



Wanyaga & 2 others v Republic (Criminal Appeal E030 & E031 of 2022 & E077 of 2023 (Consolidated)) [2024] KEHC 3274 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E030 & E031 OF 2022 & E077 OF 2023 (CONSOLIDATED)**

AK NDUNG'U, J

APRIL 9, 2024

BETWEEN

JULIUS WANYAGA 1ST APPELLANT

ERIC WAINAINA 2ND APPELLANT

NICHOLAS GITUKU GITAHI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence in Nanyuki
CM Criminal Case No 1379 of 2019– V.M Masivo, RM)*

JUDGMENT

1. The Appellants in this appeal, Julius Wanyaga (1st accused during trial), Eric Wainaina (3rd Accused) and Nicholas Gituku Gitahi (4th Accused) were convicted of house breaking and stealing contrary to Section 304 1(a) as read with Section 275 of the Penal Code. The 1st Appellant also faced an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code. On 28/03/2022, they were sentenced to four (4) years imprisonment on the first limb of house breaking and two (2) years on the second limb of stealing. The sentences were ordered to run concurrently. The second Accused was acquitted.
2. The particulars of the offence were that on 21/10/2019 at around 16hrs in Anka Resort in Kieni East, Nyeri County broke and entered cottages and did steal from therein 3 television make hisense and one television make Bruhm, one bed cover and two bed sheets all valued at Kshs.102,000/- the property of Stephen Kamanda.



3. The Appellants have appealed against both conviction and the sentence. They filed separate petition of appeal raising different grounds of appeal. For the 1st Appellant, the Appellant's counsel filed a petition of appeal dated 08/04/2022 challenging the conviction on the following grounds;
 - i. The learned magistrate erred convicting the Appellant when the offence was not proved beyond reasonable doubt.
 - ii. The learned magistrate convicted the Appellant on a defective charge.
 - iii. The learned magistrate misapprehended and misapplied the doctrine of recent possession to his detriment.
 - iv. The learned magistrate erred by relying on evidence of a co-accused which was hearsay and inadmissible.
 - v. The prosecution evidence was inconsistent, contradictory and did not support the charge.
 - vi. The learned magistrate erred in misapprehending and misapplying circumstantial evidence to his detriment.
 - vii. The learned magistrate failed to analyse the defence evidence thus arriving at a wrong finding.
 - viii. The sentence was illegal and excessive in the circumstances.
4. The 2nd Appellant filed a petition of appeal on 11/04/2022 challenging the conviction and the sentence on the following grounds;
 - i. The learned magistrate erred by failing to note that the prosecution's evidence was uncorroborative, full of inconsistencies and material contradictions.
 - ii. The learned magistrate erred by failing to note that the case was not proved beyond reasonable doubt.
 - iii. The learned magistrate failed to note that there was no independent witness who testified that he was found breaking a house.
 - iv. The learned magistrate failed to note that the prosecution's evidence was untrue.
 - v. The learned magistrate failed to note that there was no photographic evidence that was produced to prove that he was found breaking a house.
 - vi. The learned magistrate failed to note that dusting was not done on the broken house or stolen items to prove that he was in contact with them.
 - vii. The learned magistrate erred rejecting his defence without cogent reason.
 - viii. The learned magistrate failed to consider that he was a first offender.
5. The 3rd Appellant filed a petition of appeal on 02/10/2023 and is also challenging the conviction and sentence on the following grounds;
 - i. The learned magistrate erred by failing to note that the case was not proved beyond reasonable doubt.
 - ii. The learned magistrate erred by convicting the Appellant on a case that was founded on a mere suspicion.



- iii. The learned magistrate erred convicting him without appreciating that he did not sign any inventory as required in law.
 - iv. The learned magistrate failed to appreciate that photographic evidence on breaking was not produced thus contravening section 78 of *Evidence Act*.
 - v. The learned magistrate erred by failing to produce the informer as a witness.
 - vi. The learned magistrate rejected his defence without giving reasons for rejection.
6. The appeals were canvassed by way of written submissions. The 1st Appellant's counsel submitted that there was no direct evidence linking the 1st Appellant with theft as none of the Accused led the police to the arrest of the 1st Appellant. That the evidence of PW2 contradicted itself. Further, there was contradiction on ownership of the stolen property as the witnesses testified that the stolen properties belonged to PW1 whereas the evidence on record revealed that the properties were owned by Anka (K) Ltd. That the charge sheet stated that the properties belonged to PW1 whereas PW1 testified that they belonged to Anka Resort where he was the director. Therefore, there were grave contradictions on who owned the stolen properties as under the company laws, a company, Anka Resort and PW1 were distinct persons and there was no evidence that they jointly owned the goods. Reliance was placed on the case of *David Ojeabuo vs Federal Republic of Nigeria* and *Twehengane Alfred vs Uganda* to emphasis on the effect of contradictions.
 7. That PW2 testified that the goods were recovered from the 1st Appellant's house but no inventory was produced to that effect. Further, the 1st Appellant denied ownership of the house where the alleged recoveries were made as he told the police that the house belonged to Maina and the prosecution failed to call any other evidence to confirm that the house indeed belonged to the 1st Appellant. That this was brought up during cross examination of the prosecution's witnesses and at defence stage. No other police officer was called to corroborate the evidence of PW2 which was contradictory as who led to the arrest of the 1st Appellant.
 8. On defective charge, it is submitted that the Appellant was charged under section 304(1) as read with section 275 of the Penal Code instead of section 304(1) as read with section 279(b) of the Penal Code which the trial court found that there was duplicity but however held that there was no failure of justice since 1st and 2nd Accused were represented by counsels. That the court failed to note that 3rd and 4th Accused were not represented and that 1st and 2nd Accused took plea before their counsel came on record and was discharged before defence case. Therefore, there was miscarriage of justice and violation of right to fair trial.
 9. On misapprehension of doctrine of recent possession, he submitted that the trial court misapprehended the evidence when it held that the property was found with the suspect when there was no evidence tendered on ownership. There was no proof that the property belonged to PW1 who himself told the court that they belonged to Anka Resort Ltd and it was not proved that it was stolen from him. Finally, the Appellant gave a plausible defence as he told the court that the stolen goods were found in Maina's house.

2nd Appellant submissions

10. He submitted that PW1 evidence was contradictory in that he testified that he was informed that the suspects were a rider and a pillion passenger and, on another instance, he said that Lawrence told Fridah that he saw a motorcycle ferrying TV sets wrapped in sheets with three occupants. This raises a question whether the suspects were two or three and how a motor cycle could ferry four tv sets with three people



on board. Further, PW1 contradicted himself when he said that Lawrence was a customer who was at the reception at his hotel on the material day and reported having seen a motor cycle ferrying Tv sets whereas in another instance he stated that Lawrence saw the motor cycle transporting the Tv sets from the shopping centre and not from the reception of his hotel.

11. That there was no evidence adduced before court to prove that a break in ever occurred as no photographs were availed as evidence despite the fact that PW1 alluded to have witnessed photographs being taken at the scene. Therefore, with no photographs to prove such break ins and with no witness from the hotel, housebreaking was not proved by concrete evidence and remained as a mere allegation and hearsay. PW2 testified that the premises was guarded but did not record statements of the security officers. There was no inventory that was produced. That PW2 stated that he was unable to bond and avail two witnesses from the hotel who had written statements and who were material witnesses and did not present evidence of broken doors.
12. That according to PW2's evidence, it was clear that that the 2nd Appellant did not know his customer's house but gave out the location, he did not have the customer's contacts and if he knew the house, he would have taken the police there instead of them searching the entire neighbourhood. Further, the prosecution was not able to infer a common intention between him and the perpetrators as there was no evidence that he jointly committed the offence with them. He was not seen at the scene of crime or connected with the place where the items were recovered and if he was in cahoots with his pillion passenger, he would have known the exact house where the items were hidden. That the hotel had CCTV which would have shown the real culprits but none came up. There was no evidence that he knew that he was transporting stolen goods as he was doing his normal duties of ferrying customers. Further, PW2 corroborated his defence as he did not take PW2 to the house where the goods were recovered.

3rd Appellant submissions

13. The 3rd Appellant submitted that according to PW1 evidence, the CCTV footage showed nothing, there were no photos of broken doors, windows, etc. That the evidence of evidence of PW1 to the effect that he was told by Lawrence that he (Lawrence) saw a motor cycle with three occupants carrying TV sets wrapped in sheets sounds like an impossible fact. Furthermore, the informer only saw them at Burguret shopping centre but did not see them at the hotel. On re-examination he did not recognise the Appellant as one of his casual workers.

PW2 was of the opinion that the breaking in was an inside job involving workers although he arrested none. That he contradicted PW1 by stating that the informer said the motorcycle was carrying two pillion passengers. It is urged that from the proceedings, it could be deduced that the informer did not see him ferrying the TVs as the informer identified his motorcycle and not him.

14. As to who was ferrying the TV sets, the proceedings were clear that the motor cycle belonged to him and had hired it out to the 3rd Accused to use it for transporting customers and who led the police to a customer who had hired him. That the inventory was omitted since he had not signed and no photographs were produced to show the broken doors in order to support the charge. That the prosecution witnesses did not place him at the scene of crime or saw him ferrying the TV sets apart from the evidence of an informer which was just hearsay. It was important to avail the informer to clear some issues since the informer had made a mistake in identification for he mistook 3rd Accused with him and failure to call him by the prosecution meant that his evidence would have been adverse to the prosecution's case. Reliance was placed on the case of Juma Ngodhia vs R (1982-1988) KAR 454 and Bukenya & Others vs Uganda 1972 EA 549. That failure to call the evidence of the informer for it to be tested by cross examination prejudiced him for he was dragged to a crime he had not committed



by virtue that he had hired out his motorcycle. Reliance was placed on the case of Kigecha Njuga vs Republic (1965) EA 773.

15. That the 3rd Accused exonerated him by stating that he was the one who was driving the motor cycle ferrying a customer unsuspectingly on the material day. That there was no evidence that connected him to the commission of the crime. The prosecution failed to demonstrate the principle of common intention among the Accused persons and his case was founded on mere suspicion. There was no evidence to connect him to the crime except hearsay evidence from an elusive informer. Further, other key witnesses like hotel workers were not availed to testify.
16. The Respondent's counsel filed separate submissions for each Appellant. For the 1st Appellant, she argued that the prosecution proved their case beyond reasonable doubt as PW1 testified that they received information from an informant that that the Accused were seen in a motorbike carrying TVs wrapped in bedsheets and PW1 told the court that he could not disclose his informant and as such, the informer could not be called as a witness. Reliance was placed on the case of Joseph Otieno Juma v Republic (2011)eKLR. That the Appellant's defence was a mere denial as he did not challenge the evidence before court particularly the inventory which he signed. Further, the properties were recovered in his house. As to contradictions, she submitted that the evidence on record was corroborative, consistent and was reliable enough to secure a conviction. As to the sentence, the same was proper as the court considered the mitigating factors.
17. For the 2nd Appellant, she argued that PW1 testified that the informer informed him that the Appellant was seen together with others in a motorbike carrying televisions wrapped in a bedsheet. That there was no issue of identity as PW1 identified the Appellant as one of his casual labourers. That the Appellant's defence was a mere denial and did not challenge the prosecution's evidence particularly the inventory which he had signed. Further, the evidence on record was corroborative, consistent and reliable enough to secure a conviction and the sentence was lawful in the circumstances of the case.
18. In respect to the 3rd Appellant, the counsel submitted that the prosecution proved its case beyond reasonable doubt in that PW1 and PW2 stated that they were informed by the informant that the 3rd Appellant was seen riding a motorbike carrying the 1st and 2nd Appellants who were carrying televisions wrapped in bedsheets. Their evidence was corroborative and there was no issue as to identity of the Appellants. That the 3rd Appellant was found in possession of the motorbike that had been used to ferry the stolen televisions. The 3rd Appellant led the officers to the 2nd Appellant who in turn led them to the 1st Appellant where the television sets were found. That according to definition of possession under Section 4 of the Penal Code, even though the television set were recovered from the 1st Appellant, the fact that 2nd and 3rd Appellant led the officers to the recovery of the same points to the fact that they knew where the televisions were and therefore had possession of the same. The 1st Appellant was found in actual possession of the televisions approximately 24 hours after the complainant made a report hence, the chain of events calls for application of the doctrine of recent possession.
19. As regards to the number of witnesses to be called, she submitted that the prosecution called the necessary evidence to secure a conviction against the 3rd Appellant in line with Section 143 of the *Evidence Act*. As to contradictions, she submitted that the question would be whether those contradictions go to the root of the charges and the quality of evidence as was held in MTG vs Republic (Criminal Appeal e067 of 2021) (2022) KEHC 189 (KLR). That in the instant case, there was no contradicting evidence as to who was seen transporting the stolen televisions and who was found with televisions. There was also no contradictions that the motorbike that was seen transporting the televisions belonged to the 3rd Appellant and he was found with it upon his arrest. That on his defence, the 3rd Appellant merely denied committing the offence and did not give conflicting version of the



events that would cast doubt on the mind of the court. He confirmed owing the motorbike and that on the material day, he was the one who was riding it and hence, his defence did not cast doubt in the prosecution's case. That the sentence against the 3rd Appellant was appropriate as the court considered both aggravating and mitigating circumstances raised by the 3rd Appellant.

20. Following the settled legal principle set in *Okeno v Republic* [1972] EA 32, the duty of this court being an appellate court is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.
21. In consonance with that calling, I have perused and considered the evidence as recorded before the trial court and subjected it to my own analysis of the facts to enable me reach independent findings based on that evidence. In doing so, I have taken cognizance that I neither saw nor heard the witnesses testify and given due allowance for that fact. In addition, I have considered the submissions on record and case law cited.
22. In a nutshell, the evidence before the trial court was as follows. PW1, Stephen Kamanda testified that he was the proprietor of Anka Resort. On 21/10/2019, he was called by his supervisor Jedidah Wangeci who informed him that there was a breaking in the hotel rooms and four television sets were stolen. Fridah also called him informing him that a motorcycle was seen leaving. The doors were made of wood and the rooms were accessed through breaking the door. That the hotel is fenced using kei apple and there was a guard at the front. There was a back gate where he was told that the boys used to peeped in preparation. He identified the receipts for the television sets and register for the rooms/inventories. He confirmed that room A1 was broken into and the adjoining door to A2 was unlocked and they were able to access A2. Room B1 and B2 were broken into.
23. The inventory of 30/08/2019 showed that room A1 had a hisense tv serial number 3TE32M1703170, Room A2 had a hisense tv serial no. 3TE32FI521160, in B1 a Bruhm tv serial no. IC59E0060 and in B2 a hisense tv serial no. 3TE32FI521160/JCG410320. The inventory of 22/10/2017 showed there were no televisions in the said rooms. That one tv set was worth Kshs.30,000/- whereas a bed sheet was Kshs.3,500/-. He contacted the Nyumba kumi members and one of them told him that a motorcycle was seen carrying tv set wrapped in a sheet. It was a rider and a pillion passenger. He identified their appearances, names and residence. They were three on the motorcycle. He was informed that two boys were caught at Ichunga and the television sets were recovered. He testified that he knew 3rd and 4th Accused who were casual workers during the construction of the hotel. He identified the four television sets.
24. On cross examination by counsel for 1st and 2nd Accused, he testified that he was the owner of Anka resort. That it is owned by a company but he was the director. That the scene of crime was visited but no photographs were produced. Nobody saw the thieves break in and there were no CCTV at the place where the thieves accessed the premises. Mr Lawrence was a customer on the material day who reported to the receptionist having seen motorcycle with three occupants ferrying TV sets wrapped in sheets. That he saw them at the shopping centre and not at the hotel reception.
25. PW2 CID Richard Kipngeno was the investigating officer. He testified that he was instructed to attend a break in case at Anka Resort. He stated that the breaking was rough as there were broken timbers at the door and the doors were forced open using tools. Stealing was confirmed in cottage A1-2 where two hisense televisions were stolen and B2 where one hisense tv and one Bruhm tv were stolen. Bed sheets and blanket were stolen too. The suspects gained access through the fence as they found a hole at kei apple fence behind the hotel. The area was not guarded. Fridah Mumbi who was at the reception informed them that she received customers who had booked the cottages and she instructed a colleague



- to prepare the rooms when they noticed the break in. That it was impossible for the break in to be heard as the cottages were a few meters behind the reception area.
26. An informer informed them that he saw a motor bike carrying two pillion passengers and he identified the motor bike as KMCF 303W. The informer was able to identify Nicholas Gitau as the rider of the motorcycle which he said was been driven at high speed. PC Kioko inquired about Nicholas and he was informed that he was at Starehe bar. He went there and he was shown the 4th Accused, Nicholas and he arrested him. Upon interrogation he denied that he was carrying tv sets but stated that he was carrying passengers including 3rd Accused. He led them to 3rd Accused who led them to 1st Accused rental house where they found the four television sets and other assorted items. An inventory was made. He questioned him as to where he got the television sets and he stated that he was keeping them for his brother, the 2nd accused who had a hardware in Nairobi. 2nd Accused visited him the next day and he was as well arrested.
 27. He confirmed that the serial numbers on the television sets corresponded with the inventory collected at the hotel. He produced the television sets as exhibits and the hotel inventory as Pexhibit4. That they found the motor cycle parked outside 4th Accused house before his arrest. He prepared the investigation diary which he produced as Pexhibit10.
 28. On cross examination by 1st Appellant's counsel, he testified that the properties belonged to PW1 though the name in Pehxxbit4 was Anka Resort limited. That the premises was guarded but he did not record the statement of the security officers on the material day. That he did not know the informer and it was the 4th Accused who led them to other Accused. That his statement did not state that the 3rd Accused led them to 1st Accused. He confirmed that the properties were in the 1st Accused' house. That he did not know the alleged owner Maina as the items were not recovered in Maina's house. He denied arresting Maina and releasing him.
 29. On cross examination by 3rd Accused (2nd Appellant), he testified that he was arrested at his house and his house was not searched as he was cooperative and he promised to lead them to where the items were. That he did not identify the specific house but gave out the location and they conducted a search. That it was not true that he was ferrying customers without knowledge of what he was carrying.
 30. On cross examination by 4th Accused (3rd Appellant), he testified that he led them to 3rd Accused. That the informer informed PW1 who later informed the police.
 31. On re-examination, he testified that the items were recovered from the 1st Appellant's house and he did not contest that the house did not belong to him. He was alone. That the 3rd Accused was not taking them to a customer. The informer led them to 4th Accused. That he and PW1 met the informer personally.
 32. The Appellants were placed on their defence and the 1st Appellant gave sworn testimony. The 2nd and 3rd Appellants opted to give unsworn defence.
 33. The 1st Appellant testified that he was found at home by unknown people who asked him if he knew Maina. He showed them the house of Maina but they did not find him. They insisted that he was Maina and he was beaten and taken to a Landcruiser and found himself at police station. The following day he was shown some properties that were found at Maina's house and he denied knowledge of those properties. On cross examination, he testified that he was informed by the investigating officer that the properties were found in Maina's house and he denied that the properties were found in his home.
 34. The 2nd Appellant testified that he was a boda boda rider and on the material day at 3:00p.m, a customer approached and wanted to know how much he will charge him with his luggage. He ferried him to



- Ishuga with his luggage and he was paid Kshs.200/-. He was later visited by police who inquired if he had ferried a customer at 3:00pm. They gave description which matched and he confirmed that he had ferried him. He took them where he had dropped the customer and showed them the direction that he took and he was left under guard. The police returned with television and strangers and none was his customer. He denied that he took the police to the house. He denied committing the offence.
35. The 3rd Appellant testified that he is a private motor vehicle driver and he owns the subject motorcycle but would lend it to 2nd Appellant who was his neighbour. The 2nd Appellant went for the motorcycle in the morning and left. He himself dropped his neighbour to town and he returned to Burguret. In the evening, he went to the pool table place and two people found them there and they asked for their IDs. He gave out his name and he was arrested. The motor cycle was outside and it was seized and he was taken to police station where he found his co-accused. They claimed that they were found with stolen properties. He explained that 2nd Appellant had borrowed his motor cycle but they claimed that it was involved in theft.
36. That was the totality of the evidence before the trial court. Having considered the evidence before the trial court, the only issue for determination is whether the prosecution proved its case to the legal threshold set in law against each of the Appellants.
37. The 1st Appellant's counsel raised a preliminary point of law that the charge sheet was defective. He submitted that the Appellant was charged under section 304(1) as read with section 275 of the Penal Code instead of section 304(1) as read with section 279(b) of the Penal Code which the trial court found that there was duplicity but however held that there was no failure of justice since 1st and 2nd Accused were represented by counsels. That the court failed to note that 3rd and 4th Accused were not represented and that 1st and 2nd Accused took plea before their counsel came on record and was discharged before defence case. Therefore, there was miscarriage of justice and violation of right to fair trial.
38. The trial court while addressing this issue held that the charge sheet was duplex for charging the Appellants under section 304(1) and section 275 of the Penal Code. The magistrate further stated that the charge sheet was to be framed under section 304(1) and section 279(b) as per the second schedule of the Criminal Procedure Code. The court held that the question was whether there was failure of justice for framing the charge sheet as such. He further found that there was no confusion due to the defect since the accused fully cross examined the witnesses and raised no complaint during the trial. 1st and 2nd accused were also represented by a counsel and no such complaint was raised. The court further found that the error was curable under section 382 of the Criminal Procedure Code. In finding so, the magistrate was guided by Court of Appeal decision in Joseph Njuguna Mwaura & 2 Others v Republic (2013)eKLR and Paul Katana Njuguna vs Republic (2016)eKLR and other cases.
39. As seen earlier, the Appellants were indeed charged under section 304 (1) (a) as read with section 275 of the Penal Code. Section 304 1(a) states that;
- “(1) Any person who -
- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
 - (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.”



40. Section 275 on the other hand provides for general punishment for theft by stating thus;
- “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.”
41. Section 279 of the Penal Code states that;
- “If the theft is committed under any of the circumstances following, that is to say—
- (a) if the thing is stolen from the person of another;
 - (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;
 - (c) if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;
 - (d) if the thing stolen is attached to or forms part of a railway;
 - (e) if the thing is stolen from a vessel which is in distress or wrecked or stranded;
 - (f) if the thing is stolen from a public office in which it is deposited or kept;
 - (g) if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen years.”
42. It therefore follows that the correct section to charge the Appellant with was Section 304(1)(a) as read with Section 279(b) which pertains to offence committed in a dwelling place.
43. Having so found , the question is whether the defects occasioned a failure of justice. Section 134 of the Criminal Procedure Code provides that;
- “Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”
44. It is trite law that an accused person must be charged with an offence that is known in law. Particularizing the charge enables the accused person know the offence with which he is charged and the likely sentence that he would get should he be convicted. This is the information that enables the accused person to adequately prepare his defence as was held in *Sigilani v Republic* [2004] 2 KLR 480 thus:-
- “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”



45. The Court of Appeal in *Cornel Ogutu Mikwa v Republic* [2016] eKLR- stated that;

“Whereas more care should have been exercised in drafting the charge sheet so that a clear distinction is made in the statement of the offence of the charge sheet between the statutory provision of the *Sexual Offences Act* creating the offence and the provision of the same statute prescribing the penalty, the appellant has not demonstrated what prejudice he suffered on account of the omission or that there was a failure of justice as a result. Furthermore, the appellant could and should have raised this matter before the trial court. He did not do so. Neither did he do so on his first appeal. The omission is one which, in our view, is excusable under section 382 of the Criminal Procedure Code. We hold that there is no merit in the complaint that the charge sheet was defective.”

46. In *Mwangi v Republic* (Criminal Appeal 46 of 2020) [2021] KEHC 103 (KLR) where Majanja J held that;

“In this instance, the case against the Appellant was that he broke into PW 1’s house and stole items therein. The Appellant cross-examined the witnesses and defended himself on the basis of the charges that were clear to him. Likewise, I do not think that an error in the sections quoted in the charge sheet were prejudicial to the Appellant as the particulars of the charge and substance of what was required to be proved were clear.”

47. It is therefore my view that the particulars having been read to the Appellants, it cannot be said that they did not understand the charge they were facing for the mere fact that the wrong provision was cited. The Appellant were able to cross examine the witnesses in a manner suggesting that they in fact understood the charge. They further did not raise the issue at the earliest instance if indeed they were faced with difficulty or prejudice for that matter. The 1st Appellant’s counsel represented 1st and 2nd Accused during trial but did not bring out that issue during trial. It is also my view that the error can be cured by Section 382 of the Criminal Procedure Code which states that;

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings.”

48. As to whether the case against the Appellants was proved, the 1st Appellant’s contention is that none of the Accused led the police to his arrest. That there was contradiction on ownership of goods as evidence revealed that the stolen goods were owned by Anka (k) Ltd whereas the charge sheet stated that PW1 was the owner. PW2, evidence was also contradictory as to who led the police to the arrest of the 1st Appellant. There was no inventory of recovery that was produced and the 1st Appellant denied ownership of the house where the goods were recovered and no evidence was tendered to prove that he owned the house. That the trial court misapprehended the doctrine of recent possession as there was no proof of ownership of the goods by PW1.



49. The 2nd Appellant contention was that PW1 testimony was contradictory on the number of the pillion passengers on board the motor cycle as he said at one point that the motor cycle had one pillion passenger and, on another instance, he said it had two pillion passengers. That Lawrence saw the motor cycle while at the hotel reception and, on another instance, he said Lawrence saw the motor cycle while at the shopping center and not while at the hotel. There was no evidence of broken doors and there was no witness from the hotel who testified. There was no evidence of common intention and if at all he knew the house where the stolen goods were, he would have taken the police to the exact house and not the neighbourhood as he did.
50. As for the 3rd Appellant, his contention was that PW2 contradicted PW1 by stating that the motor cycle was carrying two pillion passengers. That the informer did not see him but only saw his motor cycle and that there was no evidence of broken doors. That none of the prosecution witnesses saw him transporting the televisions apart from the informer whose words were just hearsay. That it was incumbent to avail the informer for he mistook him with the 2nd Appellant and failure to call him meant that his evidence was adverse to the prosecution's case. Further, failure to call the informer prejudiced him as he was charged with a crime he did not commit. That 2nd Appellant exonerated him by stating that he was the one driving the motor cycle on the material day. That other key witnesses like the hotel workers were not availed. Further, the proceedings were clear that he had hired his motor cycle to the 2nd Appellant.
51. As to contradictions highlighted by the Appellants, it is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in *Njuki & Other Vs Republic* (2002) 1 KLR 771 held that:
- “Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and indiscrepancies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code”.
52. In *Erick Onyango Ondeng' v Republic* [2014] eKLR, the Court of Appeal cited *Twehangane Alfred v Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:
- “With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”
53. Similarly, the Court of Appeal in the case of *Richard Munene -v- R* Cr. Appeal No. 74/2016 (2018) eKLR held:-
- “It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it.”



54. In respect to contradiction as to the ownership of the goods, it was in evidence that PW1 was the proprietor and the director of Anka Resort. With that in mind, I refer the court to the Court of Appeal decision in *Komora Wario Borjo & 4 others v Republic* [2008] eKLR where the court held that;

“Finally, they allege that whereas the charge sheet claims that the property stolen belonged to Dancun Gitau Njoroge, yet the evidence adduced points to Edward Mwangi Gitau (PW1) as the owner of the stolen items. Once again, it is our view that the variance was not fatal to the prosecution case. They were minor and did not at all prejudice the appellants in their defences. In any event they are curable under section 382 of the Criminal Procedure Code. Dancun Gitau Njoroge was Edward Mwangi Gitau, the owner of the shop that was raided.”

55. In our instant suit, the certainty of the ownership of the stolen items was never in doubt. It is correct to state that PW1 and Anka Hotel Limited are two separate legal entities. It is however not disputed that PW1 was the owner and Director of the company Anka Limited. In those circumstances, any attempt to hang on the legal technicality of the legal persona of PW1 and the company is in my view a splitting of hairs and a very weak straw which anyone trying to hang on would fall with thunderous opprobrium. The Appellants were not prejudiced at all by the naming of the director of the company as the owner of the stolen items and the defect is one that is readily curable by a simple amendment of the charge sheet. It is clear that the stolen property belonged to the hotel where PW1 was a director.

56. The other issue raised was failure by the prosecution to call key witnesses including the informer and the hotel workers. PW2 testified that two hotel workers, Frida Mumbi and Mercy Miano had recorded their statements but they were laid off during COVID 19 pandemic. They were later contacted to testify but they refused on account that they were laid off. The informer was not called to protect his identity.

57. It is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with section 143 of the [Evidence Act](#) which provides that;

“In the absence of a provision of the law, no particular number of witnesses is required to prove a fact.”

58. In *Bukenya and Others V. Uganda* [1972] EA 349 it was held that;

“While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

59. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if a prosecutor fails to call crucial witnesses, an inference can be made that their evidence would have been adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate. It is upon the court to decide whether the evidence was adequate or not.

60. As to whether there was proof that the Appellant’s were involved, the 1st Appellant claim was that none of the Accused led the police to his arrest and that PW2 evidence was contradictory on who led him to 1st Appellant. Further, there was no evidence that the house where the goods were recovered belonged to the 1st Appellant.



61. PW2 testified that the 2nd Appellant confessed as to where the stolen items were and he led the police to the 1st Appellant's rental house where the 1st Appellant was found together with the stolen items. His house was one roomed. He questioned the 1st Appellant as to where he had gotten the items and he said that he was keeping them for his brother, the 2nd Accused at trial who was to collect them and whom he arrested when he went to see the 1st Appellant at the station. On cross examination by Appellant's counsel, he stated that his statement did not state that the 2nd Appellant led them to the 1st Appellant's home. He stated that he found the goods at the 1st Appellant's house and he did not know the alleged Maina and the items were not recovered from Maina's house and he did not arrest Maina.
62. The 1st Appellant in his sworn defence testified that he was at home and unknown people asked him if he knew Maina and he showed them the house of Maina. They did not find him and they insisted that he was Maina. They started beating him and placed him in a police land cruiser and some people were left in Maina's house. He was later shown items found in Maina's house.
63. While evaluating the 1st Appellant's defence, the trial court held that he did not contest on cross examination that he had told the police that the goods belonged to his brother, the 2nd Accused who was to collect them. In cross examination, he claimed that one Maina was arrested in connection with the goods but was released. In his defence however, he contradicted himself by stating that the police looked for Maina in the house he had shown them but they did not find him and they claimed that he was Maina and he was arrested. This contradiction renders his defence false and a mere denial and untruthful.
64. It is my view that the trial court correctly analyzed the 1st Appellant's defence and found that it did not dislodge the prosecution's case. The established fact is that the stolen items were recovered from the 1st Appellant's house and in his presence. PW2, an independent witness with nothing to gain from the outcome in this case narrated with unparalleled clarity the fact of the recovery. The recovered goods matched the identification of the same in the inventories produced in evidence. The 1st Appellant was arrested a few hours after the breaking and theft. The noose of the doctrine of recent possession tightly ties the 1st Appellant to the breakage and stealing.
65. It is not in dispute that the persons who broke into the complainant's hotel were not seen by any witness. However, the stolen items were found in the house of the 1st Appellant. In the absence of a plausible explanation to the contrary, that recovery connects the 1st Appellant to the breaking and stealing. That is the law. In the case of Republic versus Loughlin 35 CR. APP. R69 1951 the Lord Chief Justice of England stated thus:

"if it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards a man is found in possession of the property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop-breaker".

The doctrine of recent possession has also been re-stated in the case of Chaama Hassan Hasa versus Republic [1976] KLR 10 where the court stated thus:-

"Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, presumption arises that he was either the thief or a handler by way of receiving..."

66. As regards the cases against the 2nd and 3rd Appellants, it is trite law that the prosecution bears the burden of proof throughout a criminal trial and that the Appellants bore no duty to prove their



innocence. These 2 Appellants were not placed at the scene of crime. Nothing was recovered from them. Their involvement revolves around the use of a motor cycle allegedly owned by the 3rd Appellant and which was said to have been driven by the 2nd Appellant ferrying the stolen goods. PW2 connects them to the offence by the mere fact that 3rd Appellant on arrest led the police to the 2nd Appellant who in turn led the police to the 1st Appellant. It is worth of note that the 2nd Appellant did not lead the police to the actual house of the 1st Appellant but to the general location where he had allegedly dropped his ‘customer’. The thread of common intention between the 3 Appellants that PW2 sought to establish in his evidence is shattered by the 1st Appellant’s clear statement that no one led the police to his home. In those circumstances, doubts linger as to the actual involvement of the 2nd and 3rd Appellants in the commission of the offence herein. Such doubts, as per dictates of the law, must be resolved in favour of the 2.

67. The 1st Appellant challenges the sentence on grounds that the same was illegal and excessive. The trial court in an elaborate ruling on sentencing, observed that the maximum punishment for house breaking is 7 years imprisonment while the penalty for stealing is 3 years. Further, that the 1st Appellant was a 1st offender. The court considered the mitigation by each of the then Accused persons and the fact that the stolen items were recovered and restored to the owner. The court then outlined in detail the purposes of sentencing. A sentence of 4 years imprisonment was pronounced in respect of the first limb of the offence and 2 years in respect of the 2nd limb which sentences were to run concurrently.
68. It is trite that sentencing is at the discretion of trial Judge. An appellate court will not interfere with the exercise of such discretion unless it is proved that the trial Magistrate acted on some wrong principles, overlooked some relevant factors or failed to consider some relevant matters or the sentence is manifestly excessive.
69. Each case must be treated on its set of facts and circumstances. In *Ogalo S/o Owoura –v- R (1954) E. A CA 270* the court stated;
- “The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v. R (1950) 18 EACA 147*, ‘it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.’ To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.....”
70. The first Appellant did not submit on sentence despite raising the issue as a substantive ground in the petition of Appeal. For the Respondent, it is submitted that the sentence was appropriate and in accordance with the law and the court considered the aggravating and mitigating factors.
71. I have considered the relevant law and the sentences meted out by the trial court. Section 304 1(a) states that;
- “(1) Any person who -
- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
 - (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or



vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.”

72. Section 275 on the other hand provides for general punishment for theft by stating thus;

“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.”

73. Section 279 of the Penal Code states that;

If the theft is committed under any of the circumstances following, that is to say—

- (a) if the thing is stolen from the person of another;
- (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;
- (c) if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;
- (d) if the thing stolen is attached to or forms part of a railway;
- (e) if the thing is stolen from a vessel which is in distress or wrecked or stranded;
- (f) if the thing is stolen from a public office in which it is deposited or kept;
- (g) if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen years.”

74. A look at the cumulative sentence of 4 years imprisonment vis-à-vis the penalties prescribed in law as set out above clearly shows that not only were the sentences lawful, but the same were manifestly lenient. The trial court did not act upon some wrong principle and neither did it overlook some material factor. The sentence was not manifestly excessive. No basis is laid out upon which I can interfere with the discretion of the trial court in sentencing.

75. The cumulative result of the above is that the Appeal by the 1st Appellant fails and is dismissed in its entirety. The Appeals by the 2nd and 3rd Appellants are successful and are allowed. I quash the conviction against the 2nd and 3rd Appellants, set aside the sentence and direct that each of them be set at liberty unless otherwise lawfully held under a separate warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF APRIL 2024

A.K. NDUNG’U

JUDGE

