



REPUBLIC OF KENYA



**Mdigo v Republic (Criminal Appeal E052 of 2023)
[2025] KEHC 15278 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E052 OF 2023
AN ONGERI, J
OCTOBER 30, 2025**

BETWEEN

ARNEST MSAFIRI MDIGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of Hon. C. L. Adisa (RM) in
Taveta PMCC No. 357 of 2019 delivered on 12th November 2019)*

JUDGMENT

1. The Appellant Arnest Msafiri Mdigo was charged alongside another with house breaking contrary to Section 304(1) (b) and stealing contrary to Section 279 (b) of the Penal Code.
2. The particulars of the offence were that on 26th June 2019 at an unknown time at Kiwalwa village Taveta Sub County within Taveta County, the person jointly with his co-accused broke and entered the building used as a dwelling house of George Augustino Lekaroyo and stole a sack of maize, a blue mattress and assorted clothes all valued at Kshs. 36,400/= the property of George Augustino Lekaroyo.
3. The Appellant was charged with an alternative charge of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code.
4. The prosecution evidence was that PW1, the mother of the complainant discovered on 26th June 2019 at 8a.m that the house of the complainant had been broken into and 50kgs of beans stolen together with 70kg maize and clothes.
5. PW1 called PW2 Liverson Peter who responded and the matter was reported to the police.
6. On 29th June 2019 PW1 received a report from Hashim Karea Sengodo who was the Appellant's co-accused that the Appellant wanted him to buy a mattress at Kshs. 500/=



7. PW1 proceeded at the house of HASHIM were the mattress belonging to the complainant was recovered.
8. The Appellant was arrested together with HASHIM and they were charged in court.
9. HASHIM said in his evidence that the mattress was taken to him by the Appellant.
10. The Appellant did not give any evidence.
11. The trial court convicted Hashim with the offence of handling stolen property and he was sentenced to 2 years imprisonment.
12. The Appellant was convicted with the offence of house breaking and stealing and he was sentenced to 7 years imprisonment on each.
13. The sentences were to run concurrently.
14. The Appellant has appealed against the Judgment on the following grounds:-
 - I. That the Appellant never pleaded guilty to the preferred charge and still stands by his position.
 - II. That the trial Magistrate erred in both law and fact by convicting the Appellant without conclusively ascertaining the age of the complainant.
 - III. That the trial Magistrate erred in both law and fact by holding that penetration was established.
 - IV. That the trial Magistrate erred in law and fact by disregarding the significant and material contradictions and inconsistencies in the evidence, which rendered the entire testimony of the witnesses untenable.
 - V. That the trial Magistrate erred both in law and fact by shifting the burden of proof under Section 107 of the Evidence Act onto the Appellant.
 - VI. That the learned trial Magistrate erred in law and fact by rejecting the Appellant's Alibi Defence without providing cogent reasons for doing so.
15. The parties filed written submissions as follows:- The appellant submitted that his conviction for housebreaking and stealing should be overturned as the prosecution failed to discharge its legal burden of proving the case against him beyond a reasonable doubt.
16. The core of the appeal rests on the insufficiency and unreliability of the evidence presented.
17. The prosecution's case was fundamentally flawed by a lack of direct and corroborative evidence.
18. That the initial report to PW1, which implicated the appellant, was based on information from an unknown and uncalled witness, rendering it inadmissible hearsay.
19. The allegation that the appellant was seen selling beans was, on its own, inadequate to prove that those beans were the specific ones stolen from the complainant's house.
20. Furthermore, the evidence linking the appellant to the stolen blue mattress was tenuous and unsubstantiated.
21. The mattress was not recovered from the appellant's possession but from that of the first accused.
22. That the prosecution's reliance on the testimony of this co-accused was misplaced, as it was not corroborated by any independent evidence.



23. A co-accused's statement, especially one made under circumstances where they might be attempting to exculpate themselves, is inherently unreliable and insufficient to sustain a conviction.
24. Further, the appellant submitted that the prosecution failed to prove the essential element of ownership of the stolen property.
25. The named complainant, George Augustino Lekioyo, was never called as a witness.
26. That consequently, there was no testimony to establish that the recovered mattress was his property, that it had been stolen from his dwelling, or that it was recently stolen.
27. The principles set forth in *Erick Otieno Arum vs Republic* for convicting on the basis of possession of stolen property were therefore not met.
28. The investigation was further undermined by the fact that critical aspects were left to PW1, a layperson, rather than being conducted by the police.
29. In summary, the appellant submitted that the prosecution's case was riddled with evidential gaps, hearsay, and a failure to prove core elements of the charges.
30. That the conviction rests on an unsafe foundation. The appellant therefore prays that this Honourable Court allows the appeal, quashes the conviction, and sets aside the sentence
31. The Respondent submitted that the Appellant's conviction and sentence should be upheld because they were based on evidence that proved his guilt beyond a reasonable doubt.
32. That the prosecution established that the complainant's premises were broken into and items, including a mattress and beans, were stolen.
33. Further, that the Appellant was connected to the crime through a tip-off, which led to the discovery of the stolen mattress at his accomplice's house; the accomplice confessed that the Appellant had given it to her to sell.
34. Furthermore, the Appellant was identified by witnesses, and he chose not to present any evidence in his own defense or cross-examine the prosecution's witnesses during the trial.
35. Consequently, the Respondent maintains that the trial court's judgment was sound and justified.
36. The issues for determination in this appeal are as follows;
 - i. Whether the prosecution adduced sufficient evidence to prove the charges of housebreaking and stealing against the Appellant beyond a reasonable doubt.
 - ii. Whether the conviction was safely founded upon the evidence presented.
37. The court has carefully considered the record of appeal, the submissions of both parties, and the applicable legal principles.
38. The evidence presented by the prosecution was fraught with fatal inconsistencies and did not meet the requisite standard of proof.
39. The prosecution's case rested on a chain of circumstantial evidence linking the Appellant to a stolen mattress.
40. However, this chain was broken at several critical points. Firstly, the evidence regarding the recovery of the mattress was hearsay.



41. The initial report to PW1 from Hashim Karea Sengodo, the co-accused, that the Appellant wanted to sell a mattress, was inadmissible as it was tendered to prove the truth of the fact that the Appellant was in possession of the mattress.
42. This offends the hearsay rule, a fundamental principle of evidence law designed to ensure reliability, as the maker of the statement was not available for cross-examination at that point.
43. Secondly, the only direct evidence implicating the Appellant came from his co-accused, Hashim, who testified that the mattress was given to him by the Appellant.
44. It is trite law that the evidence of an accomplice must be treated with the greatest caution. It is unsafe to base a conviction solely on the evidence of an accomplice unless it is corroborated in material particulars implicating the accused.
45. In this instance, there was no independent evidence to corroborate Hashim's claim.
46. His testimony was inherently unreliable, given his own interest in exculpating himself, and it was legally insufficient to ground a conviction against the Appellant.
47. Thirdly, the prosecution failed to prove a crucial element of the offence of handling stolen goods, which forms the basis of the circumstantial case: that the property was, in fact, stolen.
48. The named complainant, George Augustino Lekaroyo, was never called as a witness.
49. Consequently, there was no testimony to establish that the recovered mattress was his property, that it had been stolen from his dwelling, or its value. This failure constitutes a fundamental evidential gap.
50. The principles for convicting on the basis of recent possession of stolen property require proof that the property was stolen, that shortly after it was stolen it was found in the possession of the accused, and that the accused failed to account for such possession.
51. In the instant case, the first leg of this test was not met. The prosecution did not discharge its legal burden of proof as stipulated under Section 107 of the *Evidence Act*.
52. Furthermore, the investigation was shoddy and left significant inquiries to a layperson, PW1, rather than being conducted by the police. This further undermined the integrity of the evidence gathered.
53. In light of these cumulative deficiencies—the reliance on hearsay, the uncorroborated evidence of an accomplice, and the failure to prove the stolen nature of the property—the conviction is rendered unsafe.
54. The learned trial magistrate erred in law by relying on this weak evidence to find the guilt of the appellant was proved beyond a reasonable doubt.
55. The Appellant's decision to remain silent did not in any way relieve the prosecution of its primary burden to establish a prima facie case.
56. For these reasons, the appeal is allowed. The conviction is hereby quashed and the sentence of seven years' imprisonment is set aside.
57. The Appellant be and is hereby set at liberty unless otherwise lawfully held for any other reason.
58. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF OCTOBER 2025 IN OPEN COURT AT VOI HIGH COURT.



ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

.....for the Appellant

.....for the Respondent

