



REPUBLIC OF KENYA



**Wairimu v Republic (Criminal Appeal E009 of 2022)  
[2023] KEHC 3694 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3694 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E009 OF 2022**

**PM MULWA, J**

**MAY 2, 2023**

**BETWEEN**

**ANASTACIA WAIRIMU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon.  
O.M. Wanyaga, SRM in Thika Criminal Case No.108 of 2020)*

**JUDGMENT**

1. The appellant herein, Anastacia Wairimu was together with another person charged with three (3) counts of the offence of Breaking into a building and committing a felony contrary to section 306 (a) of the *Penal Code*, Stealing contrary to section 268 as read with section 275 of the Penal Code and Destroying evidence contrary to section 116 as read with section 36 of the *Penal Code*. The alternative charge is Handing stolen goods contrary to section 322(1) (2) of the *Penal Code*.
2. In count I the particulars are that on diverse dated between 15<sup>th</sup> November, 2019 and 4<sup>th</sup> January, 2020 at African Spirit Limited in Thika Sub-County within Kiambu County, jointly with others not before the court, broke and entered a factory of African Spirit Limited and committed therein a felony namely theft of assorted brands of wines and spirits valued at Kshs. 3,000,000/= the property of African Spirits Limited.
3. The particulars of count II are that on diverse dates between 15<sup>th</sup> November 2019 and 4<sup>th</sup> January 2020 at African Sprit Limited in Thika West Sub-County within Kiambu County, jointly with others not before court stole 11 cartoons of spirit branded Furaha finest vodka each containing 30 bottles of 250 millilitres valued at 49,500/= the property of African Spirit Limited.
4. In count III the particulars are that on diverse dates between 15<sup>th</sup> November 2019 and 4<sup>th</sup> January 2020 at African Spirit Limited in Thika West Sub-County within Kiambu County, jointly with others not



before court, knowing that assorted brands of wines and spirits were required in evidence in Milimani Criminal Case No. 1333 of 2019, wilfully removed the said assorted brands of wines and spirits with intent to prevent it being used in evidence.

5. The particulars of the alternative charge are that on 4<sup>th</sup> January 2020, at Engen Petrol Station along Thika- Garissa Highway in west Sub- County, while in a motor vehicle registration number KBP 770D, Toyota Premio, Metallic grey in colour, the accused were found in possession of 11 cartoons of spirits branded Furaha Finest Vodka each containing 30 Bottles of 250 millilitres valued at Kshs. 49,500/= knowing or having reasons to believe them to be stolen.
6. Upon being arraigned in court on 17<sup>th</sup> January 2020, the accused persons denied the offences in all counts and a plea of not guilty was entered. The matter proceeded for hearing with the prosecution calling a total of 5 witnesses while the defence called 3 witnesses. After the hearing, the trial magistrate in his judgment found count I was defective and proceeded to acquit both accused persons. The 1<sup>st</sup> accused person was acquitted on both counts II and III, but convicted on the alternative charge. The appellant convicted in counts II and III and sentenced to a fine of Kshs. 50,000/= in each count in default serve one (1) year imprisonment.
7. Aggrieved by the trial court's judgment the appellant filed the memorandum of appeal dated 3<sup>rd</sup> March 2022, on both conviction and sentence citing the following 10 grounds:
  - a. The learned trial magistrate erred in law and in fact when he failed to fully analyse the ingredients forming part of the stealing and wrongly applied or interpreted the said principals thereby arriving at a wrong principle.
  - b. That the learned trial magistrate erred in law and in fact by failing to appreciate the fact that the appellant had no knowledge of the alleged and the prosecution failed to adduce evidence to support the charge.
  - c. That the prosecution did not prove their case on the charges of destroying evidence but in fact relied on extraneous evidence not canvassed during trial.
  - d. That the learned trial magistrate erred in law and fact by holding that the prosecution had proved its case beyond reasonable doubt without considering the defence tendered by the appellant as the circumstances leading to her arrest thereby arriving at an erroneous decision.
  - e. That the learned trial magistrate erred in law and in fact when she shifted the burden of proof on the appellant.
  - f. That the learned trial magistrate erred in fact and in law by convicting the appellant based on inconclusive, contradicting evidence by the prosecution witnesses thereby arriving at an erroneous decision.
  - g. That the learned trial magistrate erred in law and in fact in failing to take into account the time lapse between the time the factory was closed and the time alleged offence is said to have taken place.
  - h. That the learned trial magistrate erred in law and in fact by filling the gaps left by the prosecution in the matter.
  - i. That the learned trial magistrate erred in law by failing to find that the evidence did not disclose conclusively where the alleged exhibits were recorded from if at all there was such recovery.



- j. That the appellant will adduce additional grounds once in receipt of the appeal records.

8. The appeal was heard through written submissions, of which parties complied.

### **Appellant's submissions**

9. By the submissions filed on 8<sup>th</sup> February 2023, the appellant choose the argue all the grounds of the appeal together and framed the issue for determination as whether the evidence tendered by the prosecution was sufficient enough to warrant a conviction.
10. The appellant submits that in count I the trial court was right in acquitting her on the charges. She states the prosecution failed to prove the appellant stole the property belonging to the complainant company. According to the appellant before the closure of Africa Spirits Limited some of the products manufactured on 30<sup>th</sup> January had already been released to the market, but she could not tell the time.
11. The appellant submits that Pw3 was not a dispatch officer and thus could not tell when the product manufactured on 30<sup>th</sup> January 2019 was released. She submits that Pw3 failed to prove the property belonged to Africa Spirit Limited.
12. The appellant submits there was no direct and or circumstantial evidence of her taking the alcohol from the complainant premises. Further the appellant submits the trial court erred in convicting the her in count II as it failed to analyse the elements of the offence of stealing and erred in applying the doctrine of recent possession.
13. The appellant submits the prosecution failed to discharge its duty to prove the property found with the appellant belonged to the complainant and that the property was recently stolen. The evidence tendered by the prosecution does not show the appellant in possession of the 11 cartoons. She denies having been in custody of the same.
14. The appellant submits the trial court shifted the burden of prove to her and the Prosecution failed to prove the appellant was in possession of the cartoons of alcohol.
15. On count III the appellant submits the prosecution failed to prove the appellant removed from the store the 11 cartoons which were exhibits in Milimani Criminal Case No. 1333 of 2019, the evidence adduced was not sufficient to prove count III or the alternative.
16. In conclusion the appellant urged the court to allow the appeal and quash the conviction and sentence in counts II and III and affirm the trial court finding in count I and the alternative charge and further order for the refund of the fine already paid.

### **Respondent's submissions**

17. Opposing the appeal, the state counsel filed submissions dated 23<sup>rd</sup> January 2023, in which he submitted that the prosecution established all the elements required to satisfy the conviction on counts II and III.
18. Counsel submits the evidence of Pw3 and Pw5, confirmed that Africa Spirits had been closed due to claim of evasion of taxes and was under the watch of CIPU and the Kenya Police when the premises were broken into and goods stolen.



19. It was submitted that the prosecution did prove the goods found in the possession of the appellant belonged to Africa Spirits Limited, and thus the evidential burden shifted to the Appellant to prove reasonable explanation for the possession of the stolen goods.
20. Counsel urged the court to reject the grounds of the appeal advanced by the appellant as the same fails to shake credibility of the prosecution case. And further that the conviction was safe and the sentence meted on the appellant was legal and urged the court to uphold the trial court's judgment and dismiss the appeal.

### **Analysis**

21. Pw1 Corporal Julius Murimi testified he is stationed at Makongeni Police Station and that on 4<sup>th</sup> January 2020, at 22.30 hrs while on patrol with his colleagues Corporal Mwangi, Pc Muthoni, and Pc Kimani they got a tip off from members of the public of a vehicle carrying liquor opposite Kenyatta Primary School. They rushed to the scene and impounded motor vehicle KBP 770D which had 11 cartons of Furaha Vodka labelled African Wines Spirits. They arrested one of the civilian occupants and detained the vehicle. The lady occupant who was a police officer, resisted arrest.
22. Pw2 Pc Jacob Mutwiri, also attached to Makongeni Police Station corroborated the evidence of Pw1.
23. Pw3 Prabhu Sethu testified that that he worked as a production Manager at African Spirits from 2014. The factory was closed in January 2019, by the KRA and DPP and the products produced were left in the factory. He told the court the products that were outside the factory were stolen when the company was closed. He was called by the CID on 27<sup>th</sup> May 2020 to confirm if the alcohol was a product of the company. He testified the exhibit before court was produced on 30<sup>th</sup> January 2019, and had a factory batch code. He told the court according to the company records, the products with the batch code had not been released to the market. Pw3 told the court the alcohol was manufactured on 30<sup>th</sup> January 2019 and was scheduled to be released to the market on 31<sup>st</sup> January 2019 but it did not happen due to closure of the factory.
24. Pw3 told the court the batch code is generated by a batch code machine.
25. Pw4 Wilson Miraji testified he is stationed at Makongeni police Station and was on patrol on 4<sup>th</sup> January 2020 with PW1, Pw3. He corroborated the evidence of Pw2 and Pw3.
26. Pw5 Sgt Pascal Omondi, the investigation officer attached to the DCI Thika West, testified that KRA agencies raided African Spirits on claims of tax evasion and the premises closed down in January 2019. That the premises were later broken into and alcohol and ethanol were stolen. He visited the premises and found all exhibits stolen and the CCTV interfered with. He was informed on 5<sup>th</sup> January 2020 that two suspects had been arrested at Engen area. He proceeded to collect the accused persons from Makongeni Police Station.
27. He further testified that the reasons for charging the accused persons with the offence of breaking was because the 2<sup>nd</sup> accused was a police officer manning the premises after it was shut down and she was supposed to ensure the premises were safe. He adduced photos showing the premises was broken into.
28. Dw1 Ben Kamau Kamande, the 1<sup>st</sup> accused in the lower court testified on how on 4<sup>th</sup> January 2020, at around 7 pm he was called and informed his nephew was unwell and he rushed to take him to hospital. That on their way back home at around 8.30 pm while near Kenyatta Primary a probox blocked their way and 4 men armed alighted and identified themselves as police officers. He was arrested and taken to Makongeni Police Station while the appellant Annastacia Wairimu Muchungu (Dw2) was allowed



to go home. Dw1 contended that he did not know the reason for the arrest and that he first saw the exhibits of the case during trial.

29. Dw2 testified she is a house wife and a police officer on interdiction. That on 4<sup>th</sup> January 2020 her son fell ill and the husband sent Dw1 to get them to the hospital. She testified further that while on their way back home from the hospital, near Kenyatta Primary they were blocked by a Toyota probox which had police officers. She was allowed to go home while DW1 was arrested. She said on 5<sup>th</sup> January 2020 while working as a station guard she was called by the DCI and was told to surrender her firearm and then put under arrest.
30. She told the trial court that she had guarded Africa Spirit Ltd on 2 occasions there had been no incidents reported. That her duty schedules ran from 6.00 am to 6.00 pm.
31. She said that when guarding the premises police officers were not allowed to go inside the premises. She told the court she saw the exhibits for the first time in court. She could not tell why she was the only officer guarding the premises who was arrested and charged.
32. Dw3 Joseph Mwangi Kamande testified he was the husband of Dw2. He confirmed having send Dw1 to pick the appellant and his child and take them to hospital on 4<sup>th</sup> January 2020. He was later called at around 8.00pm and informed that Dw1 had been arrested and taken to Makongeni Police Station. His would later be arrested and charged.

### **Determination**

33. This court has considered the record of appeal and the submissions by the parties. The issues for determinations are whether the appellant has established to the required threshold, a case for this court to interfere with the findings of the trial court.
34. This being a first appeal, the court is expected to analyze and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions considering it did not have the opportunity to listen to the witnesses – See *Okeno v Republic* [1972] EA 32.
35. Section 268 of the [Penal Code](#) defines “stealing” in the following terms:
  - (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.

36. The prosecution in the trial court did adduce evidence to proving the appellant herein was found in possession of 11 cartoons of Spirits branded Furaha vodka each containing 30 bottles of 250 millilitres belonging to Africa Spirits Ltd. In the appellant submissions she argued that Pw3 was not a dispatch officer with the complainant and thus could not tell when the products manufactured on 30<sup>th</sup> January 2019 were released to the market. She also did not provide evidence to counter the evidence of Pw3 who indicated the premises were closed before the products were released into the market. The appellant did not also prove how she came to be in possession of the 11 cartoons of vodka.
37. Pw3 went ahead to prove to the court the product in possession of the appellant belonged to Africa Spirits Limited. The trial court found the prosecution had proved the case against the appellant on the second count of stealing. And further that the appellant did not adduce any evidence to support the child was ill and had been taken to hospital.
38. During a site visit trial court found that the premises at Africa Spirits Limited were closed and heavily guarded and with a perimeter wall and only persons guarding the premises had an opportunity to access the same.
39. On the issue of circumstantial evidence, I find the appellant having been found in possession of the 11 cartons of vodka belonging to Africa Spirits Limited and having failed to elaborate to the trial court on how the same came into their possession, the prosecution had proved that such circumstantial evidence pointed to the guilt of the appellant rather than an innocent party.
40. To exonerate herself from the charge the appellant ought to have explained to the court the manner in which she acquired the products, which she failed to do.
41. The trial court found the prosecution had proved the case against the appellant, and went ahead to apply the doctrine of recent possession which I find was the best practical approach as the appellant was found in possession of goods stolen from the premises of Africa Spirits Limited.
42. The doctrine of recent possession has been explained in *Chaama Hassan Hasa v Republic* (1976) KLR at page 10 where the High Court (Trevelyan and Hancox JJ) explained as follows: “Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining).”
43. From the above evidence I do not find the trial court erred in its finding. It is trite law that the appellate court will only interfere with the trial court’s findings where the trial magistrate applied the wrong provisions of the law and thus arrived a wrong finding. In my opinion the appellant has not given sufficient reasons why the court should interfere with the trial court’s finding.
44. I find the trial court exercised its discretion in handing the appellant the verdict of guilty. Further I find the sentence meted was lenient and, in the upshot, I find no reason to interfere.
45. Final Orders

The appeal lacks merit and is dismissed

**JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 2<sup>ND</sup> DAY OF MAY, 2023**



.....  
**P.M. MULWA**

**JUDGE**

In the presence of:

Kinyua/Duale – Court Assistants

Appellant -present

Mr. Muriuki - for Respondent

N/A - for Appellant

