



REPUBLIC OF KENYA



**Wanyonyi & 2 others v Republic (Criminal Appeal E039 of 2020)  
[2024] KEHC 14534 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14534 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E039 OF 2020  
AC MRIMA, J  
NOVEMBER 19, 2024**

**BETWEEN**

**ENOCK MUKHISA WANYONYI ..... 1<sup>ST</sup> APPELLANT**

**ZADDOCK MUKHWANA FWAMBA ..... 2<sup>ND</sup> APPELLANT**

**CLEOPHAS SIMIYU WATUA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being appeals from the convictions and sentences in Criminal Case No.  
5579 of 2019 delivered by Hon. C.M Kesse (SPM) on 4th September 2020)*

**JUDGMENT**

**Background:**

1. Enock Mukhisa Wanyonyi, Zaddock Mukhwana Fwamba and Cleophas Simiyu Watua, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants herein respectively were, among other two persons, variously charged in respect of the events of the night of the 21<sup>st</sup> and 22<sup>nd</sup> October 2019 at Milimani Estate within Trans Nzoia County in the Republic of Kenya.
2. Count I was against all the Accused. It was Burglary and Stealing contrary to Section 304(2) and Section 279(B) respectively of the Penal Code. The particulars of the offence were that on the night of 21<sup>st</sup> and 22<sup>nd</sup> October 2019 at Milimani Estate at Trans-Nzoia West Sub County within Trans-Nzoia County jointly with others not before the Court broke and entered the dwelling house of Mr. Ashok Kumar Khetia with intent to steal there in the did (sic) steal from there one pistol make berretta serial number F52784Z two berretta magazines, one hundred and seventy six rounds of ammunition, one O.G.W medal, Panasonic projector remote control, a 6kg gas cylinder make total, a Samsung DVD remote control, one jiko poa, one Philips iron box, one sonny video camera, one cannon camera, one



camera make Nikon, several jewellery, a lady's handbag, two (sic) remote controls, three pairs of men shoes, a blue safari bag and cash two hundred thousand (200,000) the property of the said Mr. Ashok Kumar Khetia valued at Kshs. 772,000/-.

3. There were alternative charges to the first count. The first alternative charge was against the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. It was the charge of handling stolen goods contrary to section 322(1) of The Penal Code. The particulars for the offence of handling stolen goods were that on the 26<sup>th</sup> October 2019 at Lavington estate in Trans-Nzoia West Sub County within trans-Nzoia County otherwise that in the cause of stealing dishonestly retained total, woofer royal sound, one watch Bailin, two fridge magnet, Bluetooth music player, one neck chain, one pair of leather shoes, two pairs of rubber shoes, two extension cables, one Somali sword, one 6 x 4 mattress and two pairs of cotton gloves, Safaricom one tap card knowing or reasons to believe them to be stolen goods.
4. The second alternative charge was against the 1<sup>st</sup> Appellant. It was the offence of handling suspected stolen goods. The particulars were that on 26<sup>th</sup> October 2019 at Matisi estate in Trans-Nzoia County otherwise than in the cause of stealing dishonestly retained a LG TV set, jiko poa, in total, ladies' handbag, remote controls knowing or having reasons to believe them to be stolen goods.
5. In Count II, the 2<sup>nd</sup> Appellant faced the charge of being in possession of a firearm contrary to Section 89(i) of the Penal Code whose particulars were that on the 26<sup>th</sup> day of October 2019 at lamington area within Trans-Nzoia county without reasonable excuse had in your possession a firearm namely Beretta pistol of serial No. F52784Z in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.
6. In Count III, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants faced the charge of being in possession of ammunitions contrary to Section 89(i) of the Penal Code. The particulars were that on the 26<sup>th</sup> day of October 2019 at Lavington area within Trans-Nzoia County without reasonable excuse had in your possession ammunition to wit one hundred and ninety-eight (198) of 9 mm calibre and three Beretta magazines which raised presumption that the said ammunitions was intended to be used in a manner prejudicial to public orders.
7. The Prosecution procured a total of six witnesses in a bid to prove their case. Ashok Khetia, a Director of Khetia Drapers Limited was PW1. Constant Okumu and Joakim Baraza, a security personnel and a Chef working at Khetias testified as PW2 and PW3 respectively. Abraham Wambuyo, a Clerk Assistant at the County Government of Trans-Nzoia testified as PW4. No. 62019, Inspector Paul Kipyegon and No. 1657 Inspector John Imbayi testified as PW5 and PW6 respectively.
8. At the close of the prosecution's case, the trial Court was of the finding that a prima facie case had been made against Appellants. Accordingly, they were placed on their defences.
9. The Appellants tendered their defences without calling any witness. The 1<sup>st</sup> Appellant gave sworn testimony while the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants gave unsworn testimony.
10. Upon considering the totality of the evidence, the trial Court found all the Appellants herein guilty of the offence of Handling stolen goods contrary to Section 322(1) of The Penal Code. The Court also found the 1<sup>st</sup> Appellant guilty of being possession of a firearm contrary to Section 89(i) of the Penal Code. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were found guilty of being in possession of ammunitions contrary to section 89(i) of the Penal Code.
11. The Appellants were sentenced to 7 years' imprisonment on each conviction with the sentences running concurrently.



### **The Appeals:**

12. Each of the Appellants preferred an appeal. The 1<sup>st</sup> Appellant filed Criminal Appeal No. E039 of 2020, the 2<sup>nd</sup> Appellant filed Criminal Appeal No. E042 of 2020 and the 3<sup>rd</sup> Appellant filed Criminal Appeal No. E043 of 2020. The three appeals were subsequently consolidated with Criminal Appeal No. E039 of 2020 being the LEAD FILE.
13. The 1<sup>st</sup> Appellant herein preferred the following grounds of appeal in challenging the convictions and sentences: -
  1. That the learned trial magistrate erred in both law and in fact by failing to note that the appellant's absolute rights were violated, infringed and contravened before being arrested and before being produced to court by holding him in police custody for a long time without cogent reasons.
  2. That the Appellant humbly prays to adduce further mitigation during hearing and determination of this Appeal.
14. In his undated Petition of Appeal, the 2<sup>nd</sup> Appellant only challenged the sentence on the following grounds: -
  1. That the learned trial magistrate erred in both law and fact by failing to note that the sentence imposed upon the appellant was not concurrently served.
  2. That the Appellant humbly prays to adduce further mitigation during the hearing and determination of this appeal.
15. The 3<sup>rd</sup> Appellant on his part, challenged both the conviction and sentence on the following grounds: -
  - i. That the learned trial magistrate erred in both law and fact by convicting the appellant for the offence of burglary yet it failed to note that the ingredients forming the offence under section 304(2) and 322(1) were not proved beyond reasonable doubt.
  - ii. That the learned trial magistrate erred in law and in fact by sentencing the Appellant to serve seven years for the offence of being in possession of a firearm yet failed to note that the same was not conclusively proved.
  - iii. That the learned trial magistrate erred in law and in fact when he sentenced the appellant to a seven year term yet failed to note that indeed the appellant was not found in possession of any such ammunitions and thus the charge was not proved against him.
  - iv. That the learned trial magistrate erred in matters of law and in fact by sentencing the appellant to a term of seven years in a charge that was not proved beyond reasonable doubt and ordering the sentence to run consecutively, amounting to unfair trial and harsh sentence.
16. The Appellants variously urged their respective cases through written submissions whose import are duly considered in the analysis section of this judgment.

### **The Response:**

17. The Respondent did not file any submissions despite leave granted to do so severally.



## Analysis:

18. This being a first appeal, the duty of this Court is to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). While re-assessing the evidence, this Court is required to keep in mind the fact that it neither saw nor heard the witnesses as they testified before the trial Court. As was observed in *Ajode v. Republic* [2004] KLR 81 is imperative that due allowance is made to that end.
19. Before discharging the above duty, it is imperative that a brief appraisal of the evidence is undertaken.
20. PW1, Ashok Khetia, testified that he had travelled to Nairobi on 18<sup>th</sup> October 2019 and on 22<sup>nd</sup> October 2019, he received a phone call from his security officer, PW2, who informed him that his house had been broken into. PW1 then called Kitale Police Station. The police swiftly moved to the scene and commenced investigations. It was revealed that the intruders used a ladder to access the balcony of the house wherefrom they entered into the house through a door which was not broken into. Several items were stolen. They also cut the electric fence. Among the items stolen included a Meko gas, jiko-koa, video camera, remote control, DVD player, bag, shoes, pistol together with rounds of ammunition.
21. PW1 was on 26<sup>th</sup> October 2019 called by the County Commander with the information that the police had made recoveries. PW1 went to the Police Station where he positively identified all the items then recovered. PW1 confirmed 176 ammunitions were stolen from his house and none was recovered. He also affirmed that he found the stolen items at the station and with any of the Appellants.
22. It further was the testimony of PW1 that he had left several persons at his home including the security guard. He reaffirmed that there were no breakings into the house and that the door had been left wide open. He claimed that he had been with his employees for a period of 20 years and that they were trustworthy.
23. PW2 stated that he was a security officer at the complainant's home. He reported to work at 6.00am on 8<sup>th</sup> October 2019 and at 7.00am, a Pastor informed him that as he led his sheep to graze he saw a wooden ladder standing against the balcony of the house. PW2 confirmed that indeed that was true. PW2 then inspected the house to ascertain any breaking and/or theft. PW2 did not find any break-in. Instead, he noted that the intruders had accessed the house through the balcony door. He immediately informed PW1 and reported the case at Kitale Police Station.
24. PW3 who was a Chef at PW1's premises testified that he had been at work during the day on 21<sup>st</sup> October 2019 as from 9:00am up to 6.00pm. That he handed over the keys to PW1's brother's house and left for home. On the following day, PW3 learnt that PW1's house had been broken into. He examined the house and found that the balcony door was open, but had not been broken into. He stated that on cross-checking the household items, he established that the gas cylinder and an iron box, which he positively identified in Court, were missing. He, however, admitted that the total gas cylinder and the jiko-koa were common items in the market and anyone could own them.
25. PW4 worked as a Clerk Assistant at the County Assembly of Trans Nzoia County. He testified that on 20<sup>th</sup> October 2019 at 6.30am he received a call from the 2<sup>nd</sup> Appellant herein, who was his friend and free-hand, and was informed that his house had been broken into. PW4 reported the matter to the police where the officers accompanied him and the 2<sup>nd</sup> Appellant to PW4's house. The police found the back door/window open. They ascertained that several of his items were missing. The police then searched the 2<sup>nd</sup> Appellant's room which was adjacent to that of PW4. Surprisingly, they found PW4's items therein, among many other suspected items. The 2<sup>nd</sup> Appellant was arrested and taken to the police station alongside the items.



26. On cross-examination, PW4 confirmed that the 2<sup>nd</sup> Appellant was his employee whom he employed in July 2019.
27. It was PW5 who had received PW4's complaint on 26<sup>th</sup> October 2019. He visited the scene of crime with PW4 and the 2<sup>nd</sup> Appellant. On arrival, he found PW4's house broken into. PW5 then asked the 2<sup>nd</sup> Appellant to open his house which was on the same plot, but instead he began shaking. The 2<sup>nd</sup> Appellant eventually opened his house and several items, including those belonging to PW4, were found therein. PW5 called for reinforcement and arrested the 2<sup>nd</sup> Appellant.
28. PW5 made further discoveries in the house of the 2<sup>nd</sup> Appellant. He found two beds and a pistol. On being asked who the pistol belonged to, the 2<sup>nd</sup> Appellant stated that it belonged to his friend from Matisi. The 2<sup>nd</sup> Appellant also disclosed that there were 198 bullets were under the bed. They were recovered. When the police reinforcement arrived, the 2<sup>nd</sup> Appellant led them to his friend's house in Matisi. The said friend turned out to be the 1<sup>st</sup> Appellant herein. The police broke into the 1<sup>st</sup> Appellant's house and found several items which they suspected to have been stolen. They were jiko koa, a ladies' bag, remote control, gas cylinder and an iron box. The items were collected by the police and the 1<sup>st</sup> Appellant was later arrested.
29. PW6 was the investigating Officer. It was his evidence that he learnt of the case through the telephone conversation of 22<sup>nd</sup> October 2019 from PW1 that his house had been broken into and a firearm stolen. PW6 visited the scene in the company of other officers. They established that the home had six houses occupied by the family. He stated that they established that entry to the house was by a ladder and that that the padlock on the door was not locked.
30. PW6 produced several exhibits including jiko-koa, gas cylinder, iron box, blue safari bag, Bluetooth speaker, Samsung DVD Player, Remote control, Panasonic remote control, OGW Medal, live bullets (3 boxes), 2 magazines (13 bullets each) Berretta Pistol, ladies' handbag, firearm No. 002262, wooden ladder as PExh 1-15 respectively.
31. It was on the foregoing evidence that the Appellants were placed on their respective defences.
32. In challenging the prosecution's case, the 2<sup>nd</sup> Appellant herein testified as DW1. He gave unsworn evidence. He stated that he lived in Lavington and was a Caretaker. It was his testimony that on 25<sup>th</sup> October 2020, he was at his work place when he heard a knock at the gate. That, he found the 1<sup>st</sup> Appellant herein whom they had known each other for some time. He further stated that the 1<sup>st</sup> Appellant had employed him as his rider.
33. It was his case that the 1<sup>st</sup> Appellant had a bag whose contents he did not check. About 10 minutes later, the 1<sup>st</sup> Appellant stated that he was going to meet his employer and he left the bag behind. The 2<sup>nd</sup> Appellant's further stated that he was that very night attacked by persons he did not know, upon which he called his boss, then reported to the police station and later went back to the house with two officers. He confirmed that nothing was stolen from his house. However, upon opening the 1<sup>st</sup> Appellant's bag, they found a pistol. He affirmed pleading guilty to handling stolen goods.
34. The 3<sup>rd</sup> Appellant herein testified as DW2. He also gave an unsworn testimony. It was his evidence that in 2019 as he was going about his duties, he was interrogated by Police officers and was not arrested in possession of any items.
35. The 1<sup>st</sup> Appellant herein testified as DW5. He gave sworn evidence. It was his testimony that he does construction and business and on 23<sup>rd</sup> October 2019, he received a call from a Caretaker in Matisi where he was informed that police officers wanted to break into his house on the suspicion that there



were stolen items therein. That his house was broken into and all his household items taken away. That, he was attacked by about 20 people as he was heading to Kitale Police Station where the 2<sup>nd</sup> Appellant herein told him was being taken to. That, he was tortured at a graveyard in Kibomet and in the morning he was taken to Court where charges were read out to him.

36. The Appellants prayed that their respective appeals be allowed and they be set at liberty.
37. With the above evidence, this Court will now consider the appeals before it.
38. At the outset, the 3<sup>rd</sup> Appellant's ground of appeal to the effect that he was convicted for the offence of burglary contrary to section 304(2) and 322(1) is erroneous. No such conviction and sentence were made by the trial Court. Instead, the Appellants were variously convicted of handling stolen goods and unlawfully otherwise being in possession of a firearm.
39. Section 322(1) of the Penal Code creates the offence of handling stolen goods in the following manner: -

A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
40. The punishment for the above offence is prescribed by section 322(2) in the following terms;

A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.
41. Section 89 of the Penal Code forbids and punishes unlawful possession of firearms in the following terms: -

Possession of firearms, etc.

  - (1) Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years.
42. From the evidence, there is no doubt that several items were stolen from PW1's house. Some of them were produced as Prosecution Exhibits No. 1-14 respectively. The items included those that were recovered from the house of the 2<sup>nd</sup> Appellant.
43. When the 2<sup>nd</sup> Appellant was interrogated on the ownership of the goods found in his house, which included a firearm and ammunitions, he informed the police that they belonged to the 1<sup>st</sup> Appellant and that the 2<sup>nd</sup> Appellant readily led the police to the house of the 1<sup>st</sup> Appellant where more items suspected to have been stolen were recovered. Most of the recovered items, including the firearm, were identified and proved to belong to PW1.
44. In their defence, or otherwise, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants did not, sufficiently so, explain how they came into possession of the PW1's items.
45. The 2<sup>nd</sup> Appellant's explanation that the 1<sup>st</sup> Appellant brought the pistol in a bag and left it in his house does not absolve him of criminal culpability. If anything, it is an admission of the offence of being in possession of a firearm and ammunition since possession takes many forms and as provided for in



Section 4 of the Penal Code. Further, the 1<sup>st</sup> Appellant denied ever taking any bag to the 2<sup>nd</sup> Appellant's premises as alleged by 2<sup>nd</sup> Appellant. Further, Section 11 of the *Evidence Act* supports the prosecution's case. As such, the explanation tendered by the 2<sup>nd</sup> Appellant did not sufficiently absolve him from the possession of the bag that contained some of the items that were stolen from PW1.

46. In *Kelvin Nyongesa & 2 Other vs. Republic* [2010] eKLR, the Court in discussing the offence of possession of stolen items observed as follows: -

... Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for possession. This burden is evidential only and does not relieve the prosecution from proving its case as required standard.

47. In Criminal Appeal No. 200 of 2008 *Paul Mwita Robi -vs- Republic*, the Court of Appeal spoke to the offence of being in possession of recently stolen property in the following terms: -

... Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 11 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.

48. Deriving from the foregoing, it was, therefore, established to the required standard in law that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants committed the offences they were convicted of.

49. That said, having keenly reappraised the record, it is evident that the no wrong doing is attributable to the 3<sup>rd</sup> Appellant. The entirety of the evidence adduced by all the prosecution witnesses did not make any mention of the 3<sup>rd</sup> Appellant's culpability in respect of the charge for which he was adjudged guilty. He was not in possession of any household items. Similarly, his defence, as captured by the trial Court, was exculpatory. It was his uncontroverted evidence that he was in Lavington going about his duties when the police stopped him, interrogated and took him to the police station.

50. Apart from the above, there was no shred of evidence that linked the 3<sup>rd</sup> Appellant to the charges he faced. The trial Court, therefore, convicted and sentenced on no evidence, an error this Court has the duty to correct. As such, the conviction and sentence against the 3<sup>rd</sup> Appellant herein cannot stand.

51. As regards sentencing, the sentences rendered to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were lawful. They were also to run concurrently. The sentences cannot be alleged to be severe in the circumstances of this case. In fact, the Appellants were lucky to have been sentenced to the minimum sentences in a case of immense public interest involving a stolen firearm.

52. The appeals by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants cannot, therefore, stand.

### **Disposition**

53. In the end, this Court makes the following orders on the appeals: -

- a. The 3<sup>rd</sup> Appellant's appeal be and is hereby allowed. The conviction is quashed and the sentence set-aside.
- b. Consequently, the 3<sup>rd</sup> Appellant herein, Cleophas Simiyu Watua, is hereby set at liberty unless otherwise lawfully held.
- c. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants' Appeals are without merit and are hereby dismissed.

54. It is so ordered.



**DELIVERED, DATED AND SIGNED AT KITALE THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually and in the presence of: -**

The Appellants in person.

Miss. Kiptoo, Learned Senior Assistant Director of Public Prosecutions instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

