



**Republic v Njoroge & another (Criminal Appeal E002 of 2022)
[2024] KEHC 12564 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E002 OF 2022
WM MUSYOKA, J
OCTOBER 22, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

SUSAN WANJA NJOROGE 1ST RESPONDENT

BAKHARI MOHAMED JUMA 2ND RESPONDENT

*(Appeal from acquittal by Hon. L Ambasi, Chief Magistrate, CM,
in Busia CMCCRC No. 130C of 2017, on 20th September 2021)*

JUDGMENT

1. The respondents, Susan Wanja Njoroge and Bakhari Mohamed Juma, had been charged before and acquitted by the primary court, of the offence of stealing goods in transit, contrary to section 279(c) of the Penal Code, Cap 63, Laws of Kenya, and an alternative charge that the 1st respondent had handled goods that she knew were stolen, contrary to section 322(2) of the Penal Code.
2. The complainant, based at Eldoret, had allegedly procured maize from a broker in Uganda, called either Mukisa or Mugisha, She was informed that the same had been loaded on a lorry, driven by the 2nd respondent, but the maize was never delivered. She made a report to the police, whereupon the 2nd respondent was arrested, and maize was recovered at a store at Malaba, belonging to the 1st respondent. The defence was that the 1st respondent, who was based at Malaba, bought maize from a Ugandan, called Kagonza, and it was delivered to him by the 2nd respondent. According to the 2nd respondent, the maize loaded on his lorry, at the behest of Kagonza, was meant for delivery to the 1st respondent, at Malaba. At the end of it, the trial court was not satisfied that a case had been made out against both respondents, and the 2 were acquitted, in the judgment delivered on 20th September 2021.



3. The appellant was aggrieved, and brought the instant appeal. His grounds of appeal revolve around the court not finding that the prosecution had adduced sufficient evidence to support a conviction; the trial court taking into account extraneous facts which did not originate from the evidence adduced in court; and the trial court reaching conclusions not supported by the recorded evidence.
4. Directions were given on 27th November 2023, for canvassing of the appeal, by way of written submissions. The only written submissions that I have seen on record are by the 1st respondent. She identifies 2 issues for determination, whether the offence was established to the required standard, and whether the judgment of the trial court should stand. Her case is that the appellant failed to prove its case to the required standard. She cites *William Githibu Kirisa vs. Republic* [1983] eKLR (Sachdeva, J) and *Tembere vs. Republic* [1990] eKLR (Githinji, J). She has also attached a copy of the judgment in *John Kimathi Mbuthia vs. Republic* [2002] eKLR (Msagha, J).
5. There is only 1 issue for determination, whether the case against the respondents was proved to the required standard, beyond reasonable doubt.
6. There were only 2 charges; 1 main, the other in the alternative. The principal charge was that of stealing goods in transit, the secondary charge, in the alternative, against the 1st respondent, was that of handling stolen goods.
7. The principal charge was simple theft of goods, that were on transit. What needed to be proved was that the goods that were on transit were stolen. Theft is about property, and whenever property is involved, there must be ownership. See *Okech and another vs. Republic* [1968] EA 508 (Sir Charles Newbold P, Spry VP & Law JA) and *Cleophas Ayimba vs. Republic Kisumu CACRA No. 74 of 1983* (Kneller JA, Chesoni & Platt, Ag JJA) (Republic of Kenya, Court of Appeal Judgements, Criminal Appeals, 1983, 191). As what is stolen is property, it must be established that that property existed. Upon the existence of the property being established, it must be shown that the property belonged to the complainant. Upon ownership being proved, it must be established that the property was in transit, when the theft occurred. See *Ramadhani vs. Republic* [1969] EA 269 (Platt J) and *Okeno vs. Republic* [1972] EA 32 (Sir William Duffus P, Law and Lutta JJA). Theft is the taking of property, by the alleged offender, from the owner or his agent, with an intention of permanently depriving the owner of it. See *In Joseph Kariuki vs. Republic* [1985] KLR 507 (Kneller JA, Platt and Gachuhi Ag JJA). It can also take the form of conversion. In conversion, there would be no unlawful taking, for the property would have gotten into the possession or custody of the offender lawfully, but the person in lawful custody decides to convert the property to their own use, in a manner inconsistent with the rights of the owner. See *R vs. Burns* [1958] EA 142 (Sir Ronald Sinclair CJ and Templeton J). These are the elements that the prosecution needed to establish, for there to be proof, beyond reasonable doubt, that the respondents stole or handled stolen property.
8. The question then is whether there was proof beyond reasonable doubt of all the elements of the 2 charges.
9. Let me start with the first charge, of theft. The property in question was said to be maize, that belonged to the complainant, PW1, Milkah Sambu. Did PW1 own any maize at the material time, which could be stolen? PW1 claimed to be a trader, based at Eldoret, dealing in maize and wheat. She provided no evidence that she was a trader. A trading licence or permit would have sufficed. It should have been expected that a trader, engaged in the import trade of foodstuffs, across borders, would have a licence or permit of some sort. It should not be lost that she also claimed to be an employee of Kenya Power and Lighting Company Limited, based at Eldoret. The licence or permit would have lend some credence to her claim that she had maize on transit.



10. The second thing was that she did not travel to Uganda, to procure the maize. She allegedly had a person there, variously referred to as Mukisa and Mugisha, who testified as PW6. It was PW6 who allegedly bought the maize on behalf of or for PW1. PW1 did not hand over money for the purchase of the maize directly to PW6. The money was allegedly sent to a certain Ken, of Ken Company, a money changer, who then allegedly handed it over to PW6. PW6 said that he did not know that Ken well, and that Ken did not testify. He described him as a money changer, who he engaged, because banks charged a lot of money. So, no money was exchanged directly between PW1 and PW6, and the intermediary who allegedly conveyed the money from PW1 to PW6 did not testify. No document was produced as evidence that the money, upon being given to Ken, was handed over to PW6. PW6 alleged that he bought 28 tons of maize, he did not mention the equivalent in bags. Again, no evidence was adduced of the source of that maize, in terms of where PW6 got it from. No documents were produced, by way of receipts, regarding where PW6 procured the 28 tons of maize. PW6 did not mention where he got the maize from.
11. PW6 then testified that he allegedly got a transporter, to move the maize from Kampala to Mombasa. Curiously, PW1, herself, did not mention where the maize was to be transported to after being bought at Kampala. According to PW6, he got a trailer to transport the maize, whose driver was the 2nd respondent. It was not disclosed whether PW6 got the trailer from the owner or from the driver. He testified that he did not sign an agreement with the transporter, neither did he produce any document to prove that he paid the transporter for the business. He testified that it was not him who procured the trailer, for it was brought to him by a broker known as Sam. He stated that that Sam did not show him an agreement between him and the owner of the trailer, and that he was only introduced to the driver, the 2nd respondent herein. He alleged that he paid a brokerage fee to Sam, and a transport fee to the 2nd respondent.
12. The only document that PW6 produced, regarding the maize was an alleged delivery note, issued by Mugikate and Family Ltd, of Kampala, on 25th March 2017. It was to the order of Mrs Limo, whose address was not indicated. The goods were 28 tons of maize, to be delivered at Mombasa, by the 2nd respondent. A delivery note is meant to accompany the goods being transported, and it should be signed by the recipient, upon delivery. It cannot stand alone, as evidence of existence and ownership of the maize in question, without either an invoice or receipt of the purchase price. As it was, the same could not provide proof that that maize existed. In any event, that delivery note did not bear the name of PW1. It was addressed to Limo Mrs. When PW1 testified she did not introduce herself to the court as Limo Mrs, neither did she mention that name anywhere in her testimony. In any event, PW1 stated that her person or broker in Uganda was PW6, and not Mugikate and Family Ltd. PW6 did not attempt to explain the exact relationship between him and Mugikate and Family Ltd. He only said that it was a company registered in Uganda, but he had no documents on its incorporation. He said that he did not have a bank account for the said company.
13. PW1 and PW6 were engaged in an export/import business, between Kenya and Uganda. At the border point, documents would need to be lodged or generated by the importer and the exporter, for the purpose of clearance. PW6 did not escort the maize to the border for the purpose of ensuring that it was safely cleared out of Uganda into Kenya. The clearance was allegedly handled by PW3 and PW4. None of them produced documents to prove that they were authorised clearing agents. They also did not produce any documents that identified PW1 as the importer of the maize that they allegedly cleared, and PW6 as the importer thereof. PW4 stated that he did not see any document showing that the maize he was clearing belonged to PW1, and that what he saw was that the cargo belonged to Tipper Haulers. He did not see any agreement showing that PW1 had hired the vehicle that transported the maize.



14. From the review above, it should be abundantly clear that the prosecution did not adduce adequate evidence to prove that PW1 had any maize. She did not personally buy any maize in Uganda. She claimed to have had a broker in Uganda, who bought maize for her. Yet, the evidence on that was very shaky, for no paper trail was provided. PW6 was alleged to be that broker, yet the delivery note he produced was not issued by him, but by Mugikate and Family Ltd. So, who bought the maize, PW6 or Mugikate and Family Ltd? So, who was PW1 dealing with, PW6 or Mugikate and Family Ltd? The money, for buying the maize, was allegedly channelled to a money changer, and not to PW6, and the money changer was to give it to PW6. PW6 claimed that he was indeed given the money, but there was no evidence of that, and the alleged money changer did not take to the witness stand. PW6 claimed that he bought the maize, yet he provided no proof regarding where he got the maize from, in terms of who sold it to him. There was no proof that PW6 ever bought the maize.
15. The transportation of the maize is also shrouded in mystery. It was not clear who owned the vehicle that allegedly transported the maize, it was unclear who hired the vehicle, and all there was was the driver and the turnboy, the 2nd respondent herein and PW2, respectively. No documentary proof was provided of the transportation contract. The prosecution called PW2, on the bit on transportation, and his testimony did not help its case, for he stated that he did not know who hired the lorry, but that that person spoke with the 2nd respondent, and they drove to Malaba, and the person showed them the store belonging to the 1st respondent. The evidence from the alleged clearing agents did not help at all. None of them produced documents to show that PW1 was the importer of the maize in question, and PW6 was the exporter, nor to demonstrate that the maize they cleared belonged to PW1.
16. Overall, there was no evidence that PW1 owned the maize in question. If there was no proof that she had the maize, it would follow that she had nothing that was capable of being stolen.
17. The charge was of a theft committed while the maize was in transit. Here, it should be demonstrated that the maize was enroute to some place when the theft occurred. PW1 did not state where the maize was destined to, but PW6 claimed that it was headed for Mombasa. Of course, I have found and held, as the trial court did, that PW1 did not prove that she had maize that could be stolen. Assuming that she had such maize, the next issue should be whether that maize was ever on transit. Again, the evidence on this was muddled. PW6 claimed that a lorry, handled by the 2nd respondent and PW2, transported the maize. He also said that he was not privy to the contract over that transportation, as the same was handled by a certain Sam, and that it was that Sam who showed him the driver, the 2nd respondent herein.
18. PW2, the prosecution witness on the transportation, testified that they were engaged by a broker in Kampala, whose name he did not know, for that was his first time to be in Kampala, who directed them to a store at Malaba, where they offloaded the maize. Even if PW1 owned the maize in question, the evidence on record is cloudy on whether the same was transported in the lorry that the 2nd respondent was driving, for there were far too many loose ends that the prosecution did not tie up, to provide proof, beyond reasonable doubt, that the maize transported in that lorry belonged to PW1, and the 2nd respondent had been hired to specifically transport maize belonging to her. Therefore, whether that alleged maize was in transit, was not proved beyond reasonable doubt.
19. Without any proof of the ownership of the alleged maize, questions would arise as to whether a theft of the maize would be feasible, and whether a handling of stolen goods would arise. It was not proved that PW1 had any maize, capable of being stolen, and, therefore, the issue of maize being stolen from her, whether in transit or otherwise, would not arise. Handling of stolen goods is premised on a theft, and if no proof was provided that PW1 owned maize that could be stolen, it followed that the handling of that maize, as stolen goods, did not arise



20. I agree with the trial court; the prosecution did not establish its case against the respondents to the required standard. I shall, accordingly, find and hold that the verdict of the trial court was properly founded. The appeal herein is not merited, and I hereby dismiss it. As a consequence of this dismissal, the stay order, of proceedings in Bungoma CMCCC No. E026 of 2023, which I made in the ruling that I delivered on 16th February 2024, is hereby vacated. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 22ND DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the appellant.

Mr. Wekesa, instructed by Makokha Wattanga & Luyali Associates, Advocates for the 1st respondent.

