



REPUBLIC OF KENYA



KENYA LAW
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**Mutembei v Republic (Criminal Appeal E010 of 2023)
[2023] KEHC 21006 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E010 OF 2023
CM KARIUKI, J
AUGUST 1, 2023**

BETWEEN

PETER MUTEMBEI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment (Both conviction and sentence) of
J H S Wanyanga, (Mr.) Senior Resident Magistrate, Maralal Law Courts
in Criminal case Number E144 of 2022 delivered on 9th March, 2023)*

JUDGMENT

1. The along with others appellant was charged with the offence of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the *Penal Code*.
2. Particular being that on the night of the day of June 4, 2022 at Maralal Police line in Samburu Central sub-county within Samburu county, jointly with others not before court, broke and entered the dwelling house of No 7xx7 PC Lawrence Lekinit with intent to steal therein and did steal from therein one rifle AK 47 serial number 5504745 loaded with a magazine of thirty rounds (7.62*39mm special) valued at Kshs One hundred and three thousand (103,000/=) the property of Kenya Police Service which was issued to No 7xx7 PC Lawrence Lekinit on official duties.
3. He pleaded not guilty and matter went into full trial where of he was convicted and sentenced to a fine of Kshs 800,000/= in default to serve ten(10) years imprisonment.
4. He was aggrieved thus, lodged instant appeal which he amended setting out the following grounds.
 - a. The learned trial magistrate erred in law and fact in convicting the appellant against the weight of the evidence.



- b. The learned trial magistrate erred in law and fact in the manner he analysed evidence that led him to draw wrong inferences and findings with the effect that the judgment is manifestly erroneous and harsh.
- c. The learned trial magistrate erred in law and fact by handing a sentence that was manifestly excessive and without jurisdiction.
- d. The learned trial magistrate erred in law and fact in failing to appreciate the evidence by all prosecution witnesses whose testimonies did not touch on the appellant adversely or otherwise and which was riddled with contradictions in the evidence
- e. The learned trial magistrate erred in law and fact in failing to appreciate the defence of alibi and the evidence on support by the appellant whose testimony corroborated by evidence that he was away on duty on the night when the alleged crime was committed.
- f. The learned trial magistrate erred in law and evidence by wrongly applying the doctrine of recent possession in passing a guilty verdict.
- g. The learned trial magistrate erred in law and fact by introducing a new charge of conspiracy and erroneously made a finding that conspiracy was proved when in fact the appellant was not charged with any conspiracy offence.
- h. The learned trial magistrate erred in law and fact by convicting the appellant based on a charge in which the appellant was not charged with.
- i. The learned trial magistrate erred in law and fact by convicting the appellant on mere suspicion without evidence or sufficient

5. Parties were directed to canvass appeal via submissions.

6. Appellant Submission

7. Whether the doctrine of recent possession was sufficiently proved.

- 8. The learned trial magistrate further put reliance on the inventory produced in court as proof of the said recovery in application of the doctrine of recent possession.
- 9. The appellant submitted that the elements of the the doctrine of recent possession was not established reliance was made on the case of *Isaac Nga'ang'a Kabiga & another v Republic* [2006] eKLR
- 10. It was submitted that, the appellant at the time of commission of the offence was away on official escort duty from the June 1, 2022 escorting Safaricom Engineers to Baragoi for a period of four days as corroborated by DW4 Inspector Duncan Wachira, the Deputy OCS Maralal Police station by producing the entry book showing when the appellant left for duty to Baragoi and when he returned to the station. He relies on case on *alibi* in *Moses Nato Raphael v Republic*[2015]eKLR .
- 11. Similarly, the Court of Appeal in case of *Kiarie v Republic* [1984] KLR
- 12. He submits that, the prosecution failed to prove its case beyond reasonable doubt and that the learned trial magistrate made wrong inferences and relied on mere suspicion to pass a guilty verdict on the appellant. The learned trial magistrate disregarded the appellant's defence of alibi which was not rebutted and there was no concrete evidence adduced to implicate the appellant on the theft of gun.



The appellant was not placed at the scene of crime when the offence occurred as he was away from the June 1, 2022 until the June 5, 2022, and yet the gun is alleged to have gone missing on the June 4, 2022.

13. While convicting the appellant, the learned trial magistrate made an inference and stated that the appellant harboured intention to use the gun to commit an offence. No evidence was produced to show that the appellant had previously committed any illegal act or offence.
14. Submission that this honourable court does make a finding that the charge against the appellant did not meet the required standard of proof and that it was not proved beyond reasonable doubt and humbly request that the conviction of the trial court be quashed and set aside by this honorable court.

15. Respondent's Submissions

16. The appellant was charged with the offence of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the [Penal Code](#).
17. Particulars being that on the night of June 4, 2022 at Maralal Police Lines in Samburu Central sub-county in Samburu county jointly with others not before the court broke and entered the dwelling house of No 7xxx7 PC Lawrence Lekinit with intent to steal therein and did steal from therein one rifle AK47 serial number 53xxx5 loaded with a magazine of thirty rounds (7.62*39mm special) the property of Kenya Police Service which was issued to PC Lawrence Lekinit on official duty.
18. The substance of the charge was read over to them and they pleaded not guilty and the case proceeded to full hearing and the prosecution called a total number of 8 witnesses, and at the close of the prosecution's case, the appellant gave sworn defence and introduced an *alibi* and at the close of the defence case, the court did convict him and sentenced him to serve 10 years in prison in default of payment of a fine of Kshs 800,000.
19. Being dissatisfied with the whole of the said judgement, the appellant preferred this appeal and enumerated 9 grounds of appeal in the amended petition of appeal dated June 27, 2023.

To start with, there is need to define burglary pursuant to section 304(b) of the [Penal Code](#) which defines breaking and entering as follows:

304) Any person who-

1.
 - (a) a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein or
 - (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.
 2. If the offence is committed in the night, it is termed burglary and the offender is liable to imprisonment for ten years.
20. PW 1 in his evidence indicated that on June 4, 2022 he was then at Unison Sacco Bank, it was on Saturday so he was there up to mid-day. He went back to the station after midday. He went to armoury to return his firearm serial No 5xx4, 745, AK47 but the armorer was not present. He decided to set out of the police station to do his personal things. He left the gun in his bedroom. He hid it under his



bed. He stays with his son in the same house but he goes to school. So, he usually leaves the key at some secret point of him to access the house when he is not around. He came back to the house at 10.00pm and he went to check where he left the gun but it was missing. He woke his neighbours the appellant herein and asked them if they saw his firearm but they did not. Accused 3 then came out to help him search for the said firearm. They did not find the gun. He then called the in-charge armoury and made a report about the missing firearm.

21. As rightly observed by the honourable trial magistrate, the offence of burglary was not proved in view of the fact the complainant's house was not broken into but only realized the firearm was missing when he came into his house at night. Hence the only charge was one of stealing as opposed to burglary.
22. On June 9, 2022 PW2 a police officer in company of his wife PW3 had parked at the police lines at 3:00 am while sitting in their motor in company of PW2's sister the appellant, approached and asked PW2 to give him a cigarette and he moved a bit back, and that is when he sported the appellant had hand cuffs which were being held on his right-side hip belt. He was wearing two civilian jackets. He then asked PW2 to take him for patrol, but he declined as it was 3:00 am. He looked uneasy, and when he turned, PW2 noticed something protruding from the top of his jacket. He (appellant) then told him that he was taking the gun to his house and that he would be back. This is collaborated by the evidence of PW3.
23. PW4 on his part as the armorer confirmed that he had not issued the appellant with any gun/rifle on that night. He further testified that in the company of PW2 and in a group of about ten police officers, did proceed to the appellant's house, conducted a search, and found the firearm hidden in the ceiling board. The appellant and his two wives were in that house during the search. The two wives were accused 2 and 3, respectively. The gun had a magazine with 30 rounds of ammunition.
24. PW4 further confirms that it's the same firearm he had issued to the said PW I and also indicated in the arms movement register produced as an exhibit for the period running from June 3, 2022-June 5, 2022 that was recovered hidden in the ceiling.
25. As to where the firearm was recovered, it's indicated by PW2 that the house they were living in had two rooms. They share the kitchen, which means that the accused had a separate room from that of the complaint PW 1, and the gun, according to PW4, was found in the ceiling on the corridor leading to the appellant's bedroom. This evidence was collaborated by that of PW5, PW6 and PW8 who were all conducting a search together.
26. PW5 indicated in cross-examination that nothing was recovered in the appellant's bedroom but at the ceiling of the corridor leading to the bedroom.
27. The appellant, when placed on his defense, did tender a defense of alibi and called one witness and inducted that he had been at Baragoi on June 4, 2022 on escort duties of Safaricom Engineers which started on June 4, 2022 and arrived at Maralal Police Station on June 5, 2022 at around 12:00 Pm. He then, through DW4, the Deputy OCS Maralal Police Station produced an OB entry with return from Baragoi as D Exhibit 3 respectively, which supports the *alibi* that on the material date the theft was done, he was away.
28. D-2 and D-3, who were the appellant's wives and who had been living with him, did testify in their defenses and equally indicated that on a fateful night, the appellant had been at Baragoi and only returned on June 5, 2022 which they informed him of the incident and that as to its place of recovery, no witness connected them to the crime since the sitting room door is always open and accessible by both PW I and the appellant and D-2 and D-3 respectively.



29. On whether the gun muzzle that PW2 and PW3 saw the appellant hiding under the jacket on the right thigh was the muzzle of the stolen rifle raised some doubts and was not properly linked to the same, and there was also no eye witness.
30. On the issue of whether there existed a conspiracy between the appellant and his co-accused to steal the gun. I agree with the appellant's submissions that there is no evidence that the trial magistrate essentially relied on to convict the appellant.
31. In the upshot, the court is urged to find that the conviction of the appellant in this case was unsafe.
32. Had the benefit of perusing the appellants' submissions and the authorities cited therein, the appeal is thus conceded.

33. Issues Analysis And Determination

34. After reviewing the evidence on record and the parties' submissions, the issue that emerges is whether the prosecution proved its case beyond a reasonable doubt.
35. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal see *Selle & another v Associated Motor Boat Co Ltd & others*¹ and in *Peters v Sunday Post Limited* {1958} EA page 424.
36. In criminal cases, the burden of proving the defendant's guilt is on the prosecution, and they must establish that fact beyond a reasonable doubt.
37. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find conviction in a criminal case, the trial court has to be satisfied with the accused person's guilt beyond a reasonable doubt. On proof beyond a reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:

“[I]t is not in doubt that the burden of proof lies with the prosecution. The *locus classicus* on this is the case of *DPP v Woolmington*, [1935] UKHL 1, where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, [2013] eKLR.”
38. From the outset, the court notes that the prosecution has conceded the appeal on the ground that there is no evidence that the trial magistrate essentially relied on to convict the appellant.
39. The summary of evidence is anchored on the allegations that a stolen firearm was recovered in what was indicated by PW2 to be the house they were living in, which had two rooms. They shared the kitchen, meaning that the accused had a separate room from the complaint PW 1, and the gun, according to PW4, was found in the ceiling on the corridor leading to the appellant's bedroom. This evidence was collaborated by PW5, PW6, and PW8, who were all searching together.
40. PW5 indicated in cross-examination that nothing was recovered in the appellant's bedroom but at the ceiling of the corridor leading to the bedroom.
41. The appellant, when placed on his defense, did tender a defense of alibi and called one witness and indicated that he had been at Baragoi on June 4, 2022 on escort duties of Safaricom Engineers, which started and arrived at Maralal Police Station on June 5, 2022 at around 12:00 Pm. He then, through DW4, the Deputy OCS Maralal Police Station produced an OB entry with return from Baragoi as D



Exhibit 3 respectively, which supports the *alibi* that on the material date the theft was done, he was away.

42. D-2 and D-3, who were the appellant's wives and who had been living with him, did testify in their defenses and equally indicated that on a fateful night, the appellant had been at Baragoi and only returned on June 5, 2022 which they informed him of the incident and that as to its place of recovery, no witness connected them to the crime since the sitting room door is always open and accessible by both PW I and the appellant and D-2 and D-3 respectively.
43. Whether the gun muzzle that PW2 and PW3 saw the appellant hiding under the jacket on the right thigh was the muzzle of the stolen rifle raised some doubts and was not properly linked to the same, and there was also no eye witness.
44. On the issue of whether there existed a conspiracy between the appellant and his co-accused to steal the gun, there is no evidence that the trial magistrate essentially relied on to convict the appellant. Thus, the court finds that the appellant's conviction in this case was unsafe.
45. The court finds the appeal merited, and the prosecution was justified in conceding the appeal. Therefore, the court makes the following orders;
 - i. The conviction is quashed and the sentence set aside, and the accused shall be set free immediately unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 1ST DAY OF AUGUST 2023.

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CHARLES KARIUKI

JUDGE

