Losikiria v Republic (Criminal Appeal E012 of 2025)
[2025] KEHC 14187 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEHC 14187 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E012 OF 2025

PJO OTIENO, J

SEPTEMBER 24, 2025

BETWEEN

CHARLES LOSIKIRIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Introduction

1. Charles Losikira, the Appellant herein, was charge with the offense of breaking into a building and committing a felony contrary to section 306 of the Penal Code. The particulars of the offense were that the Appellant on June 4, 2023, in Louwai village, Turkana Central Sub- County, broke into a shop belonging to Ezekiel Ekero and stole a metallic box containing Kshs. 250,000/= and Safaricom credit cards valued at Kshs. 20,000/=, amounting to a total of Kshs. 270,000/=.

2. The Appellant denied the charges, the court entered a plea of not guilty subsequent to which the full trial ensued, the prosecution was adjudged to have proved its case to the requisite standards, the appellant was convicted and sentenced to pay a fine of Kshs. 217,000/=, and in default of paying such fine, he was condemned to serve three years in prison.

3. Being dissatisfied with the said judgement, the Appellants preferred an appeal vide Petition of Appeal dated 3rd July 2025. The grounds listed in the petition of the Appeal and upon which the Appeal is premised are as follows:

    a. The learned Magistrate erred in fact in convicting the accused person against the weight of the evidence and materials placed before him.

b. The Learned Magistrate erred in law and in fact in finding that no doubt had been raised to disturb the prosecution's case and in holding that the prosecution had discharged its burden to prove the case beyond reasonable doubt.

c. The learned magistrate erred in law in convicting the appellant without the Prosecution having proved all the ingredients of the offence.

d. The sentence imposed on the appellant was contrary to Section 28 of the Penal Code, thus unlawful, harsh, excessive and punitive.

The mandate

4. Being a first appellate court, the court is obliged to subject the entire evidence recorded at the trial, as a whole, to a fresh and exhaustive examination and reappraisal with a view to arriving at its own independent decision. This involves re-evaluating the evidence, weighing any conflicting testimonies, and drawing new conclusions. See Okeno vs. Republic (1972) EA 32.

The Evidence

5. The prosecution's case at the trial court was premised on the evidence by three witnesses. The first witness was complainant, Ezekiel Ekeno (PW1) testified that he was informed by a student that his shop had been broken into at night. He stated that he and other villagers followed footprints to a river where they found the empty metallic box. It was his case that the accused was a well-known person in the village, his former student, and a frequent visitor to his shop. That the accused had stayed with him and therefore was familiar with his operations and where he kept valuables. It was his case that the accused's brother, Jackson Ekeno (PW2), traced the Appellant to Lodwar and arrested him. Upon his arrest, an amount of Kshs. 53,000/= was recovered from the Appellant. He also stated that a polythene paper that he used to keep the money and a paper with his telephone number were found in the possession of the accused at the time of the arrest.

6. PW2, Jackson Ekeno was first declared a hostile witness by the court after his initial testimony appeared to contradict his statement. He was thus ordered detained for two weeks. In that first appearance the witness told the court that he was on his own errands and designs at Lodwar when he sported the appellant, personally arrested him and handed him over to the police.

7. In a subsequent appearance, he stated to have received a call from the complainant to the effect that the appellant had stollen from him, followed the appellant to Lodwar, and upon arrival, found the accused having been arrested. Upon cross examination, he reiterated that he found that accused already arrested.

8. The investigating officer, P.C. Robert Maina (PW3), testified as the third and last witness and on behalf of the original investigating officer in the matter who had since been transferred. He stated that the complainant reported the break-in and that Jackson Ekeno, the accused's brother, was the one who followed and arrested the Appellant in Lodwar, where Kshs. 53,000/= was recovered. The witness produced a photograph of the broken safe as well as that of the recovered money as exhibits which were marked PEXH 1(a-g).

9. That evidence marked the close of the prosecution's case which the court adjudged to have established a prima facie case and put the appellant on his defence.

10. When put on defence, the Appellant gave sworn evidence, denying the charge. He stated that he was in Lodwar to purchase a motorcycle and had Kshs. 75,000/= with him, but that he was robbed of Kshs.

55,000/= and his phone by two boys. He denied being arrested by his brother and claimed he was taken to the police station after the robbery.

11. The appellant called one witness, Wilson Nawar (DW2), who corroborated the evidence by the appellant that the Appellant had sold fish and intended to buy a motorcycle in Lodwar.

12. The trial court, in its judgment, considered the Appellant's relationship with the complainant, his immediate disappearance after the incident, the fact that he was arrested by his own brother, the recovery of some money together with a paper with complainant's contact formed a sufficient basis for a conviction. The court dismissed the Appellant's defense as unconvincing, stating that he did not give good account on how he got the money.

13. The Appeal was canvassed by way of written submissions. Both sides filed their submissions and the court has had the benefit of reading both and has derived valuable benefit therefrom.

Analysis and Determination

14. Having carefully reviewed the evidence recorded as presented at trial, the trial court's judgment, the Appellant's petition and rival submissions filed, the court identifies one key issue for determination to be; whether the prosecution proved its case beyond reasonable doubt.

15. To start with, it is a well-established principle of criminal law that the prosecution bears the burden of proving every essential ingredient of the offence beyond a reasonable doubt. This standard is not one of mathematical certainty but requires the evidence to be so convincing that no other logical conclusion can be drawn from the facts except that the accused committed the crime.

16. Tritely, the standard and burden of proof is upon the prosecution to prove all the ingredients beyond all reasonable doubt. The High Court in Eldoret in Republic vs Koech & Another (Criminal case 63 of 2019) [2024] KEHC 13581 (KLR) while reiterating the English law position on the principle of 'reasonable doubt' emphasized as follows:

> " It is the business of the prosecution to bring home the guilt of the accused to the satisfaction of the minds of the jury; but the doubt to the benefit of which the accused is entitled to must be such as rational thinking, sensible man fairly and reasonably entertain, not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle skepticism. There must be doubt which a man may honestly and conscientiously entertain."

17. Closer home, In Kioko versus Republic (1983) KLR 289, the court of appeal held that the law does not require the accused to prove his innocence save in a few exceptional cases under Section 111 of the *Evidence Act*. The test remains that of beyond reasonable doubt not of any doubt at all.

18. Section 306 of the Penal Code upon which the Appellant was charged and convicted envisages that for a conviction to be inferred, the prosecution must prove two distinct elements: first, that a person broke and entered a specified type of building, and secondly, that they committed a felony therein.

19. From the evidence of the three witnesses, it emerges that this was purely a case based on circumstantial evidence. The principles upon which a court may safely convict based on circumstantial evidence are now very well settled in innumerable. For this court, the decision, it is enough to cite Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, where the Court of Appeal stated as follows:

> " However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence

can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21:

"It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

20. Equally, in Abanga alias Onyango v R Cr. App. No 32 of 1990, the court held:

" It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;

(iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else." (Emphasis added)

21. Applying the above tests to the facts of this case, the court notes that the trial court's findings of the Appellant's familiarity with the complainant's operations was a key factor in the commission of the crime. However, it's the court's view that while this fact was established, it does not, in and of itself, prove that the Appellant committed the offense. It merely establishes an opportunity. The trial court also relied on the Appellant's immediate disappearance from the scene yet there was no evidence when he was last in the premises from where the alleged beak in and theft was allegedly committed. The prosecution never placed the Appellant at the scene of the crime in the first place.

22. Further, the court observes that the Appellant offered an explanation, by sworn testimony, for his whereabouts. In his defence, he stated to have been in Lodwar. While the trial court found this defense unconvincing, it did not provide a sufficient basis for dismissing it and instead relied on a speculative conclusion regarding his whereabouts. The court finds that the evidence by the appellant wholly displaced the otherwise shaky evidence by the prosecution that to this court never established a prima facie case as define in law.

23. The court further takes note of the absence of a definite the link between the recovered items produced by way of photographs and the stolen property. It is not clear from the evidence as to who took the photographs and if there was the mandatory certificate.

24. More importantly, while PW1 talked of a paper with his contacts, neither PW2 nor 3 ever adverted to such a document. In fact, that document was never produced at all in evidence.

25. While the recovery of Kshs. 53,000/= was treated as unerring circumstantial evidence pointing towards the guilt of the accused, no evidence was led to show that that money was actually part of the money stollen from the complainant. To treat the alleged recovery as the connecting code, was not supported by evidence but rather speculative. Speculation or mere suspicion is never a basis to found a conviction.

26. In addition to the above three glaring gaps, the court notes that both PW2 and 3 testified that it was PW2 who followed and arrested the Appellant in Lodwar. PW2's in own testimony was that it is not him who arrested the Appellant. He ambivalently stated to have bumped onto the appellant or followed him to Lodwar, and upon arrival, found him having been arrested. That state of evidence raises a reasonable doubt the veracity and credibility of the prosecution's case. It remains the law that where there exists a reasonable double, the same must be resolved in favour of the accused.

27. In upshot, the court finds and holds that the chain of circumstantial evidence presented by the prosecution was not complete and never irresistibly and unerringly pointed to the guilt of the appellant. The inconsistencies in the witness testimonies and the unproven nature of key facts break the chain thus introducing a reasonable doubt in the mind of the court whether it was really the accused who committed the alleged offence.

28. Accordingly, the court concludes that the trial court's conviction was not based on proof beyond a reasonable doubt but on the aggregation of suspicions. It stands out as wholly unsafe and must be upset because the law demands so. It is quashed and the sentence premised upon it set aside.

29. For the foregoing reasons, discussions and conclusions, the court makes orders to the effect that the conviction entered against the Appellant was unsafe and is therefore quashed. The sentence imposed on the Appellant is hereby set aside and the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF SEPTEMBER, 2025

PATRICK J O OTIENO

JUDGE