 in default to serve 2 years imprisonment is substituted with a sentence of payment of a fine of Kshs.1,000,000 in default to serve 12 months imprisonment. The default sentences shall run consecutively from the date of the appellants' conviction.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15TH DAY OF APRIL 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Soita appearing alongside Kangahi for the Appellants

Mr. Mutuma for the Respondent



