



**Ogutu & another v Republic (Criminal Appeal E006 of 2022)
[2023] KEHC 2034 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E006 OF 2022
KW KIARIE, J
MARCH 20, 2023**

BETWEEN

TOM OGUTU 1ST APPELLANT

DUNCAN OWINO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence in Criminal case NO. 46 of 2022 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Principal Magistrate)

JUDGMENT

1. Tom Ogutu and Duncan Owino, the appellants herein, were convicted after pleading guilty to the offence of neglect to prevent a felony contrary to section 392 of the *Penal Code*.
2. The particulars of the offence are that on February 28, 2022 at Karabandi Girls High School in Karabandi location, Rachuonyo North sub County within Homa Bay County, jointly being the security officers in the said institution failed to use all reasonable cause to prevent the commission of a felony termed as breaking and stealing.
3. The appellants were sentenced to two years' imprisonment. They were aggrieved and filed this appeal against both conviction and sentence.
4. The appellants raised grounds of appeal as follows:
 - a. The honourable learned principal magistrate erred in fact and in law in misdirecting herself that as per the dictates of law in not cautioning the accused of their right to legal representation as to the offense that they were facing. In as far as the said charges were ambiguous and defective.



- b. The honourable learned principal magistrate erred in fact and in law when she failed to evaluate and bring herself to the fact that the accused were not accorded a chance to mitigate before the passing of the said sentence.
 - c. The honourable learned principal magistrate erred in fact and in law when she passed a judgment that was derived of inconsistencies and which could not be substantiated as to the nature exhibits (books) that was stolen from the said premises as per the facts.
 - d. The honourable learned principal magistrate erred in fact and in law when she entered a judgment and sentencing on a defective charge sheet as the charge itself does not indicate the type of felony that the accused were said to have failed to use all reasonable cause to prevent its said commission hence the said charges against the accused are wanting in nature which also goes against the tenets of *the Constitution* and the rights of the accused persons.
 - e. The honourable learned principal magistrate erred in fact and in law by arriving at a ruling that is unconstitutional and illegal in nature and the statuses which are against the natural cause of justice.
 - f. The honourable learned principal magistrate erred in fact and in law by arriving at a judgment and sentencing that was not an unequivocal based on the facts read out and the response adduced by the accused persons in answering to the facts read out.
 - g. That the ruling of the learned trial magistrate goes against the rules of natural justice consequently the said ruling and decision is a nullity in law.
5. The appeal was opposed by the state through Mr. Ochengo. Learned counsel. His grounds were as follows:
 - a. That the charge was read to the appellants in Dholuo;
 - b. That the facts were read; and
 - c. That the plea was unequivocal.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
7. Section 348 of the *Criminal Procedure Code* provides as follows:

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.
8. Section 392 of the *Penal Code* provides:

Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour. [Emphasis added]



9. Even in instances where an accused has pleaded guilty, the facts read must support the charge and all the ingredients thereof. Where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of John Brown Shilenje vs. R. High Court (NBI) Criminal Appeal No 181 of 1981 (unreported). I must add that where the facts read do not establish the ingredients of the offence, the accused thereof will equally be entitled to an acquittal.
10. One very important ingredient of the offence under section 392 of the *Penal Code* is knowledge that a person designs to commit or is committing a felony. From the facts read no such facts of knowledge were read to the appellants. Indeed the ingredient of knowledge which is central to the offence under the section was not included in the charge. The appellants were therefore expected to plead to that ingredient.
11. I therefore find that the charge was incurably defective and the appellants are entitled to an acquittal. The conviction of each appellant is quashed and the sentence set aside. Each is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MARCH, 2023.

KIARIE WAWERU KIARIE

JUDGE

