



REPUBLIC OF KENYA



**Magiro v Republic (Criminal Appeal E058 of 2023)  
[2024] KEHC 11974 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E058 OF 2023  
MW MUIGAI, J  
OCTOBER 3, 2024**

**BETWEEN**

**MARGARET AWINO MAGIRO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT OF HON. R.W. GITAU,  
SENIOR RESIDENT MAGISTRATE AT MAVOKO LAW COURTS IN  
MAVOKO CRIMINAL CASE NO E855 OF 2021 DELIVERED ON 06.07.2023)***

**JUDGMENT**

**Trial Court Record**

1. The accused person was charged with Two counts of offences.
2. In Count I he was charged with the offence of stealing contrary to Section 268(1) as read with section 275 of the Penal Code
3. The particulars are that on 17<sup>th</sup> day of August 2021 at Tuffbitumme Go-Down No. 1 in AthiRiver sub county within Machakos county jointly with others not before court stole 1200 bags (30) tons of white rice valued at kshs 2,280,000 the property of Teresia Waithera Mwangi.
4. In Count II she was charged with stealing contrary to Section 268 (1) as read together with Section 275 of the Penal code.
5. The particulars are that on 8<sup>th</sup> September 2021 at Athi River sub –county within Machakos County jointly with others not before court stole 46 bags of njahi beans valued at kshs 379,820/-. The property of Abdallah Magire.



6. In the alternative count, the accused was charged with the offence of handling stolen goods contrary to Section 322 (1) of the Penal Code.
7. The particulars are that on 10<sup>th</sup> September 2021 at Eastleigh 14<sup>th</sup> street in Starehe sub –county within Nairobi County jointly with others not before court otherwise in the course of stealing dishonestly receive or retains 46 bags of njahi beans knowing or having reason to believe them to be stolen.
8. The Accused person pleaded not guilty to all counts and the matter proceeded to trial with the prosecution calling thirteen (13) witnesses.

### **Prosecution Case**

9. PW1, Teresiah Waithera Mwangi stated that on 10/7/21 she had gone to Nairobi looking for food for her children and was doing rice business at the time. Dismas sent her phone number of Vincent Wamalwa who stated that he was in the cereals business and that he had an order for supply of rice at UNYUCEP and requested her to send him kshs 3000 as she was to be the financier. She sent him money for him to buy the tender documents and they filled the forms. They used his company by the name Express Cargo. They submitted the documents at crescent building in Westlands. One Gabriel Kioko received the documents and gave them the go head to deliver the rice. She sent money to her supplier for 30 tonnes of rice. The rice was delivered and she asked her brother to receive it on her behalf. She sent Vincent the driver's number and all the necessary information required. They had agreed with Vincent that the rice would be paid for within 3 days after delivery.
10. PW1 contended that Vincent, Gabriel and Sam Muli received the rice at the go-down and they then went to Westlands to take the delivery note for the rice. The delivery note was prepared by Stephen Irungu and stamped by the NGO. Since delivery Vincent's Phone went off and he would momentarily switch it on and she knew things were not right because before they would correspond more often. She drove to Nairobi to follow up and Vincent was nowhere to be found. At the NGO she would be given inconsistent information that they had not received the consignment. At the godown where the rice was offloaded there was no record of the motor vehicle. The person at the godown said he was given khs. 5000 to hire the go- down temporarily. They saw the traces of the rice was removed on 17/8/2021.
11. It was her testimony that they decided to report the matter and wrote their statements. They noted that the neighbouring godown had CCTV Camera and the investigating officer was able to obtain footage of how the rice came in and how it was removed from the go down. The motor vehicle used to remove the rice was KCC 479Z Isuzu FRR driven by Japheth Rugendo and KCB 156 Isuzu driven by Samuel Gere. After two days the 2 drivers were arrested and detained. They took them to where the rice was sold in Eastleigh Beta deal strive and 29 bags were recovered. The manager identified who had sold him the rice as Anwar. Anwar said a lady had sold him the rice. The lady later called Anwar that she had black beans to sell him and they set a trap for her to deliver the Njahi and was arrested. She denied ownership of the njahi and alleged that the owners were waiting for her at Kilimanjaro hotel and the police drove to Kilimanjaro hotel where she was to identify the alleged owner who turned out to be Vincent. Vincent was arrested. They were escorted to Athi River police Station.
12. She produced a WhatsApp conversation between her and Vincent, UNYUCEP LPO for kshs 2,280,000 for grade 1 Tanzania rice border permit, inventory for 25 sack of white rice, Inventory of 46 bags of Njahi, copy of records for motor vehicles KCC and KCB.
13. She contended that she trusted Wamalwa because he took her to UNYUCEP.
14. Upon cross- examination by accused 2 , she stated that Abdi said that he was paid by Beth deal.



15. Upon cross examination by accused 3 she stated that she had been told that he deals with cereals and had orders for NGOs and that they had an oral contract with the accused 3, and that he did not sign any invoice or delivery notes. She never conducted a search for express cargo to confirm the ownership as the 3<sup>rd</sup> accused maintained that he was the director of the company. She insisted that the NGO was a front that the 3<sup>rd</sup> accused used to steal from her.
16. PW2, Stephen Irungu Chege, testified that he confirmed the delivery of the rice consignment at a go down in Athi river on behalf of PW1 who was in Tanzania at the time. The 3<sup>rd</sup> accused directed him to where the go down was located. Offloading of the rice was done in the presence of Vincent, Kioko and Sam Mulinge. Sam signed the delivery note and after the offloading of the rice they went to UNYUCEP office where they met one Kioko who signed and stamped the invoice. Upon asking about payment he was told the director was not there and payment would be done via RTGS. It was after that the accused persons numbers were off. PW1 came a week later and they decided to go to the UNYUCEP officers where they were told Kioko was in the field and they did not know Wamalwa. They decided to go to the go down where the guard told them that the rice was collected by the same people they were with that evening. They decided to report.
17. Upon cross- examination, he said his role was to only confirm that the consignment was received and that together with 3<sup>rd</sup> accused person they were to receive the consignment which was to later be taken to UNYUCEP. The third accused person was the link to the NGO.
18. Abdi Karim Ali Yusuf was PW3, He stated that on 17/8/2021 he was at the store when he met with Mohammed/ Anwar a broker who told him he had rice from Tanzania and agreed on the price of kshs 1750 per bag. He brought the 3 canters and offloaded at the store. The registration number of the vehicles were KBX 439 M which had super Biriyani rice 395 bags of 25kgs each, KCC 479Z super biriyani rice 400 bags of 25 kgs each and KCB 156 A . he confirmed that the bags were 1193 and paid Mohammed kshs 1,000,000 in cash. He sold all the rice however a customer returned 30-50 bags. The CID officers came to the store and found the rice. He was asked to avail the person who had sold him the rice and he was arrested at Carlifonia.
19. There was no cross examination.
20. PW4 Japheth Rugendo Munene testified that on 17/8/2021, a lady went looking for transport and asked if his vehicle could carry a 30 tonnes load. he told her she needed 3 vehicles. they went to Shalom where the consignment was loaded and took to Eastleigh. They were paid their dues and left. The lady who paid them was Margaret Awino. His motor vehicle carried 400 bags,
21. There was no cross examination.
22. PW5 Samuel Gere Waumo testified that on 17/8/2021, PW4 called him that there was some work that required that he accompanies him since the consignment was big. It was ferrying rice from Athi River to Eastleigh. They picked the rice and delivered to Eastleigh. After a while his motor vehicle was arrested that it had carried stolen rice. He was summoned to Athi river Police station where he explained what transpired. He went to point out to the police where they offloaded the rice and some bags were recovered. His motor vehicle was KCB 156 A Isuzu FRR which he carried 300 bags of rice. He stated that both the accused persons were present when the consignment was offloaded.
23. Upon cross examination he stated that PW4 was the one who paid him the agreed amount of kshs 8000. That The 2<sup>nd</sup> accused person boarded PW4's vehicle and the 3<sup>rd</sup> accused boarded his vehicle.
24. Pw6 Nicholas Munyi testified that on 10/9/2021 he was at the parking when two men went and said they had a consignment that they wished to be delivered to Eastleigh 46 bags of Njahi. They took him



to the yard and went to the store where the Njahi was. They loaded the njahi and started moving. They were told to stop at Petro to pick the lady who was the boss and proceeded to Eastleigh. The lady to her to deliver the consignment and directed him to the person who was to receive it. They then met a man waiting for the consignment and upon opening the door the lady was arrested accused of committing a crime. She was asked whom the njahi belonged to and she said Mutunga who had alighted prior and headed for lunch. On 11/9/2021 he took them to where he had loaded the consignment.

25. PW7 Ismael Abdulahi Adan testified that on 15/8/2021 a motor vehicle ferrying rice for PW1 arrived at the border and they cleared it. PW1 informed him on 23/8/2021 that the rice was offloaded but had been conned. He told her to report to the police
26. Pw8 Abdalla Mgiri testified that on 7/9/21 accused 3 told him that he had an order for njahi and as he was not around he connected him with his wife and negotiated the business. The 3<sup>rd</sup> accused person then connected him with the 2<sup>nd</sup> accused person. They then went to the market and bought 46 bags of njahi and transported it to Namanga, cleared it and was delivered to Athi River at the 2<sup>nd</sup> accused place. He told his wife not to release the consignment without payment and the accused 3 told him to wait he deposits the money in the account. His wife gave an account number of another Somali whom they do business since she did not have an equity account. The Somali told him that the alleged transfer was unsuccessful. They went to the bank and told the payment was inform of a cheque which had bounced.
27. It was his testimony that the 3<sup>rd</sup> accused person phone was off and the 2<sup>nd</sup> accused person phone was also off. He went to Isinya to make a report. His wife had communicated with them through the driver they had hired. He was called that he was required to show where he offloaded the consignment and took them to Milimani Kitengela where the accused had hired a go down. A lady at the shop told them that in the morning the police had gone there and they were the second group. They went to the store and noted traces of rice and njahi on the floor. The police in Kitengela contacted those in Athi river who confirmed they arrested two persons on account that they had conned a lady rice and had recovered njahi which had no complainant. They were directed to Athi river police station. They confirmed the 3<sup>rd</sup> accused had been arrested and requested that the njahi be released.
28. On cross examination he states that Vincent gave the number of his boss to his wife as he was not around at that time. The lady who received the consignment in Athi river had done business with his wife for 8 years.
29. On further cross examination he stated that he went to source for njahi in Arusha. It was cleared by Ahmed and the clearance document was there. The cheque that was to clear after 3 days never cleared.
30. Pw9 Abdi Rashid testified that on 9/9/21 a lady who does business in had sold a consignment in Kenya. Based on their working together he gave his account number for money to be paid there. A cheque was deposited in his account. They went to the bank and were told the cheque would mature after 3 days. The next day they received a text from the bank informing him that the cheque had been stopped by the drawer. They went and reported.
31. Pw10 No 75602 Cpl Joseph Mutie who stated that on 18/10/21 he received an exhibit memo from corporal Hussein Noor of DCI Athi River which was accompanied with a sealed envelope containing CCTV footage. He verified in the CD and in it were 4 video clips. It was desired that one captures still image from the footage, play it before court and avail any other relevant information. He verified the footage to be a raw copy after checking the properties. He captured the images, printed them into hard copy and certified them. He printed 25 photos. Image 1-3 dated 16/8/21 showing a truck entering a go-down carrying some goods on the trailer, image 4-5 dated 17/8/21 a whitish Isuzu canter entering the go-down, image 6-8 dated 17/8/21 a whitish canter is captured entering the go down registration



number no visible and no label seen. Image 9-10 dated 17/8/21 a whitish and bluish canter registration number KCB 156 A is captured entered the go-down, image 11-13 dated 17/8/21 a whitish canter is captured leaving the go down, image 14-20 dated 17/8/21 a whitish and bluish canter registration KCB 156 A is captured leaving the go-down, image 21-23 dated 17/8/21 a whitish Isuzu canter is seen leaving the go down, image 24-25 dated 16/8/21 a long truck is seen leaving the go down empty on the trailer side.

32. He testified that he subjected the footage to play back to detect any defect and ensure the footage had a free flow in pay back and without anytime lapses. He produced the report and the certificate as exhibits.
33. PW11 was Anwar Gedi Ndegale testified that a lady by the name Shalom who he later learnt was called Margaret communicated that she sells rice called super biriyani. He told her he did not have market at the time. He approached his family store Better Deal who agreed to buy the 1195 backs each carrying 25kgs. He took the money to the 2<sup>nd</sup> accuse person who was with the 3<sup>rd</sup> accused at Kilimanjaro. On 4/9/21 Abdikarim called him and told him that the lady who had sold them the rice had stolen from Athi River. The police then went with Abdikarim to where he was and asked him to continue talking to the second accused person so that they could finally arrest her. Shalom told him she had some Njahi that she wanted to sell him and the police directed that he orders. When the lady delivered the njahi in Eastleigh she was arrested. She took them to Kilimanjaro hotel where the owners of the njahi were waiting for her and the 3<sup>rd</sup> accused person was arrested.
34. PW12 No 63792 Corporal Hussein Noor of DCI Athi River testified on 23/8/21 at 8.30 pm he was on duty when PW1 reported a case of theft of rice consignment to with 1200 bags which was booked vide OB98/23/8/2. They interviewed PW1 and they stated they were given an order for rice by UNICEP (NGO) and consignment delivered on 16/8/21 at a go down within Athi River. The payment was to be made within 3 days but when they followed up Vincent had switched off his phone which prompted her to make a report.
35. PW12 testified that they began investigations and on 24/8/21 he proceeded to the go-down in the company of the complainant. He found the go down locked with a padlock. He looked around and found a CCTV on the neighbouring premises. He went and studied the CCTV footage and managed to see that the stated trailer made delivery on 16/8/21 and went out after offloading. He also noted the 3 vehicles KCB 156 A, KBX 439 and KCC 479Z had gone into the go down and transported the consignment out to unknown destinations.
36. On 26/8/21 they ran further investigations and a storekeeper of tuffsted by the name Samuel informed them that the said go down had not been taken over by the company was still under the contract and had its own caretaker. They called the go down caretaker Jacob Mulinge who went with the keys and opened. They confirmed that some rice grains were on the floor. They arrested Jacob who was interviewed in their office and he stated that it was the security guard who asked for the key as there were people who wanted to hire the go down.
37. On 3/9/21 he managed to arrest the drivers of the motor vehicles KCB 156 A and KCC 479Z. upon interviewing them, they said they were hired by one lady Margaret Awino and were joined by Vincent Wamalwa and another one who accompanied them to escort the trucks to Eastleigh. They also stated that they delivered the rice to Beth Deal Store in Eastleigh and that at that time Vincent and the other were left at Kilimanjaro hotel.
38. On 4/9/21 they proceeded to search the store in the presence of the two drivers and managed to recover 29 bags which were amongst the 1200 bags stolen. The driver Japheth stated that he was paid by Margaret through phone number 0740497071. on 9/9/21 they got more intel from one Anwas who acted as a broker between them and Bethel Store that the same Margaret had another consignment of



- Njahi and was ready to deliver to Beth deal store in Eastleigh. An ambush was made by him and other officers from California and luckily Margaret came in a motor vehicle KDD 102V loaded with the 46 bags of Njahi. She was arrested together with the driver. The driver was interrogated and he told them that they were hired by two men amongst them Vincent Wamalwa who boarded the vehicle and on reaching Petro city they were joined by Margaret Awino. The driver took them to where he loaded the njahi in Kitengela and on opening they found some grains of Njahi. They also got information that one Abdalla had made a report that njahi she had delivered in Athi river on 8/9/21 had been stolen by a lady known as Waithera.
39. On cross examination he stated that he did not find out whether the 1<sup>st</sup> accused was at the scene during loading and offloading and there was no traces of money sent to the 1<sup>st</sup> accused.
  40. PW13 Felix Naftali Mutethia stated that he was a senior clerical officer. He prepared the document signed by Sarah Ndungu who works at BRs. BRS received a letter dated 22/3/22 from DCI and responded. The letter requested registration information relating to two companies Cargo Express Company Limited and UNYCEP. Cargo Express Limited registration number was on plot no 209/607 Kimathi Street Nairobi and as at 26<sup>th</sup> may 2022 the directors and shareholders of the company were Givish Amuitall Ranch Kenya, Sobhagchad Hivji Shah. In relation to UNYCEP they had no records of the company on their data.
  41. DW1 Margaret Awino testified that she was into farming with a company called Obifarm Ventures where they farm rice in Ahero Nyando. Obifarm started the business of farming in 2013 and would source for markets in cereal shops, hotels and schools. That is how she met Sammy Muli who had a shop in Pipeline. She would sell him rice in small quantities. In 2020 there was covid and she had 3200 bags of rice and was struggling to sell. She requested Sammy to help her look for Market, Sammy got an order. She told her she had an order from her client in Eastleigh and had taken the remaining 1900 bags.
  42. It was her testimony that in 2021 Sammy called her that he had imported some rice from Tanzania and if she could help him look for market from her Somali clients in Eastleigh. She called Anwar who told her to go to where the rice was and take photos so that he could source for market and that she should also ask for import documents which Sammy showed her. She told Sammy that for transportation she had drivers who understood Eastleigh and also knew Anwar. She called the driver who came with other two drivers who loaded the rice and proceeded to Eastleigh. When they arrived in Eastleigh, Anwar told her to deliver to Kifaru wholesalers and that Sammy to wait for him at Kilimanjaro. The deal was successful and everyone got their share as agreed.
  43. She testified that after a few months Mutisya called her that he had 46 bags of Njahi and if she would get market from her Somali client. She called Anwar who after a while told her to deliver the Njahi. He asked If they had import documents and they proceeded to deliver in Eastleigh. Mutunga and Wamalwa went to wait in Kilimanjaro. She went to Kifaru and found Anwar waiting with DCI officers. They told her that the rice she had delivered there was a lady who was claiming non- payment. They went to Kilimanjaro and found Wamalwa. the lady from Tanzania said the person who had picked the rice from her was Wamalwa. They were arrested and taken to AthiRiver police station.
  44. On cross examination she stated that she sells her rice to schools and hotels but did not have anyone to corroborate her hustle. She maintained that she knew Mutunga through Sammy and that she found the rice in the go down in AthiRiver shalom area and was present when it was delivered in Eastleigh. She denied that Vincent was present during the loading of the rice and that he was only present during the njahi as he was Mutunga's link from Tanzania. She denied having worked in cohorts with Sammy and Mutunga and maintained that she was merely a broker and was paid kshs 59,750.



45. The Trial Court in its judgment delivered on 6<sup>th</sup> July 2023 found the 2<sup>nd</sup> accused and the 3<sup>rd</sup> accused persons each guilty of two counts of stealing contrary to section 268(1) as read with section 275 of the Penal Code.

### **The Appeal**

46. Dissatisfied by this judgement, the Appellant filed a petition of Appeal on 19<sup>th</sup> October 2023.

47. The Appeal is founded on the following grounds;

- a. The Learned Magistrate erred in law and in fact in failing to authenticate the certificate of electronic evidence produced by the prosecution labelled Pex 21 and electronic evidence on WhatsApp between Vincent and Teresiah.
- b. The Learned Magistrate erred in law and in fact by failing to appreciate the appellant was only a broker in the business transactions and was paid on commission by the owner of the bags of rice for sourcing for him market for the items.
- c. The Learned Magistrate erred in law and in fact in finding the appellant converted the bags of rice for her personal use to the detriment of the owners which was not the position
- d. The Learned Magistrate erred in law and in fact by failing to take into consideration the appellant's defence.
- e. The Trial Court erred in law and in fact by failing to hold the prosecution's evidence was full of inconsistencies and contradictions
- f. That the Learned Magistrate erred in law and in fact by convicting the appellant based on insufficient and uncorroborated evidence.
- g. That the learned Trial Magistrate erred in law and in fact in failing to hold that the prosecution evidence was contradictory
- h. That the Learned Trial magistrate erred in law and in fact in not considering the reasonable doubt in the prosecution's case and not giving the appellant the benefit of doubt
- i. That the sentence imposed on the appellant was harsh, excessive and punitive.
- j. That the Learned magistrate erred in law and in fact in failing to consider that the prosecution failed to prove their case beyond reasonable doubt as required by law
- k. That the learned magistrate imposed on the appellant a harsh sentence without the option of fine yet he is a first offender without giving reasons

48. The Appeal was canvassed by way of written submissions.

### **The Appellant's Submissions**

49. The Appellant filed submissions dated 2<sup>nd</sup> April 2024 in which she contended that from the facts it was evident that the appellant was not in communication with PW1 and thus was not aware that the 1200 bags of rice belonged to her and that she was also not actively involved in the buying and selling of the stolen items as her role was strictly that of a broker.

50. Reliance was made to the case of Stephen C. Mwangi v Republic and that the appellant's actions through the different transaction involving the stolen goods do not meet the threshold of theft as provided for in law.



51. On failing to consider the appellant's defence it was submitted that warrants for her conviction and sentence to be lifted. She relied on the case of *Karura vs Republic* which highlights the importance of courts taking into consideration all relevant factors and evidence presented during trial to ensure fair and just outcome
52. It was further submitted that the Trial magistrate failed to acknowledge the inconsistencies within the prosecution evidence thereby overlooking glaring and obvious discrepancies and relied on the case of *Jeremiah Wachira v R* to buttress the same.
53. It was submitted that the sentence passed was extremely harsh and reliance was placed on Article 50(2) of *the Constitution* of Kenya, 2010.
54. Reliance was placed on *R vs Benjamin Ogweno Koyier* and on part iv clause 23.8 of the sentencing guidelines on mitigation. She also relied on Section 169(1) of the Criminal Procedure Code.
55. It was submitted that the prosecution failed to prove their case beyond reasonable double as required
56. Reliance was placed to the case of *Woolwington vs DPP* on the legal burden of proof in criminal matters.
57. The Court was urged to find the appeal meritorious.

### **Respondent Submissions**

58. The Respondent filed submissions dated 30<sup>th</sup> May 2024 in which it was submitted that the appellant never opposed the production of the electronic evidence and that the trial court relied on Section 106 B of the *Evidence Act*.
59. That the evidence adduced by PW4, PW5 and PW6 clearly places the appellant as the person responsible for the theft and selling of rice and njahi. The prosecution relied on evidence that was cogent and the appellant's defence which was uncorroborated could not shake one adduced by the prosecution.
60. On contradictions and inconsistencies reliance was placed in the case of *Richard Munene vs Republic* to buttress the point that not every contradiction or inconsistency in evidence will be fatal to its case.
61. On sentence it was submitted that the sentence imposed was not excessive since the value of rice and njahi was valued appropriately

### **Determination**

62. I have relooked and analyzed the Appeal, the Trial Court record and considered the submissions of the parties.
63. This being a first appeal, this court is guided by the principles set out by the Court of Appeal in the case of *David Njuguna Wairimu vs Republic* [2010] eKLR where it stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has



considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

64. In criminal cases, it is old hat that the standard of proof is beyond reasonable doubt. This was elaborated in the case Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR where the court observed as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

65. The offence of stealing is provided in, Section 268 (1) and 275 of the Penal Code provide as follows;

268. Definition of stealing

- (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.

275. General punishment for theft 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 punishments provided, to imprisonment for three years.

66. The issue for determination is whether the prosecution proved beyond reasonable doubt that the appellant stole 1200 bags of rice? And whether the evidence herein support a conviction the law?.

### Elements of offence

67. The elements of stealing is as set out in section 268 of the Penal Code below: -

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.
- (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.
- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
  - (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
  - (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move

### **Appeal On Conviction**

- 68. PW1 Teresia Waithera Mwangi testified that she was introduced to 3<sup>rd</sup> accused (who absconded from Court) as cereal business dealer who presented that he had an order to supply maize and rice and they jointly prepared tender documents. They obtained rice 1,200 bags of 25 kilos each and the 3<sup>rd</sup> Accused ensured the rice was offloaded in a go down. Later the rice was delivered to the Company in Westlands and Delivery note was stamped. Thereafter, the 3<sup>rd</sup> Accused person’s phone went off. PW1 reported the matter to Police who launched investigations.
- 69. The Investigating Officer helped obtain CCTV footages of the neighboring go down and saw the rice was transported vide motor vehicles Reg. KCC479 Z KCB 156 A. The motor vehicles were tracked down and drivers led them to Eastleigh where the rice was sold. When PW11 helped lay a trap for the Accused persons to bring njahi for sale; PW1 identified the 2<sup>nd</sup> Accused Margaret who led them to Vincent 3<sup>rd</sup> Accused and both were arrested.
- 70. PW4 Japheth Rugendo Munene testified that on 17/8/2021, a lady went looking for transport where he had parked at Pumwani and asked if his vehicle could carry a 30 tonnes load from Shalom. She told him she needed 3 vehicles. They went to Shalom where the consignment was loaded and was taken to Eastleigh. By motor vehicle Reg KCC 479 Z KCB 156A & KBX 439 M. They were paid their dues and left. The lady who paid them was Margaret Awino. His motor vehicle carried 400 bags.



71. PW5 Samuel Gere Waumo testified that on 17/8/2021, PW4 called him that there was some work that required that he accompanies him since the consignment was big. It was ferrying rice from Athi River to Eastleigh at a Fee of Ksh 8,000/- They picked the rice and delivered to Eastleigh. After a while his motor vehicle was arrested that it had carried stolen rice. He was summoned to Athi river Police station where he explained what transpired. He went to point out to the police where they packed the rice at Athi river and offloaded the rice at East leigh and some bags were recovered. His motor vehicle was KCB 156 A Isuzu FRR which he carried 300 bags of rice. He stated that both the accused persons were present when the consignment was packed and where the rice was offloaded. The 2<sup>nd</sup> Accused person rode in PW4's vehicle.
72. PW6 Nicholas Munyi testified that on 10/9/2021 he was at the parking in Kitengela when two men went and said they had a consignment that they wished to be delivered to Eastleigh 46 bags of Njahi at the agreed price of Ksh 10,000/- They took him to the yard and went to the store where the Njahi was. They loaded the njahi and started moving. They were told to stop at Athi River Petrocity to pick the lady who was the boss and proceeded to Eastleigh. The lady gave directions upto Shell Petrol Station. The men alighted and she rode in his car Reg KDD 102 N to deliver the consignment and directed him to the person who was to receive it. They then met a man waiting for the consignment and upon opening the door the lady was arrested accused of committing a crime. She was asked whom the njahi belonged to and she said Mutunga who had alighted prior and headed for lunch. On 11/9/2021 he took them to where he had loaded the consignment.
73. PW11 Anwar Gedi testified he knew 2<sup>nd</sup> Accused person since 2019 as Shalom and she supplied items in Eastleigh. She called him on 17/8/2021 and told him she had biryani rice to sell to him. He approached one Abdikarim of Betadeal who agreed to buy the rice. The 2<sup>nd</sup> Accused brought 1195bags of rice at Ksh 1570/- per bag and 70/- each bag as commission. He paid Shalom 2<sup>nd</sup> Accused person Ksh 920,000/-. She was with 2 other men whom she said were owners of the rice. The following day, he paid her Ksh 876,150. On 4/9/2021 Abdul Karim called him that Police visited his Store and claimed the rice he had was stolen. PW11 continued engaging Shalom/Margaret 2<sup>nd</sup> Accused on WhatsApp and asked her to bring njahi. On 10/9/2021 Shalom brought the njahi, PW11 had alerted Police and the Police arrested her. She took them to Kilimanjaro Hotel and the 3<sup>rd</sup> Accused person was arrested.
74. DW1 Margaret Awino testified that she was into farming with a company called Obifarm Ventures where they farm rice in Ahero Nyando. Obifarm started the business of farming in 2013 and would source for markets in cereal shops, hotels and schools. That is how she met Sammy Muli who had a shop in Pipeline. She would sell him rice in small quantities. In 2020 there was covid and she had 3200 bags of rice and was struggling to sell. She requested Sammy to help her look for Market, Sammy got an order. She told her she had an order from her client in Eastleigh and had taken the remaining 1900 bags.
75. It was her testimony that in 2021 Sammy called her that he had imported some rice from Tanzania and if she could help him look for market from her Somali clients in Eastleigh. She called Anwar who told her to go to where the rice was and take photos so that he could source for market and that she should also ask for import documents which Sammy showed her. She told Sammy that for transportation she had drivers who understood Eastleigh and also knew Anwar. She called the driver who came with other two drivers who loaded the rice and proceeded to Eastleigh. When they arrived in Eastleigh, Anwar told her to deliver to Kifaru wholesalers and that Sammy to wait for him at Kilimanjaro. The deal was successful and everyone got their share as agreed.
76. It is evident from the above 5 prosecution witnesses that the appellant was actively engaged in the rice and njahi sale transactions and was in fact in charge of the transportation of the rice from the Shalom go down to Eastleigh and as much as she claims to be a broker she has not substantiated with evidence



to disapprove that she was actively involved in the rice transaction and knew of the rice loaded from the Go down transportation, sale and receipt of payment. The Appellant acted in concert with the 3rd Accused who absconded and another not in Court. There was positive identification by the witnesses and some who knew her well before this incident and PW11 had dealt with her since 2019 therefore it was not a case of mistaken identity. Infact PW11 set her up and was arrested. All witnesses placed 3<sup>rd</sup> Accused in her company and they seemed to work together.

77. From the testimony of DW1 who is the appellant herein apart from alleging to be broker she has not corroborated her evidence yet the evidence of prosecution witnesses largely point out to her being involved in the transportation of the rice. The issue of stealing clearly arises and she cannot distance herself from it. The offence of stealing entails depriving owner of the item/goods. How could she load rice from Go down which she did not buy, or establish owner and sell in Eastleigh? When she was paid by PW11 why did she retain the proceeds of sale yet she was not the owner. The Trial court considered her defence in detail and the allegation that she was broker at Page 8& 9 of judgment delivered on 6/7/2023. Although she claimed the rice and njahi belonged to one Mutunga and had contacts from Tanzania, whom she did not know, she seemed quite involved in the said transactions to be an innocent bystander. The evidence on record leads to only logical and reasonable inference she was part and parcel of a cartel that sold cereal produce and she was not a broker.

### **Sentence**

78. Looking at the nature of the offence and the kind of evidence that was adduced, it is fair and reasonable to conclude that, the findings by the trial court were based on evidence and the prosecution proved its case beyond reasonable doubt.
79. On sentencing, Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-
- “In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.
80. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor vs R, (1954) EACA 270* wherein the Court of Appeal stated as follows:
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R - v- Shershowsky (1912) CCA 28TLR 263*).”
81. The penalty is provided for in Section 275 which provides that any person who steals anything capable of being stolen is guilty of the felony termed theft, and is liable to imprisonment for three years. The sentence of one (1) year imprisonment for each count meted on the Appellant was therefore lawful, to the extent that it is provided for by the said provisions of the Penal Code.
82. The Appellant was sentenced on the 1<sup>st</sup> count fined Kshs 2,280,000/- or 1 year imprisonment and on 2<sup>nd</sup> count fined Kshs 379,820/- or I year imprisonment which I find to be appropriate in the circumstances.

### **Disposition**

83. This Court finds as follows;



- a. The upshot is that this appeal is unmerited and is hereby dismissed.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 3/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

