



**Republic v Wageni (Criminal Appeal E001 of 2022)  
[2024] KEHC 11954 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E001 OF 2022  
CJ KENDAGOR, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**PAUL GACHIRI WAGENI ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence in Criminal Case No. 230 of 2019 at Othaya Law Courts by Hon. M. N. Munyendo (PM) on 13/01/2022)*

**JUDGMENT**

1. The Respondent was charged with the offence of Stealing contrary to Section 268 as read with Section 275 of the Penal Code. The Particulars were that Paul Gachiri Wageni on unknown date during the month December, 2016 at Kihuru village in Nyeri South Sub- county within Nyeri County within the Republic of Kenya, stole two dogs terrier breed valued at Kshs 300,000/= the property of Thomas Wahome Njuguna.
2. In the alternative, the respondent was charged with handling stolen property contrary to Section 322 (1) (2) of the *penal code*. The particulars were that on 6<sup>th</sup> December, 2018 at Kihuru village in Nyeri the accused otherwise than in the course of stealing, dishonestly received and retained one terrier dog knowing or having reason to believe it was stolen.
3. The matter proceeded to trial, where the Respondent was acquitted. The trial court found that the Appellant did not prove the case beyond reasonable doubt, thus acquitting the Respondent. Aggrieved by the decision, the Appellant lodged the instant appeal.
4. The petition of appeal reveals the following grounds of appeal:
  - i. That the learned trial magistrate erred in law and fact in failing to appreciate the elements required to prove the charges.



- ii. That the learned trial magistrate erred in law and fact by basing her decision on identification evidence.
  - iii. That the learned trial magistrate erred in law and fact in relying on the evidence of defence witness in acquitting the respondent
  - iv. That the learned trial magistrate erred in law and in over-reliance in the respondent's frail defence and entering a finding that the dog belonged to the respondent
  - v. That the learned trial magistrate erred in law by failing to execute judicial independence and fairness in the conduct of trial leading to the acquittal of the respondent
5. The Appellant filed in his written submissions on 11<sup>th</sup> July, 2023 and the respondent put in his submissions on 20<sup>th</sup> September, 2023 which the court has scrutinized and addressed in this Judgment.
  6. The Prosecution called 7 witnesses. During the trial, the complainant stated that on 19/11/2014, he imported two terrier breed dogs (one male and another female) from South Africa valued at Ksh. 150,000/-. He described the male as black and white in colour, and the female was white and had small black spots on the head and back. He stated that the dogs gained entry through Tanzania and that he later transferred them to his rural home in Kihuri, where his mother lived. He stated that he was informed in 2016 by PW2 Stephen Ndichu that the dogs were stolen. He then went home in December and reported to the assistant Chief (Accused), who agreed to announce during village baraza. He stated that in 2018, he was called by PW2, who informed him that one dog had been traced. The complainant proceeded to report the matter at Othaya Police Station and, in the company of two police officers, proceeded to the respondent's home, where they recovered a female dog from the wooden house and wire mesh. The recovered dog was black and white in colour. On cross-examination, the complainant stated that he paid for the dogs in cash and was issued with an invoice, not a receipt. He stated that the importation documents indicate the female dog is a white female dog with small spots on the head and neck.
  7. PW2 Stephen Macharia Ndichu, the farm manager, testified that in 2014, the dogs were taken to the farm and left with Mr Mugo (PW5), the complainant's brother. He described the dogs' colours to the court as white with black spots, while the other was black, the dominant colour. PW2 stated that in November 2016, Mr Mugo (PW5) informed him that the dogs were stolen, and he informed the complainant of the same. He stated further that in 2018 while looking for a plumber, he spotted a white and black dog roaming within a compound through a metallic gate. Upon inquiring, he was informed that it was the assistant chief's home. He informed the complainant, who stated that he would follow up. According to PW2, the dogs came in at 3 years old and were stolen at 5 years old.
  8. The investigation officer (PW3) told the court that the complaint that the dogs were stolen was made at the police station, and the dog was recovered at the respondent's home. The recovered dog was a female, black and white in colour. According to the investigating officer, the appellant claimed that the dog was his and that he had bought it from the complainant's mother
  9. PW4B Dickson Nasoko, a veterinary officer, testified that he indeed administered a vaccine to two puppies in 2014, who were less than six months old.
  10. PW5, Godfrey Mugo Njuguna, is the complainant's brother. His evidence was that the dogs went missing from their kennel within the compound in December, 2016.
  11. PW6, Antonina Gachambi Njuguna, the mother of PW4 and PW5, stated that PW4 had numerous dogs and had hired someone to take care of them. She was not aware of the specific details regarding



the dogs. She later heard that the dogs were found at the accused's person's home. She denied selling the dogs to the respondent, as they belonged to his son.

12. The Defence called 3 witnesses. The respondent (accused in the lower court file) informed the court that he had visited the complainant's home in 2013 and found that a dog in the home had given birth to four puppies. The respondent stated in court that upon expressing interest in acquiring the puppies, the complainant informed him that they belonged to PW6, his mother. The respondent further elaborated that he negotiated with PW6 for a fee of Kshs. 400 and subsequently arranged for a workman (DW2) to facilitate the delivery of the puppies. He confirmed that the dog he received from PW6 was the same dog recovered from his home. According to the respondent, his arrest and prosecution were borne out of the conflict between him and the complainant after he (the respondent) declined to assign the complainant's late brother's properties to him in a Chief's letter for Succession purposes.
13. DW2, Paul Mugambi, told the court that he had been employed as a farmhand by PW6. He stated that he was present when the complainant delivered three dogs to Pw6, 2 female and one male. According to DW2, one of the dogs birthed four puppies, and PW6 instructed him to deliver one puppy to the respondent's home in exchange for tea seedlings.
14. DW3, Godfrey Ruoro Murage, was the complainant's cousin. He testified that he worked at the complainant's farm together with DW2 and confirmed that there were dogs in the homestead. He stated that during his employment between 2015 and 2017, he had never seen or heard of PW2 Stephen Ndichu.
15. The appeal proceeded by way of written submissions. The appellant submitted that the trial court made conclusions that relied on extraneous factors and were contrary to the evidence adduced. Further that the trial court failed to execute judicial independence and fairness in the conduct of the trial.

### **Analysis**

16. The Court of Appeal in *Kiilu & Another vs. Republic* [2005]1 KLR 174, held as follows on the duty of a first appellate court:
  - I. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
  - II. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.
17. The appellant was charged with the offence of Stealing contrary to Section 268 of the *Penal Code*, the Section states as follows:
  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.
  2. A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
    - (a) an intent permanently to deprive the general or special owner of the thing of it;



- (b). an intent to use the thing as a pledge or security;
- (c). an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
- (d). an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
- (e). in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

18. I have re-examined the proceedings before the lower court to ascertain whether there was any bias in the conduct of the trial. The appellant’s submissions highlight court hearings and interim directions that he argues were not fair, the record shows that the court provided all parties with the chance to address preliminary issues. These proceedings were handled comprehensively, and the trial court also provided reasons for the directions/orders issued. Contrary to the assertions, I found a case whose case management was well conducted; the complainant and an accused person all have a right to a fair trial, and this includes expeditious disposal of cases.

**Did the prosecution prove beyond reasonable doubt that the respondent stole a terrier-breed dog?**

19. The prosecution case relied heavily on the complainant’s testimony. There was a referral to documentation supporting the purchase of the dogs in the examination in chief. However, the prosecution opted not to produce the documents and asked to expunge them after the defence raised concerns over them. I concur with the trial court’s determination that the presentation of forged documents undermines the complainant’s credibility as a witness. This raises grave suspicion, especially if weighed alongside the defence raised that the complainant instigated the arrest and prosecution in bad faith.
20. The complainant and the respondent are well-known to each other. From the evidence, they don’t live so far away from each other. The evidence also shows that they related closely. It raises eyebrows that the dogs were stolen in 2016 and that within nearly three years, no complaint had been made to the police or any authority, including the local administration.
21. The complainant told the court that PW6, his mother, was staying at the farm where the dogs were. He only referred to two dogs, while PW6 stated that there were many dogs and the complainant employed someone to look after them. From the proceedings, DW-3 Godfrey Ruoro Murage, the cousin to the complainant who used to work for the complainant, stated that PW6 had given the respondent a dog in exchange for seedlings. There was no evidence to support the age of the dogs, as different ages were given for the imported dogs and the recovered dog. It cannot be ruled out that the recovered dog may have been a puppy birthed by the dogs referred to by the complainant, so what about the possession by the respondent? The respondent explained how he came into possession of the recovered dog. The defence evidence is corroborated and casts doubt on the prosecution case. It has been established that the respondent did not unlawfully acquire the dog.
22. The resolution of a case in court requires careful consideration of the arguments presented by both the prosecution and the defence. It is entirely appropriate to take into account the evidence presented by the defence when reaching a decision. An accused person is presumed innocent unless proven guilty. The burden of proof is on the prosecution.



23. The court's finding of *Benson Limantees Lesimir & Ano. Vs. Republic Criminal Appeal No. 102 & 103 Of 2002* where the court of appeal stated:-

“In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of *R. vs Kipkering Arap Koske & Another* 16 EACA 135 where it was inter alia held that:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

24. In the Court of Appeal in the case *Joan Chebichii Sawe – V- Republic* Crim. App. No. 2 OF 2002 had this say about suspicion in a criminal case:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of *Mary Wanjiku Gichira vs Republic* (Criminal Appeal No. 17 of 1998(unreported), suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.”

25. Upon review of the case as a whole, I conclude that the grounds of appeal lack merit. The evidence presented before the lower court failed to meet the standard of proof beyond reasonable doubt on the charge of stealing and the alternative charge of handling stolen property.

26. As previously stated, I observed no irregularities in the proceedings. The trial was conducted fairly and in accordance with procedural standards.

27. I find no fault in the lower court's finding on acquittal and, thus, uphold it.

The appeal is dismissed for lack of merit. It is so ordered.

**DELIVERED VIA MICROSOFT TEAMS PLATFORM ON 18<sup>TH</sup> SEPTEMBER, 2024**

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**C.KENDAGOR, JUDGE**

Cc Hellen

Mr. Mwakio ODPP for Appellant

