



REPUBLIC OF KENYA



**Karuri v Republic (Criminal Appeal 4 of 2019)
[2023] KEHC 17254 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 4 OF 2019
RM MWONGO, J
MAY 10, 2023**

BETWEEN

RICHARD WANJOHI KARURI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of Stealing Contrary to Section 275 of the *Penal Code*. Following a full hearing he was he was convicted and sentenced to serve 12 Months' Probation period on 4th August, 2019.
2. The particulars were that on diverse dates between 2nd June and 11th July 2016, at Gitumbi Village in Kirinyaga, the appellant entered into the land of the complainant and her husband, and stole 293 Eucalyptus trees valued at Kshs 564,170, the property of Samuel Karani Muriithi.
3. Dissatisfied, the appellant filed an appeal on 4th September, 2019 on the following grounds:
 - i. That the trial Court erred in convicting him and relied wholly on contradictory evidence.
 - ii. That the trial Court erred in disregarding the oral agreement between the complainant and the Applicant.
 - iii. That trial Court erred by failing to consider that the Appellant's evidence for proof of payment of Kshs 280,000 was not shaken.
 - iv. That the trial Court erred in entertaining a civil matter that ought to have been referred to a civil Court.
 - v. That the trial Court erred in failing to make a finding that the Complainant was not the owner of the Land giving rise to the Criminal Case.



4. Briefly, the prosecution's case was as follows. The complainants Samuel Karani Wahome (PW1) and his wife Hellen Wambura Njoka (PW2) alleged that the accused had entered into their Land No Inoi/ Mbeti /805 without authority, and cut down 293 Eucalyptus Saligna trees. The land is registered in the name of Hellen and the title was produced as PExb 3. At the material times, the land had over 300 such trees growing on it.
5. Hellen had not visited the land for a long time, at least five for years. She was told of the cutting down of the trees by her husband on 11th July 2016. On his part, Samuel received a telephone call on the same day from Sarah Njeri, PW 3. She was a business lady in Kangaita, who passed through the land and found that trees had been cut. On receiving the information, he visited the land and confirmed that they trees had been cut. He and his wife reported to the police and wrote statements.
6. Later he and his wife accompanied by three police officers, and a forest officer visited the scene and took pictures, identified in court as MFI-6. Both Samuel and Hellen deny that they had entered into any agreement with the accused to sell or cut down the trees.
7. According to PW4, Peter Rugango, the Kirinyaga Sub-County Forest Officer who visited and assessed the land after the incident, he observed that: the land parcel had 293 stumps of trees; 8 trees were left standing; there was a lot of sawdust indicating cutting had occurred; and there was one stack of fuel wood. He estimated the value of the value of the trees that had been removed at Kshs 564,170/-. He had received a letter from the OCS Kerugoya to assess the value of the trees. He produced a letter containing the valuation as PEx 1
8. The other prosecution witnesses were PW 5 PC Daniel Kiragu and Corporal Joseph Munyao PW6. According to PC Kiragu on 7th October 2016, he received 6 photographs accompanied by Exhibit memo from CPL Munyao in his capacity as a Scenes of Crime officer. He was requested to certify them which he did and prepared a report dated 21st October 2016. He produced them as PExhibit 2(a) and the Report as Exhibit 2(b). He gave his gazette No as 4562/7/7/13.
9. Corporal Joseph Munyao testified that he was on duty on the 1st of August 2016 when the complainant informed him of the damage done to their property. That after recording the statement and ascertaining actual ownership, he proceeded to the scene in the company of a Forest Officer. He was able to see the damage and photographs were taken he prepared the Exhibit memo which he produced as P Exhibit-4.
10. According to Corp Munyao, he later summoned the accused, interrogated him and found that he had no permit to cut the trees, and accordingly charged him. In cross examination he stated that he was told the trees were sold to Kimunya Tea Factory, that the photographer was not a police officer, that the complainant did not tell him that he had cut some trees himself.
11. The Defence case was made out by the appellant, Richard Wanjohi, and his sole witness Musi Mureithi (DW1), a power saw operator. The Appellant stated that he had known the complainant, Samuel, for 3-4 years. According to him, at one point Samuel asked him whether he could buy trees from him. Samuel took him to the tree plantation for price assessment in the company of the Musi Mureithi. On meeting the Complainant for price assessment, he stated that they were 50 trees, but in between those trees there were other trees which had been cut.
12. Wanjohi further testified that he wrote the number of trees and their prices in a book and they agreed that he would buy them for Kshs 280,000/-. He proceeded to instruct the DW1 to cut the trees and did not cut a single tree himself. He stated that there were 15 people on the land.



13. He asserted that on 1st June at his shop he paid the Samuel all the money and that the complainant would come to the land whilst the tree cutting was going on. Later on, the complainant's wife demanded Kshs 350,000/- and he refused to pay the new amount as that was not their agreement.
14. According to Wanjohi, the complainant told him to leave 7 trees standing which he did. The process of cutting trees took one month and three days. The complainant's wife never at one point visited the land when the tree felling was going on.
15. The only issue that arose in cross examination was that the power saw man was present when the complainant was selling him the trees and that it was he, the appellant, who gave instructions to cut the trees.
16. Musi Mureithi testified that he was a power saw operator. He was given the work of cutting trees by the Appellant. He was called and told by the Appellant that they had entered into an agreement and he was required to go and see the trees. He testified that before he started work, the accused and the complainant agreed on payment, and the complainant was paid 280,000/-.
17. Musi stated that he went ahead to cut trees, leaving 7 of them standing. The Complainant went to the tree cutting site twice. In cross examination, he stated in court that he was present when the appellant and the Complainant were negotiating the price of the said trees. He was present during payment. He saw money being given to the Complainant, but he did not know how much.
18. In cross examination, he said he was present when the negotiations were going on and also during the payment. He saw money being given but did not know the amount.
19. The kernel issue that arises in the appeal is whether or not there was an agreement for the sale of the trees, or whether this was a case of stealing.
20. The charge sheet states that the accused stole 293 Eucalyptus trees. That is the case that the prosecution was required to prove. The trial court correctly defined stealing as the taking of personal property illegally with intent to keep it unlawfully.
21. Section 275 of the [Penal Code](#) sets out the penalty for stealing as follows:

“ 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.
22. The elements of stealing are 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...
- (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

23. The trial court correctly found that the act of cutting down the trees is not denied, and the only question was whether it amounted to theft. The trial court found that:

“the accused person admitted that he bought the trees from the complainant. He did not however show any evidence eg of an agreement or proof of payment, not that the burden of proof has been shifted to him, but that purpose of him being placed to his defence was for him to exonerate himself which he failed to do.

In the end I find that the prosecution has proved its case beyond reasonable doubt as required”

24. I think the trial magistrate misdirected himself in this regard. The standard of proof in a criminal case is always beyond reasonable doubt, and it rests on the prosecution. It is the highest standard of proof in our legal system, and properly so because the consequences lead to the penal outcomes including the punishment of imprisonment and fines. It means that there must be no doubt in the mind of the trial magistrate as to the viability of the prosecution case, and that there is no other reasonable explanation that can come from the evidence presented at trial.

25. In the case of *Peter Wafula Juma & 2 others v Republic* [2014] eKLR the the court, dealing with the issue of burden of proof stated thus:

“Legal burden of proof; does it shift?

(16) According to *Halsbury’s Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.”



26. Further, Mativo J (as he then was) aptly said in *JMN v Republic* (Criminal Appeal E017 of 2021) [2022] KEHC 279 (KLR) as follows:

“

“ 12. For starters, 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. As the Supreme Court of Nigeria held in *Ozaki and another v The State*,⁵ for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In *Uganda v Sebyala & Others* the court stated: -Case No. 130 of 1988. {1969} EA 204.

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.’

13. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi. Once an accused person discharges the evidential burden of adducing evidence of alibi, it’s the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the issue adduced by the prosecution and if there is doubt in the mind of the court the same is resolved in favour of the accused.”

27. I agree with and adopt the above sentiments of Mativo J.

28. An accused person is protected from a situation where he has to provide evidence to show he was not guilty. It is for the prosecution to prove guilt. If the court has to balance the evidence of the prosecution as against that of the defence, the balance must tilt in favour of the accused, since the standard of proof is beyond reasonable doubt.

29. I also note that the trial court did not seriously take into account the evidence of the defence

30. There was the evidence of DW1 who said he knew of the agreement and witnessed an exchange of money between the accused and the complainant. The trial court did not take that evidence into account and was silent thereon.

31. The cross examination of the accused and DW1 did not even venture to challenge the defence evidence of the agreement and payment. Indeed, the accused’s cross examination did not challenge the accused’s evidence that he had an agreement and that he paid for the trees. It merely showed that DW1 was present when the negotiations were going on.

32. The cross-examination of DW1 was also supportive of the agreement:

“I was present when they were negotiating. I was present during payment. I saw money being given. I don’t know how much they had agreed”



33. The evidence of Corporal Munyao after he had received the complaint from the complainant was, inter alia, as follows:

“I recorded his statement and that of his witnesses....

I summoned the accused ...[and] interrogated him. I found he had no permit to cut the trees and I charged him”

34. It appears to me that the officer was not concerned with theft at the outset but rather with whether there was a permit for logging. On what basis then did he charge the accused for theft?

35. In the case of *Justus Aura Andanje v Republic* [2008] eKLR Criminal Appeal 59 of 2005 the learned Judges J Mwera and J. R. Karanja stated thus:

“In a criminal trial, the evidence tendered by the accused should be considered by the court before determining the guilt or innocence of a person. That is to say the evidence is of vital importance and should be considered by a court carefully, failure of which it is fatal to convict after disregarding his defence. The consequence of this is that the accused person should be set free.”

36. More importantly, there is no indication as to whether the accused, during the interrogation, raised the issue as to whether the trees were sold or had been the subject of even a verbal agreement for sale, the police officer made no mention of this fact.

37. But the issue of the sale of trees featured throughout the evidence. In his testimony in chief, the complainant stated:

“I never sold any single tree neither have ever discussed any business in relation to the mature trees....

In cross examination, he said:

“I know the accused person....for about one year....

I didn't sell to the accused the trees to cut timber...

I never discussed the issue of money with the accused

I can't remember whether we discussed the issue of payment

.....

My trees were stolen”

38. Clearly the complainant's evidence is contradictory. On the one hand he swears that he never sold a single tree, and on the other hand stated that he couldn't remember whether they discussed the issue of payment. Here is a situa

39. On her part Hellen testified in chief that after she discovered that it was the accused who delivered the logs to Kimunye Tea Factory:

“We called the accused, he came and promised he will bring us money but he didn't. We trusted him and that is why we didn't record an agreement. He disappeared and then we reported to the police”



40. In cross examination, she said:

“ Accused himself informed me on 11th of July and he told me he will give me Kshs 350,000/-.
Had he paid, we wouldn’t have reported...

I trusted him that is why we didn’t enter into an agreement.....

We had not sold the trees to the accused for Kshs 280,000”

41. It appears strange that the complainants, when they first allegedly received news of the cutting of the trees did not take the first step of reporting the alleged theft. Instead, they traced the alleged thief, whom Hellen stated she trusted, and then sought to report to the police when he didn’t come through with the money. It seems to me that there was a prior arrangement regarding the trees. Otherwise, why would Hellen trust the alleged thief unless perhaps there had been prior engagements between them that earned him her trust?

42. The complainants appear to have received the information concerning the theft on 11th July 2015. On the same day, according to Hellen, she spoke to the accused and, according to her, he offered to pay 350,000/-. She then testified that she went to the police on 1st July, after the accused ran away. However, the evidence of Corp Munyao is that on 1st August he received a complaint from Samuel. There is no indication that Helen went to the police station.

Conclusion

43. Whilst minor contradictions are usually excusable, I think that the two contradictory stories of the events as told to the trial court by the prosecution and the defence demonstrate that the defence’s option of the story is also a viable option. As such it should have been taken into account by the trial magistrate, and the outcome should have ultimately fallen for the benefit of the accused.

44. Accordingly, I agree with the accused that there was a good probability that there was a verbal agreement between the parties for the sale of the felled trees. This was an option not at all considered by the police in their investigation, as the investigator was only concerned with whether or not the accused had a permit for felling the trees.

45. In the result, I find in favour of the appellant and hereby allow the appeal and set aside the conviction and sentence.

46. As the appellant served his full sentence no orders are made as to his liberty.

Dated and signed in Kerugoya this 10th day of May, 2023

R. MWONGO

JUDGE

Delivered in the presence of:

1. Mamba - for DPP
2. Applicant - Present in Court
3. Mshindi - holding brief for Wandaka for Applicant
4. Court Assistant - Murage

