



**Mbaya v Director of Public Prosecutions (Criminal Appeal
E100 of 2023) [2024] KEHC 6161 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E100 OF 2023
TW CHERERE, J
MAY 23, 2024**

BETWEEN

JOSEPH MURIUKI MBAYA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal against conviction and sentence Nkubu Criminal
Case No. E364 of 2021 by Hon. E. Ayuka (PM) on 12th July, 2023)*

JUDGMENT

1. Joseph Muriuki Mbaya (Appellant) was charged with housebreaking contrary to Section 304 (1)(b) and stealing contrary to Section 279 (b) of the *Penal Code* (Chapter 63 of the Laws of Kenya) and alternatively holding stolen property contrary to section 322(1) of the same *Act*. Offences were allegedly committed on diverse dates between February, 2021 and 22nd July, 2021 and the property involved belonged to one Kevin Muriungi Mworo.
2. Kevin Muriungi Mworo stated that Appellant was his nephew. He recalled that in February, 2021, he returned home to find his 13kgs mobil gas cylinder and a black and white duvet missing. In July 2021, he returned home after he was informed that his house had been broken into. He found KES. 200,000/- he had kept in the house, sawa soaps and grey, black and white duvet missing. Upon his arrest, Appellant was found with a new motor cycle suspected to have been bought with the stolen money. The 13kgs mobil gas cylinder 13kgs mobil gas cylinder was recovered from a person who said he bought from the Appellant. Complainant's brother informed him he had recovered 13 pieces of sawa soap from Appellant's house.
3. Annet Gatwiri Kimathi stated that one Patrick Kirimi sold a 13kg mobil gas cylinder to her in February, 2021 and he paid him KES. 4,000/- on account of the Appellant. Stella Kanana stated he bought two duvets from Appellant in March, 2021 and later sold them off. that Appellant was his neighbour.



Kenfray Mbaabu Mworro stated he recovered sawa soap from Appellant's house. Patrick Kirimi stated he sold a 13kg mobil gas cylinder to Annet Gatwiri on behalf of Appellant and was paid KES. 3000/- which he gave to Appellant and thereafter both collected KES. 1,000/- from Annet. Cyprian Mutuma was present on 23rd July, 2021 when Appellant bought motor cycle KMPD 081M for KES. 82,000/-. CPL Onsono the investigating officer arrested the Appellant and recovered a 13kg mobil gas cylinder after he was led to Annet by Patrick Kirimi. Appellant was subsequently charged.

4. Appellant in his sworn testimony denied the offence and stated that he bought a motor cycle after obtaining a loan of KES. 110,000/-. He tendered the loan agreement as PEXH. 1.
5. After the conclusion of the trial, Appellant was convicted and sentenced to serve 5 years' imprisonment.
6. Dissatisfied with the conviction and sentence, Appellant lodged this appeal 18th July, 2023 setting out 5 grounds of appeal. He subsequently filed amended grounds of appeal that:
 1. That he was not found with any of the stolen property
 2. He was arrested based on suspicion
 3. His mitigation was not considered
 4. The sentence was harsh
7. Appellant submitted that whereas he demonstrated that he bought a motor cycle after obtaining a loan, complainant did not tender any evidence to prove that the 13kgs mobil gas cylinder was his. Appellant contended that the person from whom the gas cylinder was recovered confirmed he bought it from Patrick Kirimi and additionally that there was no corroborated evidence that he sold duvets or that any soaps were recovered from his house.
8. Appellant additionally submitted that complainant did not tender any evidence that the gas cylinder in issue was his and in support thereof placed reliance on *Samuel Mukunya Kamunge versus John Mwangi Kamuru* [2005] eKLR where the Court of Appeal, though dealing with a civil matter concerning ownership of a vehicle the subject of the suit held that

“.....where ownership of a vehicle is denied, the best evidence to prove ownership is a certificate of search from the Registrar of motor vehicles.”
9. Appellant also submitted that he was suspected of stealing from complainant after he bought a motor vehicle yet he had demonstrated he had secured a loan from which he bought the motor cycle. He placed reliance on *Joan Chebichii Sawe vs Republic* (Criminal Appeal No. 2 of 2002); [2003] eKLR where the Court of Appeal held:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”
10. Concerning sentence, Appellant submitted that he was a first offender and was entitled to a lenient sentence.
11. Ms. Rotich for the DPP opposed the appeal and submitted that Appellant had been identified as the person that sold the property that was stolen from complainant's house.



Analysis and determination

12. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo vs Republic* Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

13. No one saw Appellant break and steal from complainant’s house and the prosecution case was mainly based on circumstantial evidence.

14. The evidence on record discloses the following undisputed facts. Firstly, other than state that a 13kg mobil gas cylinder recovered from Annet was his, and taking into consideration that the cylinder produced in court is not the only one from mobil, complainant did not tender any evidence whatsoever to demonstrate that the particular one tendered before the court was his.

15. Secondly, Annet from whom the cylinder was recovered from stated it was sold to her by Peter Kirimi and not by the Appellant.

16. Thirdly, Stella Kanana stated he bought two duvets from Appellant. Evidence concerning the duvets was that of Stellah against that of Appellant. Even if Appellant sold the duvets to Stellah which he denied, Stellah did not lead evidence concerning the colour of the duvets and there was therefore no evidence to link between the black, grey and white duvets stolen from the Complainant and the ones allegedly sold to Stellah.

17. Fourthly, Appellant tendered evidence to demonstrate that he obtained the money from which he bought a motor cycle from a loan. That evidence remained unchallenged and thereby disapproved the suspicion that he bought from the money stolen from complainant.

18. Finally, Appellant denied that any sawa soap was recovered from his house thereby casting doubt on the uncorroborated evidence by complainant’s brother that any such soap was recovered from Accused’s house. And even if such soap had been recovered, there was no evidence that these were the particular ones stolen from the complainant.

19. From the summary of the foregoing facts, I do not find it difficult to agree with the Appellant that he was arrested on the basis of suspicion.

20. *Sawe v Republic* (*supra*) the Court of Appeal whose main holdings still hold good held that;

- “1. 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.
2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
3. 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.”

21. From the foregoing, I find that the trial magistrate’s finding that the prosecution had proved its case was against the weight of evidence.
22. There was clearly no evidence to link Appellant to the offences he was charged and convicted of and this I find is a proper case for the court to interfere with the trial court’s finding.
23. In the end, I find that this appeal has merit and it is hereby ordered:
 1. The conviction is quashed
 2. The five-year imprisonment term is set aside
 3. Appellant shall be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU THIS 23RD DAY OF May 2024

WAMAE. T. W. CHERERE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present

For the State - Ms. Rotich (PC-1)

