



REPUBLIC OF KENYA



**Wafula v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 11808 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11808 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E002 OF 2024**

DK KEMEL, J

OCTOBER 4, 2024

BETWEEN

ISAAC WAFULA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence by Hon R K Langat
(PM) in original Sirisia Law Courts Case No. E392 of 2023 delivered
on 9TH November 2023 and 23rd November 2023 respectively)*

JUDGMENT

1. The Appellant, Isaac Wafula, was charged with the offence of stealing contrary to Section 279 of the of the *Penal Code*. Particulars of the offence were that on 17th September 2023, at around 1100hrs at Msemwa Village, Malakisi Location, Sitabicha Sub-Location in Bungoma West Sub-County within Bungoma County, stole five sacks of beans valued at Kshs. 20,000/= property of Evans Wabuke. He faced an alternative charge of handling stolen property contrary to Section 322 of the *Penal Code*, particulars being that on 17th September 2023, at around 1100hrs at Msemwa Village, Malakisi Location, Sitabicha Sub-Location in Bungoma West Sub-County within Bungoma County, otherwise than in the course of stealing, was found handling stolen five sacks of beans knowing it to be stolen property.
2. The gist of the Prosecution's case was that on the material date, the Complainant was at his work place, slaughter house at Sirisia when he received a call from his wife notifying him that the Appellant herein was uprooting his beans. He quickly proceeded to report the incident at Mukholo Police Post. The Police went to investigate the claim and found the appellant uprooting the beans and placing them in sacks. He noted that the Appellant had also taken some beans to his homestead. They apprehended him and took photos of the recovered sacks of beans. The Appellant, at the scene, insisted that the beans belonged to him.



3. In his defence, the Appellant gave sworn testimony in which he denied the offence and narrated his movements on the day he was arrested. He stated that on the material day, he was harvesting beans from the farm he was working on and that two police officers led by the Complainant showed up at the farm. He informed the Police Officers that he was working at the farm and who asked for his ownership documents to which he stated that they were in his house. He was arrested and on being asked where he resides he led the Officers there. He intended to show them his ownership documents but his spouse refuted. He informed the Court of his case over the parcel of land where he acquired injunction orders, issued on 7th September 2023, against the Complainant and that the said orders are still in place. He told the Court that he did not plant the beans.
4. Following a full trial, the Appellant was found guilty and convicted on the main count for the offence of stealing contrary to Section 279(b) of the *Penal Code*. He was consequently sentenced to one (1) year imprisonment therefor.
5. Being dissatisfied, the Appellant filed the instant appeal against conviction and sentence vide a memorandum of appeal dated 28th December 2023, wherein the Appellant herein sought to have the Judgement of the trial Court as delivered on 9th November 2023 and sentence issued on 23rd November 2023 be set aside. He advanced six (6) grounds and later filed an amended memorandum of appeal with his submissions wherein he advanced four (4) grounds.
6. The gist of the instant appeal is that there was no conviction over the alleged offence as per the delivered judgement; introduction of non-existent charge of livestock theft; the Prosecution's case was not watertight.
7. The Appeal was canvassed by way of written submissions. Only the Appellant complied with the Court directives.
8. The duty of the first appellate court is to re-analyze and reconsider the evidence tendered before the trial court with a view of arriving at its own conclusion. See *Okeno v R* 1972 C.A 32. In *Kiilu & Anor v R* (2005) 1 KLR174 the Court of appeal stated thus:
 - “ 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
 2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
9. The same was reiterated in the case of *David Njuguna Wairimu v R* (2010) eKLR where the Court of Appeal stated:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think



there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

10. I have considered the evidence on record, the grounds of appeal, submissions, authorities and the law. I find the issue for determination is whether this appeal has merit.
11. Upon perusal of the lower Court record and the evidence adduced, it is clear that the trial Court’s conviction of the Appellant herein is at variance with the charge. From the trial Court Judgement, it is clear the trial Magistrate proceeded to find that the Prosecution failed to prove its case on the offence of stock theft contrary to Section 278 of the Penal Code and acquitting a 2nd accused person who was not a party to this suit.
12. The trial Court failed to establish whether the Prosecution’s evidence was cogent, credible and trustworthy enough to prove beyond reasonable doubt that the Appellant was guilty of the main or alternative charge and it proceeded to convict the Appellant on a different charge and even referring to a co-accused where there was none herein.
13. I therefore find that the Appellant was unlawfully held as there exists no conviction on record for him under either the main or alternative Count for the trial Court to proceed to sentence him to (1) year imprisonment.
14. It is clear that i have been invited to look at the legality of both the sentence and the conviction. From the foregoing, i have come to the conclusion that the Appellant was not convicted on either the main or alternative charge as it is expected under law, therefore, this makes the sentence passed an illegality under the law. I find the resultant conviction and sentence of the trial court to have been in error and must be interfered with. In any case, were the trial court to have strictly analyzed the entire evidence, it would have reached a verdict of not guilty in view of the fact that the land on which the beans had been grown and harvested had a dispute wherein the appellant had obtained a court order restraining the Complainant from accessing the land that belonged to the appellant herein. The appellant’s defence was quite credible and it dislodged the Respondent’s case. The complainant ought to have proceeded with the civil case regarding the ownership of the land in question as well as the beans grown thereon. Hence, the appellant ought to have been given the benefit of doubt and acquitted of the charge of stealing.
15. In the result, I find merit in the appeal. The same is allowed. The conviction is quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 4TH DAY OF OCTOBER 2024.

D. KEMEI

JUDGE

In the presence of:

Isaac Wafula Appellant

Miss Mwaniki for Respondent

Kizito Court Assistant

