



**Ongangu v Republic (Criminal Appeal E008 of 2022)
[2023] KEHC 22320 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E008 OF 2022
WA OKWANY, J
SEPTEMBER 21, 2023**

BETWEEN

WILFRED MORAA ONGANGU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. W. C. Waswa –
RM Nyamira dated and delivered on the 2nd day of March 2022
in the original Nyamira CMC Criminal Case No. 1261 of 2020)*

JUDGMENT

1. The appellant was charged with the following charges: -

Count I

Breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code

2. The particulars being that on the 21st day of August 2019 at Nyamira Township Sub-location, Bonyamatuta Chache Location, within Nyamira County broke and entered into a building of Joseph Mirambo with intent to steal from therein and did steal thirty (30) pieces of iron sheets and ten (10) pieces of timber all valued at Kshs. 9,500.00 the property of Joseph Mirambo.

Alternative Count

Handling stolen goods contrary to section 322 (1) as read with section 322 (2) of the Penal Code

The particulars being that on the 21st day of August 2020 at Nyamira Township Sub-location, Bonyamatuta Chache Location, within Nyamira County otherwise than in the course of stealing dishonestly received or retained three (3) iron sheets knowing or having reasons to believe them to be stolen goods.



Count II

Trespass upon private land contrary to section 3 (1) as read with section 11 of the *Trespass Act* cap 294 Laws of Kenya

The particulars being that on the 10th day of December 2020 at Nyamira Township Sub-location, Bonyamatuta Chache Location, within Nyamira County unlawfully trespassed upon private land parcel number West Mugirango/Siamani/8277 registered under Joseph Ondicho Mirambo and did plant therein kales (Sukumawiki) without the consent of the owner Joseph Ondicho Mirambo.

2. At the close of the trial, the trial Magistrate convicted the Appellant for the offence of Breaking into a building and committing a felony contrary to Section 306 of the Penal Code. The Appellant was however acquitted for the offence of Trespass upon private land contrary to Section 3 (1) as read with Section 11 of the *Trespass Act* Cap 294 Laws of Kenya.
3. Upon his conviction on the 1st count, the appellant was sentenced to compensate the complainant, Joseph Mirambo, with the sum of Kshs. 20,000/= and in default to serve one (1) year imprisonment.
4. The appellant was in addition to the sentence ordered to undergo counselling under the umbrella of Probation for one (1) year from the date of payment of compensation or when he completes the sentence.
5. Aggrieved by the conviction and sentence, the appellant filed the instant appeal on July 25, 2022 in which he listed several grounds which he later amended on April 11, 2023 and listed following grounds of appeal: -

1. That the learned magistrate erred in law and fact by not considering that the witness “PW1” contradicted himself by stating that they visited the accused’s home where they found 30 iron sheets while the 30 iron sheets were not before the court as evidence, and/or no pictures were presented to prove the same.
2. That the learned magistrate erred in law and fact by not considering that the witness “PW1” was only giving hearsay evidence.
 - a. The learned trial magistrate erred in law and fact by failing to appreciate the fact that the appellant and PW1 had a long history of litigation and other suits were pending before the lower court and the court of appeal touching on suit respective property in dispute which could have led to the instigation of the case to implicate the appellant in order to get rid of the appellant, and this appointer to an intention of incarcerating the appellant for a long period of time.
3. That the learned magistrate erred in law and fact by not considering that “PW3” witness in his evidence, who contradicted his testimony in the respect of scene of crime, he stated that he was at Borabu near (Tente) and at the same time at Manga filling station which is actually 1km apart.
4. That the learned magistrate erred in law and fact by not considering “PW3” witness which contradicted the entire prosecution witness of “PW1”, “PW2” and “PW4”. He testified that he didn’t know where the accused got the posts from.



5. That the learned magistrate erred in law and fact by convicting the accused by considering the exhibit of the 3 iron sheets recovered from “DW2’s” toilets by the police officers but failed to consider and that the matter was reported, by “DW2” to at Nyamira Police Station vide OB NO. 28/23/8/2019 was arrested and released without any charges preferred against her, the trial court to consider that the exhibit did not belong to the appellant.
6. That the learned magistrate erred in law and fact by not considering that the witness “PW3” during close examination stated that the accused was heading towards Tente while he was from the opposite direction without stating specific the opposite direction and the trial court went ahead and gave out judgment against the accused.
7. That the learned magistrate erred in law and fact by not considering the witness “PW4” who took photos of a different scene of crime but not the really scene of crime, where they took iron sheets the property of the witness “Dw2” and yet the trial court gave out judgment against the accused.
8. That the learned magistrate erred in law and fact by convicting the accused by considering “PW1”’s exhibit which he could not positively identify since there was no specific trade mark or any receipts. “PW1” claimed that 30 iron sheets, 20 pieces of timber and 20 posts were stolen but only 3 iron sheets were produced in court the property of “DW2” and yet the trial court delivered judgment in favour of the respondent.
9. That the learned magistrate erred in law and fact by considering that the witness “PW2” who stated that a friend by the name Vincent Mirera reported to him that he saw the accused cart away with the stolen items without considering that the said person was not a witness in this matter but the trial court relied on the evidence of another person who was not before the court but went ahead and gave out judgment against the accused.
10. That the learned magistrate erred in law and fact by believing the witness “PW4” who stated that the accused person disappeared from his home without considering the accused’s evidence that he was not present during the only in the time of crime, the trial court failed to consider that the DW2 had stated that even other days they were together with the complainant attending court proceedings on the civil suit No. 24 of 2019 at Nyamira law Court, on several occasions so the respondent deceived the court by claiming severally within the alleged and/or claimed that the applicant was not within reach.
11. That the learned magistrate erred in law and fact by believing the witness “PW4” who stated that he recovered three (iron sheets from the accused’s home without considering that the iron sheets were new and/or old neither producing receipts as evidence to prove ownership.
12. That the learned magistrate erred in law and fact by not considering that the (3) iron sheets belonged to witness “DW2”.
13. That the learned magistrate erred in law and fact by stating that witness “DW1” did not claim ownership without considering that witness “DW2” had a right to own properties without the knowledge of witness “DW1”.



- a. The learned trial magistrate erred in law and fact by failing to appreciate that the appellant and PW1 had other protracted legal matters before the lower court touching on the suit property and was in error in dismissing his defence as mere denial.
14. That the learned magistrate erred in law and fact by not considering witness “DW1” was in Molo and not in Nyamira during the time of crime while at the same time he considered the evidence of “PW2” who was not in the list of witnesses neither had he written a statement, therefore it was difficult to cross examine him and/or during cross examination.
 - a. The learned trial magistrate erred in law and fact by convicting the appellant on the offence despite there being no proof beyond reasonable doubt that he was positively identified for the offence committed.
 15. That the learned magistrate erred in law and fact by delivering in his judgment that the applicant to pay and/or has paid the complainant a sum of Kshs. 21,500 for the stolen items inclusive of the costs incurred, while the applicant was not found with any item contradicting the charge where the stolen property where alleged to be Kshs. 9,500.
 - a. Amended the learned trial magistrate erred in law and in fact by failing to find that the ingredient of the offence was not proved beyond reasonable doubt.
 16. Amended that the learned magistrate erred in law and fact by giving two contradictory orders on the same subject matter, the trial court gave out one year imprisonment and at the same time ordered that the accused to pay the accuser Kshs. 20,000 with Kshs. 1,500 interest on the same.
 17. Amended that the learned magistrate erred in law and fact by not considering whether it was tenable to give orders that the appellant pay the accuser costs of the matter herein and yet at the same time the appellant be imprisoned for one year.
 18. The learned magistrate erred in law by convicting the appellant on the basis of a charge sheet which was fatally defective.
 19. The learned trial magistrate erred in law and fact by considering extraneous evidence other than what was contained in the witness testimonies.
 20. The learned trial magistrate erred in law and fact by finding the appellant guilty on non-existent charge not known in law.
 21. The learned trial magistrate erred in law and fact by failing to ensure that the appellant was accorded his constitutional right to a fair trial.
 22. The learned trial magistrate erred in fact and in law by finding that the prosecution had proved its case beyond reasonable doubt and convicting the appellant on that basis.



23. The learned trial magistrate erred in law and in fact by failing to consider the glaring inconsistencies in the prosecution's case and therefore wrongly convicted beyond reasonable doubt.
6. He seeks the following orders in the appeal: -
 1. That the judgment decree of the Honourable court dated 2nd day of March 2022 to be set aside and/or be dismissed.
 2. Costs be provided by the respondent.
 3. Amended that the respondent be compelled to return to the appellant Kshs. 21,500 with interest and interest accrued from 2/3/2022 to the date of judgment.
 4. Amended CID be compelled to return fingerprints from Nairobi.
 5. That the PW1, PW3 and PW4 to be accused of perjury.
7. The appeal was canvassed by way of written submissions wherein the appellant expounded on the grounds listed on the petition appeal.
8. The respondent, on the other hand, submitted that the trial court correctly relied on the doctrine of recent possession in convicting the appellant. It was the respondent's case that there was sufficient evidence of recent possession of stolen property. Reference was made to the decision in *Eric Otieno Arum vs R* [2006] eKLR where the doctrine of recent possession was discussed.
9. The duty of the 1st appellate court is to re-analyze the evidence tendered before the lower court with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. What was evidence presented by the prosecution before the trial court?
10. PW1, Joseph Mirambo, testified that he knew the Appellant as he purchased land from the appellant's father. He stated that he, on August 21, 2019, went to the land that he had purchased with the intention of carrying out some construction work when he discovered that his building materials, to wit, 30 pieces of iron sheets and 20 posts had been stolen from a house he had constructed on the purchased property. He then reported the matter to the police. He accompanied the police to the Appellant's home where 3 pieces of iron sheets were recovered after the Appellant allegedly fled from the scene.
11. PW2, Samuel Onganga, the appellant's father, testified that he sold land to someone else who in turn sold it to PW1. He stated that he did not witness the alleged breaking in and theft but added that the appellant and PW1 had a land dispute.
12. PW3, Vincent Mirera, testified that he on August 21, 2019 met the appellant carrying posts but he did not know where the appellant got the posts from. On the following day he met the Complainant complaining that his posts had been stolen. He did not see the appellant with the iron sheets.
13. PW4, Cpl. Sammy Sigei, investigated the case and recovered 3 used iron sheets from the appellant's home. He however did not recover any posts from the appellant's home.
14. When placed on his defence, the appellant denied the charges and stated that he was in Molo at the time of the alleged offence. He testified that he had a land case against the complainant before Kisii Court being case No. 60 of 2016 where he had secured an eviction order but that the complainant



refused to vacate the land. He added that the land in question belongs to his father, PW2, and not the complainant. On cross examination, he testified that the land in dispute belongs to him.

15. DW2, Irene Nyamoita, was the Appellant's wife. She testified that the Appellant was not at home on the alleged date of the offence as he had travelled to Molo on August 15, 2019. She stated that the police, in the company of the complainant came to her home on August 23, 2019 and took away her iron sheets. She added that she went to Nyamira police station to report the case when she was arrested and placed in custody.
16. On cross examination, DW2 stated that she bought the said iron sheets a long time ago and had used them to build her house but later pulled down the house and used the iron sheets to build a toilet. She confirmed that the appellant had sued the complainant over a land dispute.
17. DW3, Daniel Nyangau, testified that he accompanied the Appellant to Molo on August 21, 2019 where they had gone to till some land. He added that they stayed in Molo for 2 months. He produced a bus ticket as Defence exhibit No. 6. On cross examination he stated that they boarded the bus to Molo at Kisii at 4pm.

Analysis and Determination

18. I have carefully considered the Record of Appeal and the parties' respective submissions. The main issue for determination is whether the prosecution proved its case against the Appellant beyond reasonable doubt.
19. As I have already stated in this judgment, the appellant was convicted for the offence of Breaking into a building and committing a felony.
20. This court is therefore called upon to determine if the evidence presented by the prosecution was sufficient to sustain/prove the charge of Breaking into a building and committing a felony.
21. The trial court held as follows when convicting the appellant: -

“In summary, PW3 saw the accused person carrying posts on August 21, 2019. He was from the direction where PW1's house is located. On the same day, PW1's iron sheets were recovered from the accused person's home by PW1 and PW4. At the same time, the accused person's defence of alibi failed due to material contradictions and hence this court believes that he was not in Molo on August 21, 2019.

Based on the foregoing reasons, this court finds that the prosecution has proved its case beyond reasonable doubt. Consequently, the accused person is found guilty and is hereby convicted, pursuant to section 215 of the [Criminal Procedure Code](#), for the offence of Breaking into a building and committing a felony contrary to section 306 (a) of the [Penal Code](#).”

22. My analysis of the evidence of PW3, which the trial court relied upon, in convicting the Appellant, shows that the said witness testified that he saw the Appellant carrying posts. The witness testified as follows:-

“On 21/8/2019 at 6pm I was from Borabu where I found the accused carrying posts. The accused had 3 posts on his shoulders..... I don't know where the accused got the posts from. I did not see the accused with iron sheets.”



23. PW4, the Investigating Officer testified as follows: -
- “The accused has used the iron sheet to support his fence. We took photos before we removed the iron sheets..... Vincent saw the accused transporting stolen items. We did not recover any posts from the accused’s house.”
24. My finding is that the testimony of PW4 contradicts the account of PW3 in certain respects – for example, while PW3 testified that he saw the appellant ferrying 3 posts, no such posts were recovered from the appellant’s home. PW4 claimed that they recovered the iron sheets which the appellant had used to support his fence in the appellant’s absence.
25. DW2, the appellant’s wife on the other hand, testified as follows: -
- “The iron sheets were mine. When officers came to my home I was absent. It is the children who told me that officers had picked the iron sheets. I went to Nyamira Police Station at 12.00pm and I reported the case. I was placed in the cell that I had stolen the iron sheets.”
26. From the testimony of DW2, it is clear that the 3 pieces of iron sheets were recovered from her home in her absence. She explained that the iron sheets belonged to her and she took steps to report their loss to the police only to be arrested and placed in the cells.
27. I find that the conduct of DW2, upon learning that iron sheets had been taken from her home, does not depict her as a person guilty of theft. She was able to explain her ownership of the iron sheets to the police.
28. I further find that the prosecution did not establish any distinguishing feature or marks on the complainant’s alleged iron sheets when compared to iron sheets that could be found in any other home within the same locality. I find that there was no direct evidence linking the appellant to the alleged breaking into a building so as to justify his conviction. In any event, PW3 testified that he saw the appellant carrying posts and not the iron sheets that were recovered from the appellants home. Moreover, PW3 did not state that he saw the appellant taking the said posts from the complainant’s house.
29. There was also no evidence to show that the 3 iron sheets found in the appellant’s home were the exact same iron sheets that the complainant allegedly lost. No material was placed before the court to establish that the complainant owned the iron sheets and posts that were allegedly stolen.
30. It did not escape the attention of this court that it was not disputed that the complainant and the appellant had a long standing land dispute that could have precipitated bad blood between them leading to the instant prosecution.
31. The appellant presented alibi evidence and called a witness DW3 who explained that he was away in Molo with the Appellant at the time he was alleged to have committed the offence. I find that the alibi evidence was credible as it was not shaken on cross examination.
32. In a nutshell, I am not satisfied that the case against the appellant was proved beyond reasonable doubt.
33. In conclusion, I find that this appeal is merited and I therefore allow it.
34. Consequently, I quash the conviction and set aside the sentence with the result that any compensation made to the complainant shall be refunded to the appellant.
35. It is so ordered.



**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 21ST DAY OF SEPTEMBER 2023.**

W. A. OKWANY

JUDGE

