



**Republic v Daudi (Criminal Case E598 of 2023)  
[2023] KEMC 299 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEMC 299 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
CRIMINAL CASE E598 OF 2023  
AT SITATI, SPM  
NOVEMBER 21, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**KELVIN MWENDA DAUDI ..... ACCUSED**

**JUDGMENT**

1. The accused person was charged in the 3 Main Counts and 1 alternative charge.
2. In Count I, he was charged with the offence of stealing contrary to section 268 as read with section 275 of the *Penal Code*. The particulars were that on 27<sup>th</sup> October, 2023 at 1930hours at Kithirune market within Imenti Central Sub County of Meru County he stole meat worth Kshs 850/=-, smartphone C30 valued at Kshs 20,000 and a knife worth Kshs 250/= the property of Lilian Gakii Mwirigi.
3. In the Alternative Count, he was charged with the offence of handling stolen goods contrary to section 322(2) of the *Penal Code*. The particulars were that on 29<sup>th</sup> October, 2023 at 1745hours at Kithirune market in Imenti Central Sub-County of Meru County, otherwise than in the course of stealing dishonestly phone make Nokia C30 valued at Kshs 20,000/= the property of Lilian Gakii Mwirigi knowing or having reason to believe that it was stolen property.
4. In Count III, he was charged with the offence of malicious damage to property contrary to section 339(1) of the *Penal Code*. The particulars were that on 27<sup>th</sup> October, 2023 at about 1930hours in Kithirune market within Imenti Central Sub-County of Meru County, he wilfully and maliciously damaged the phone screen of Nokia C30 the property of Lilian Gakii Mwirigi.
5. In Count IV, he was charged with the offence of creating disturbance contrary to section 95(1)(b) of the *Penal Code*. The particulars were that on 27<sup>th</sup> October, 2023 at 1930hours at Kithirune market in Imenti Central Sub-County within Meru County, he created disturbance in a manner likely to cause a breach of the peace by chasing Lilian Gakii Mwirigi while armed with a stick.



6. The accused person denied all the charges. He represented himself at the trial which was conducted by Prosecution Counsel Kibiti Dixon.

### **The DPP'S Case**

7. PW1 Lilian Gakii Mwirigi told the court that on 27<sup>th</sup> October, 2023 at 730pm she was attending to her customers at her pork butchery when the accused person stormed in and started shouting at her in a loud voice. He demanded an immediate repayment of his money –Kshs 135/= which he owed her. PW1 told the court that she asked him to let her finish with the client first but he persisted and grabbed her butcher knife, the client's pork worth Kshs 850/- which she had already weighed for her and then snatched her phone. In the course of the grab, he smashed the phone on the floor and cracked its screen. There was Kshs 2,300 on the phone cover which he took away too.
8. Following these events, she alerted the local chief who directed her to the police. She reported that same evening at Githongo Police Station. The accused was arrested 2 days later and her phone recovered. The rest of her butchery equipment was not recovered during the arrest.

### **In cross-examination, the following came to light:**

1. On previous days, she had bought cooking as worth Kshs 1,200/= on credit but cleared the debt without any problems.
2. The clients who were in the butchery at the time included Mwenda Njore and Kithinji Dennis.
3. It was true that she owed the accused person Kshs 135/- for maize flour, tomatoes and onions taken from his shop.
4. At the same time, the accused person owed her butchery Kshs 40 for pork which he had eaten on credit.
5. The accused person took away all her tools of trade namely the butchery knife which she used for cutting up the pork and her smartphone with which she used to contact her other clients for deliveries of pork.
6. She declined to pay his Kshs 135/- as she wanted a reconciliation of accounts before clearing the correct amount.
7. To date the butcher knife has not been surrendered back to her.
8. The accused person ate the client's pork worth Kshs 850/= since he never returned it to her.
9. The phone with its broken screen was later recovered from the accused person during his arrest by the police.
9. In re-exam, PW1 affirmed that the accused person unlawfully retained the butchery knife and ate the client's Kshs 850/= worth of pork.
10. PW2 Dennis Kithinji told the court that on 27<sup>th</sup> October, 2023 he was eating pork in the hotel run by the Complainant herein when he heard loud shouting and noise from the front side where the butchery was located. He got up to go and see what was making such a loud noise only to find the accused person shouting unnecessarily at the complainant who was in the butchery attending to clients.
11. PW2 tried to calm the accused person down but he ignored his pleas and instead snatched her smartphone, butcher knife and pork worth Kshs 850/= belonging to a client. Then he went away with them.



12. In cross-examination, his testimony remained firm and was unshaken.
13. PW3 Kenneth Kiogora told the court that he was eating pork in the hotel side of the butchery when he heard loud shouting and noise from the butchery side. When he went over, he found the accused person shouting unnecessarily at the complainant. He smashed her phone on the floor as he attempted to grab it. He also took her Butcher knife and pork worth Kshs 850/- which was already packed for another customer.
14. His testimony was unshaken during the cross-examination. He affirmed that the accused person was well known to him and the place was well lit up by electric bulbs.
15. PW4 S/no. 243676 Police Constable Napoya Mustapha of Githongo Police Station testified as the Investigating Officer. He told the court that on 27<sup>th</sup> October, 2023 at 803pm the complainant lodged her report about the theft and disturbance made by the accused person at her butchery. He recorded the witnesses' statements the following day and effected the arrest of the accused person 2 days later during which the accused person was found with the complainant's stolen phone. PC Napoya produced the recovered phone and an inventory as P.Ex.1 and P.Ex.2. respectively.
16. At that stage, the DPP closed their case whereupon the Court found that the Accused person had a case to answer on each count. He was put to his defence.

### **The Defence Case**

17. Kelvin Mwenda Daudi gave sworn defence and called no witness. He admitted that he took the above listed items using the reason that the complainant owed his Kshs 135/-. He then closed his defence. No other witness was called by the Accused person.
18. The duty of this Honourable Court is to determine whether or not the DPP has proved the charges beyond any reasonable doubt on each count.

### **Determination**

#### **Count I: Stealing Contrary to Section 268 of the Penal Code**

19. The ingredients of stealing under section 268 are set out as follows:
  268. Stealing
    - (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
    - (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents:
      - a. an intent permanently to deprive the general or special owner of the thing of it;
      - b. an intent to use the thing as a pledge or security;
      - c. an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
      - d. an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;



- e. in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;
20. This section was extensively discussed by the High Court in *Sammy Kasaine Ole Kantai –v- Republic (2022)*eKLR (F. Gikonyo J.) and this court is thereby guided and applies the principles discussed therein as hereunder.
21. From the tested evidence, this Honourable Court finds that there is direct and overwhelming evidence to prove that he took the packed pork worth Kshs 850/=, butcher knife and smartphone worth Kshs 20, 000/- from the complainant. While admitting to the taking these items in his defence, he says that this did not amount to theft because he took these items as an attachment for the unpaid Kshs 135/= which she owed him. The question that arises is whether or not this defence amounted to the legal defence of claim of right or colour of right under section 268 of the *Penal Code*.
22. It was uncontested that the 2 items seized by the accused person were tools of trade: the butcher knife was to be used to cut up the pork in the butchery while the phone was being used to generally contact suppliers and clients for deliveries. In the Common Law as well as our statutory law- section 44 (1)(ii) of the *Civil Procedure Act* to be precise, a debtor’s tools of trade are strictly protected from attachment whether civil or criminal and therefore, the Accused person could not legally rely on this defence of claim of right or lien over tools and equipment of trade used by Lilian Gakii at her pork butchery. This leads to the collapse of the defence because the law does not recognize the seizure of the tools of trade.
23. The stronger evidence showing and that proves his criminal intention was that he also took away a client’s packed pork worth Kshs 850/- and went away with it. He consumed that package and thereby permanently deprived the owner of the packed pork. This confirmed beyond any doubt that his intention was theft. In the result, he is guilty as charged in Count I and is convicted under section 215CPC.

## **Count II: Malicious Damage to Property**

24. The elements of the offence of malicious damage to property were extensively set out by the High Court in the case of *Republic v Robert Kaibi Baraba [2020]* eKLR (F. Gikonyo J.) where the learned Judge held as follows:

Elements of the offence

15. According to Section 339(1) of the *Penal Code*;

Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.”

16. I am content to state that, elements of the offence of malicious damage to property under section 339(1) of the PC were stated in the case of *Simon Kiama Ndiagui vs. Republic (2017)* eKLR, as follows-

In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third that the destruction was willful and therefore there



must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.

17. In the same case (ibid), the Learned Judge stated that: -

I cannot find any suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state.”

18. In Republic vs. Jacob Mutuma & another (2018) eKLR, the rationale for not tying down the offence of malicious damage to property to proof of ownership of the property was explained in the following terms –

In my view, it is not difficult to see why the offence is not necessarily tied down to ownership of particular property. It is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands.”

25. On this count, the evidence is also direct and overwhelming. His action of snatching and smashing the phone proved his intention was to destroy the complainant’s phone by his wilful action. He did not address this charge in his sworn defence and left the DPP’s clear evidence unchallenged. He is guilty as charged on it and is convicted under section 215 of the *Criminal Procedure Code*.

### **Count III: Creating Disturbance**

26. Section 95(1)(b) of the *Penal Code* provides:

Any person who brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.

27. This legal definition was discussed in the case of Jacob Nthiga Ngari –v- Republic (2014)eKLR (Muchemi J.) where the learned Judge had this to say:

For the offence to be proved, the prosecution must prove that there was a brawl caused by the accused in that the accused creates disturbance in such a manner as is likely to cause a breach of the peace. A brawl is defined as a rough or noisy quarrel or fight.”

28. In the present case, there was direct and clear evidence showing that his noisy brawling and quarrelling with the complainant created such a disturbance that disturbance caused PW2 and PW3 who were peacefully enjoying their pork meals, to get up from the back side of the hotel and dash to the front side butchery to see who was disturbing the peace. He is guilty as charged and is convicted under section 215CPC. Right of appeal is 14 days.

**DATED, READ AND SIGNED AT GITHONGO THIS 21<sup>ST</sup> NOVEMBER, 2023**

**HON. T.A. SITATI**



**SENIOR PRINCIPAL MAGISTRATE  
GITHONGO LAW COURTS**

