



**Waringa v Republic (Criminal Appeal E055 of 2022)
[2023] KEHC 21969 (KLR) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E055 OF 2022
HI ONG'UDI, J
SEPTEMBER 1, 2023**

BETWEEN

SAMUEL MWANIKI WARINGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment delivered by Hon E. Kelly SRM on 29th
September 2022 in Naivasha CM's Court criminal case No. E1011 of 2021)*

JUDGMENT

1. Samuel Mwaniki Waringa alias Machete hereinafter referred to as the appellant was charged with the offence of burglary contrary to section 304(2) of the *Penal Code*. The particulars are that the appellant on 15th day of May 2021 at Kayole area in Naivasha Sub-County within Nakuru County, jointly with others not before court, broke and entered the dwelling house of David Maina Kinuthia with intent to steal from therein and did steal one TV make Star Max, and cash Kshs 25,000/= all valued at Kshs 33,000/=.

In the alternative he faced a charge of handling stolen goods contrary to section 322(1)(2) of the *Penal Code*. The particulars being that the appellant on the 12th day of June 2021 at Ubuntu area in Naivasha Sub-County within Nakuru County, otherwise than in the course of stealing, dishonestly retained a Television set make Star Max the property of David Maina Kinuthia knowing or having reason to believe it to be stolen property.

2. The appellant pleaded not guilty and the matter proceeded to full hearing with the prosecution calling three (3) witnesses. The appellant gave a sworn statement of defence. Thereafter the learned trial magistrate found him guilty, convicted him and sentenced him to four (4) years imprisonment on the main count.



3. Being dissatisfied with the judgment he filed this Appeal on the following grounds
 - i. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defense was cogent and believable
 - ii. That the learned trial magistrate erred in both law and facts in failing to appreciate that the prosecution had failed to establish their case to the required standard i.e. beyond any reasonable doubt.
 - iii. That the prosecution failed to call other witnesses whom in my side caused a miscarriage of justice since the witnesses had different opinion about the commission of the offence and that would have accorded me a chance to be acquitted.
 - iv. That further grounds shall be adduced at the hearing of this appeal.

4. A summary of the prosecution case is that on the night of May 15, 2021 PW1's neighbours were attacked. He ran out to see what was happening and they saw someone running away from the said plot. The person was in a black marvin cap, monkey cap covering his face and was of middle height. When he returned to his house he found his door open, TV Starmax 12 inch, and Kshs 25,000/= missing. The TV was valued at Kshs 8000/=. He produced the TV receipt (Pexb 1). He reported the matter, and was later informed of a recovery and he went to the station where he identified his TV (Pexb 2).

5. PW2 No. 218500 Sgt Morris Tandazi of Karai post testified that on June 12, 2021 while at the station he received a report of the spotting of a common thief. He and PC Elam Wafula went upto the person's house where they recovered a Starmax TV 32 inch S/No M32QYKYST00-90858 and took it to the station. The person who is the appellant was arrested.

6. PW3 No. 71415 Cpl George Chali was the investigating officer. He rushed to the scene on receipt of the report of the appellant's arrest as people bayed for his blood. A TV had been recovered. He did not witness the arrest. The inventory was signed by the arresting officer as the appellant refused to sign it.

7. The appellant testified that he sells bhang in Maai Mahiu and Naivasha. On June 12, 2021 he was selling bhang when two (2) officers arrived and arrested him. This was not the only such case against him. He had even done a complaint letter to IPOA, which police wanted him to withdraw. He has been severally threatened.

8. The appeal was canvassed by way of written submissions. It is only the respondent who filed written submissions through the prosecution counsel, M/s Mogoi Lilian.

They are dated April 4, 2023. The same were wholly supported by the appellant. Basically the respondent is conceding the appeal for the following reasons.

- a. The person who was said to have stolen from PW1 and the neighbours ran away without being identified as it was dark.
- b. Besides PW1, no other witness testified to inform whether he/she could identify the thief.
- c. No one identified the appellant at the scene or even later after his arrest as being the one who stole the items from PW1's house.
- d. PW1 only stated that he left his house. He never mentioned if he had locked it or not. He did not indicate whether the run away person headed towards



his house or the direction he took. He did not indicate how much time he was away from his house for the court to know if that was sufficient time for any break in to take place.

- e. There was no evidence to show where the Kshs 25,000/= was stolen from or where he had kept it for the thief to have accessed it too fast or without notice.
 - f. The TV receipt produced bore no proof of ownership. It bore no serial number and had nothing to connect the TV to PW1.
 - g. The evidence adduced was uncorroborated. No witness appeared to corroborate the evidence of PW1 on the TV and the money. Further PW2 is alleged to have visited the scene with others who did not testify to corroborate his evidence on the recovery.
9. The respondent submitted and conceded to the appeal. I must however point out that such concession by the state does not automatically lead to the appeal being allowed.

Analysis and Determination

10. Upon consideration of the evidence on record, grounds of appeal, the respondent's submissions and the law the only issue I find falling for determination is whether the prosecution proved its case against the appellant, to the required standard.
11. This is a first appeal and this court has a duty to consider the evidence afresh and arrive at its own conclusion as guided by the case of: *Okeno v Republic* (1971) E.A 32, *Simiyu & another v Republic* (2005) 1 KLR 192.
12. Upon evaluation of the material before this court I find the first anomaly to be with the charge sheet. The appellant was in the main charge only charged with the offence of burglary contrary to section 304(2) of the [Penal Code](#). He was never charged with stealing of TV and Kshs 25,000/=. It follows that when the particulars in the main charge talk of "intent to steal from therein and did steal one TV make Star Max and cash Kshs 25,000/= all valued at Kshs 33,000/= the main charge ought to have had a 2nd limb containing an offence of stealing.
13. There was no limb of stealing in the main charge which is a real misnomer. Particulars can never create an offence. The learned trial magistrate should have rejected the charge sheet or the prosecution ought to have amended it. That was never done and so the charge was defective. An alternative charge finds its footing in the main or principal charge. Since the main charge was defective the alternative has no footing and must also go.
14. I also agree with the submissions by the respondent on the identified loopholes in the prosecution case and how the case was handled. The appellant was a mere suspect and the prosecution has a duty to adduce sufficient evidence to support its case. In the case of [Sawe v Republic](#) (20023) KLR 364 the Court of Appeal stated as follows

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”.



15. Further in *Mary Wanjiku Gichira v Republic* Criminal Appeal No. 17 of 1998 the Court of Appeal held that:

“Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life”.

16. In the present case the trial court relied on unsupported evidence to convict the appellant. There is no reason why people who were with PW1 were not called to testify. The receipt produced by PW1 did not have sufficient details to identify the TV produced as belonging to PW1. Furthermore those who were present when the TV was allegedly recovered in the appellant’s house ought to have been called to testify to support PW1’s evidence. PW3 never witnessed any of the occurrences. Besides PW1’s word there was no iota of evidence to show that his house was broken into.

17. The upshot of the above analysis leads me to the conclusion that firstly the charge sheet was defective. Secondly there was no sufficient evidence to sustain the charge had the charge sheet been properly placed, before the court. I therefore find merit in the appeal which I hereby allow. The conviction is quashed and the sentence set aside. The appellant to be released forthwith unless lawfully held under a separate warrant.

18. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF SEPTEMBER 2023 IN OPEN COURT AT NAIVASHA.

HEDWIG ONG’UDI

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms Ogutu- Court assistant

