



REPUBLIC OF KENYA



KENYA LAW
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**John v Republic (Criminal Appeal E016 of 2025)
[2025] KEHC 16347 (KLR) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E016 OF 2025
JN ONYIEGO, J
NOVEMBER 13, 2025**

BETWEEN

SAMSON MWENDWA JOHN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence by Hon. R. Lemayan – RM,
delivered on 19.03.2025 in Garissa CM’s Court in Criminal Case No. E621 of 2024)*

JUDGMENT

1. The appellant herein was charged with the offence of stealing a motor cycle contrary to section 278(A) of the Penal Code. The particulars being that on 19.12.2024 at around 0326hrs at Iftin Location, Garissa sub County within Garissa County, together with another not before the court he stole one motor cycle registration number KMGF 464 P chassis no. MD625AE30M1K00856 make TVS HLX 1500 CC blue in colour worth Kes. 262,742/- the property of James Oluoch Oduor.
2. He also faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code. The particulars were that on 19.12.2024 at around 1020hrs at Nguni market centre area, Mwingi North Sub County within Kitui County, together with another not before the court, otherwise than in the course of stealing, he dishonestly retained one motor cycle registration number KMGF 464 P chassis no. MD625AE30M1K00856 make TVS HLX 1500 CC blue in colour worth Kes. 262,742/- the property of James Oluoch Oduor knowing or having reasons to believe it to be stolen property.
3. A plea of not guilty was entered both on the main charge and the alternative count thereby prompting the matter to proceed for hearing.
4. PW1, James Oluoch Oduor, a bodaboda rider residing at Bula Ijara, testified that he owns a motorcycle registration number KMGF 463P, which he acquired on credit from Watu Credit Limited. That on the evening of 19.12.2024, at around 8 p.m., he parked the motorcycle outside his house and secured



it to a tree using a chain and padlock before going inside to eat supper and sleep. At midnight, he stepped outside for a short call and confirmed the motorcycle was still in place. However, at around 3 a.m., he discovered the motorcycle was missing, although the gate was open and the chain and padlock remained where he had left them.

5. He stated that he immediately contacted Watu Credit through their emergency number who advised him to report the matter to the police. He proceeded to Iftin Police Station to file the report. Later, Watu Credit informed him that the motorcycle had been spotted at Madogo area thus prompting him to visit Madogo Police Station. The officers in madogo advised him to liaise with the police along the route, but all in vain.
6. Subsequently, he received another call from Watu Credit indicating that the motorcycle had been intercepted in Nguni area. He returned to Iftin Police Station, where the OCS contacted the OCS at Nguni Police Station. Upon traveling to Nguni, he found and positively identified his motorcycle. He confirmed that two individuals had been arrested in possession of the motorcycle and recognized one of them in court as the appellant herein. He added that he saw the appellant for the first time upon arrest.
7. During cross-examination, he stated that one of the individuals arrested alongside the accused had since passed away. He reiterated that the motorcycle was stolen from outside his residence in Bula Ijara while he was asleep and that he did not witness the theft or see who took it. He acknowledged having several neighbors but none of them could provide useful testimony. He confirmed recovering the motorcycle at Nguni Police Station and admitted he did not know the circumstances under which the accused was arrested. He emphasized that he had no testimony from the deceased linking the accused to the theft.
8. PW2, Police Constable Solomon Tukei testified that he was assigned to investigate a case involving a stolen motorcycle reported at Iftin Police Station on 29,12.2024 at around 3:26 a.m. He stated that the complainant had purchased the motorcycle through Watu Credit Ltd., which was actively tracking its location. According to the witness, Watu Credit later informed the complainant that the motorcycle had been sighted along the Garissa–Mwingi Road. Officers stationed along the road were contacted and the complainant was subsequently notified that the motorcycle had been found in Nguni.
9. He explained that he, along with Police Constable Yussuf, Corporal Makau, and Police Constable Glein, traveled to Nguni and arrived at approximately 9:30 a.m. There, two suspects—Justus Kimwele and Samson Mwendwa, the appellant herein—were handed over to them. He noted that both suspects had been subjected to mob justice before being rescued by police and taken to hospital. The officers were also given the recovered motorcycle, registration number KMGF 464P, and transported both the suspects and the motorcycle back to their station.
10. He further stated that on 20.12.2024, the suspects complained of pain and were taken to Garissa Referral Hospital. The following day, Justus Kimwele continued to experience pain and was returned to the hospital, where he died while receiving treatment. He confirmed that the appellant present in court was one of the individuals they had transported from Nguni. He added that the complainant had provided a loan agreement with Watu Credit Ltd. as evidence of ownership.
11. During cross-examination, he affirmed that he was the investigating officer and that his inquiries revealed the accused and the deceased had stolen the motorcycle. He acknowledged that there was no testimony from the deceased but maintained that the accused was found in possession of the stolen motorcycle. Upon re-examination, he reiterated that the accused had been charged with theft of a motorcycle and handling stolen property.
12. PW3, No. 250329 Police Constable Dennis Wepukhulu testified that on the morning of 19.12.2024, at around 10 a.m., he was on patrol along the Garissa–Nairobi Road with his colleague, Police Constable



- Kemboi and their driver. He stated that they received a call from the Deputy Officer Commanding Station (OCS) at Nguni, informing them of a report from Garissa regarding a missing or stolen motorcycle bearing registration number KMFG 464P, a blue TVS model, believed to be headed along the Nairobi route.
13. That approximately 20 to 40 minutes after receiving the alert, the officers spotted the motorcycle carrying a pillion passenger. They pursued it and, at about 200 meters from the market they found that the motorcycle had been stopped and the two riders were being assaulted by members of the public. The officers intervened, halted the attack and took the two individuals to Nguni Health Centre for treatment. After the duo were treated and discharged, the officers returned them to the station and secured the motorcycle. Communication was then made with Garissa Police for the suspects' collection. He noted that he could not identify who was riding the motorcycle at the time but confirmed that the appellant present in court was one of the individuals handed over to Garissa Police.
 14. During cross-examination, the witness affirmed that the appellant was found on the motorcycle reported to have been stolen. He added that the officers arrived at the scene within five to ten minutes and found the appellant on the ground being attacked by the public. He emphasized that the motorcycle was indeed stolen and that the appellant was from Garissa hence not his home area.
 15. PW4, Number 118215 Police Constable Elias Kiptoo Kemboi, attached to Nguni Police Station in Kitui County, testified that on 19.12.2024, he was on duty with PC Dennis Wepukhulu and their driver when they received a report from Deputy OCS Senior Sergeant George Majani. The report, originating from Garissa, indicated that a stolen motorcycle was being rode towards Mwingi.
 16. Acting on this information, the officers pursued the motorcycle which bore registration number KMGF 464 P. That within five to ten minutes, they located the motorcycle and found that the two individuals riding it had been stopped and attacked by members of the public. The officers intervened, rescued the individuals and transported them to the police station before taking them to a health centre for treatment. After being treated and discharged, the individuals were returned to the station and later transferred to Garissa (Iftin) Police Station. During cross-examination, he stated that they found the appellant in possession of the stolen motorcycle alongside another person.
 17. PW5, Ibrahim Chesire, a Risk Asset Recovery Officer at Watu Credit Ltd based in Kitui, reported that on the morning of 19.12. 2024, their client James called to report that his motorcycle had been stolen in Garissa and that he had already informed the authorities. That upon checking their system, he found the tracker was still active and the motorcycle was moving along Garissa Road toward Mwingi. He explained that he coordinated with officers at Iftin Police Station and continued tracking the motorcycle's movement.
 18. He added that they contacted police at Ukasi Road Block, unfortunately, the motorcycle had already passed that location. Eventually, they managed to reach officers in Nguni area, where the motorcycle was intercepted. During cross-examination, he clarified that his role was limited to tracking the asset and that he did not visit the scene nor did he know who had stolen the motorcycle.
 19. DW1, Samson Mwendwa John stated that on the morning of the day in question, he was at home in Kabati, as was his usual routine before traveling to Mwingi Town. That day, he went to the stage intending to board a matatu but instead opted for a motorcycle whose rider was unknown to him. While en route, they encountered police officers on the road, but the rider failed to stop. That he noticed that several boda boda riders were following them and the rider diverted onto a murrum road.



20. During this diversion, they fell off the motorcycle. That members of the public apprehended and attacked them, despite his attempts to explain that he was merely a passenger. The police from Nguni arrived at the scene and arrested both of them, later transferring them to Iftin Police Station.
21. Upon cross-examination, he clarified that he does not live in Garissa and had never been there prior to his arrest. He reiterated that he was in Kabati on the morning of the incident and boarded the motorcycle there. He emphasized that he did not know the rider and that the police officers involved were from Nguni Police Station. He was arrested in Nguni, which he described as being about a ten-minute walk from Kabati. He could not recall the motorcycle's make but remembered it was blue in color.
22. It was his evidence that he informed the crowd that he was merely a passenger, although he had no witness to support his claim. He mentioned that his sub-location is Mugwika and that he did not know the name of the person arrested alongside him. He firmly denied stealing the motorcycle.
23. Upon being convicted, he was sentenced to five (5) years' imprisonment and that the sentence to run from the date of arrest.
24. Being aggrieved by the said conviction and sentence, he preferred the instant appeal on the following amended grounds:
 - i. That the learned trial magistrate erred in law and fact in convicting while relying on prosecution's evidence which had gross contradictions and inconsistencies.
 - ii. That the learned trial magistrate erred in law and fact in shifting the burden of proof to him contrary to the laid down tenets of criminal law.
25. The appeal was canvassed by way of written submissions.
26. The appellant in his submissions dated 25.12.2025 urged that the trial magistrate convicted him notwithstanding the fact that the evidence of the prosecution was full of contradictions and inconsistencies. That the credibility of the prosecution witnesses was impeachable and therefore, it was unsafe for the trial court to rely on such evidence to convict him. He urged that there was no direct evidence that linked him to the theft of the motor cycle in question. That he was only found in possession of the motor cycle as it remained unknown the person who was responsible for stealing the same.
27. According to him, one Justus Kimwele, deceased was the alleged thief who stole the motor cycle and who at the material time of arrest was the rider as he was simply a passenger. He thus contended that, the burden of proving his innocence was unfairly shifted to him notwithstanding the fact that this was a criminal case. In the end, he urged this court to allow the appeal and find in his favour.
28. The respondent opposed the appeal from the outset and submitted that the trial court properly evaluated the evidence and reached a sound decision. In support, the respondent cited the case of Wycliffe Anyona Nyabuto vs Republic [2014] eKLR, where the court emphasized that theft involves depriving the owner of property through fraudulent means.
29. The respondent invoked the doctrine of recent possession, citing Erick Otieno Arum vs Republic [2006] eKLR, which requires proof that the property was found with the suspect, belonged to the complainant, and was recently stolen. The respondent argued that all these elements were satisfied in this case. In urging this court to uphold the finding of the trial court, counsel maintained that the prosecution's case was consistent, credible and unshaken and that the appellant's defence did not raise reasonable doubt.



30. On sentencing, the respondent while citing the case of Bernard Kimani Gacheru vs Republic [2002] KECA 94 (KLR), contended that sentencing is at the discretion of the trial court and should only be disturbed if it is manifestly excessive or based on wrong principles. Counsel argued that no such errors were demonstrated in the case herein and that the sentence was appropriate.
31. The issues for determination are; whether the complainant's motor cycle was stolen on the material day; Whether the appellant stole the same with the intention of dispossessing the owner of permanent possession; whether the appellant was found in possession of the motor cycle and whether the appellant had knowledge that it was stolen.
32. It is trite that this being a criminal case, it was incumbent upon the prosecution to prove beyond reasonable doubt that indeed, the appellant herein together with the deceased stole the complainant's motor cycle. In the case of Philip Nzaka Watu vs Republic [2016] eKLR, it was held that to find conviction in a Criminal Case, the Trial Court has to be satisfied that the accused person's guilt is beyond reasonable doubt.
33. Further, on the question of proof beyond reasonable doubt, the Court stated in the case of Stephen Nguli Mulili v Republic [2014] eKLR the court held as follows:
- “It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP vs Woolmington, (1935) UKHL 1 where the Court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases”.
34. As already noted, the appellant was charged with an offence under Section 278A of the Penal Code. The provisions thereof states that: -
- “If the thing stolen is a motor vehicle within the meaning of the *Traffic Act* (Cap. 403), the offender is liable to imprisonment for seven years.”
35. The offence of stealing is defined under Section 268 of the Penal Code as follows:
- “(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”.
36. While addressing the ingredients of the offence of stealing, the Court of Appeal in the case of, John Muiruri Kagunyi vs Republic [1982] eKLR stated that:
- “Stealing consists of taking anything "fraudulently and without claim of right (section 268(1) of the Penal Code).”
37. There was no dispute that a motorcycle belonging to the complainant being registration number KMGF 464 P chassis no. MD625AE30M1K00856 make TVS HLX 1500 CC blue in colour worth Kes. 262,742/- belonging to PW1 was stolen on the material day. It is also clear from the record that nobody saw the motor cycle being stolen and by who.
38. The prosecution's case is hinged on circumstantial evidence based on the recovery of the motor cycle allegedly in the appellant's possession. According to the prosecution, it was the appellant and the



deceased who collaboratively stole the motor cycle in question while the appellant urged that he was simply a pillion passenger and was caught up in the misfortunes caused by the deceased. He denied stealing the motor cycle in question.

39. I am alive to the evidence of PW2 who testified that he found the appellant together with the deceased with the said motor cycle. The foregoing was also embraced by PW3 and PW1. Of importance to note is the fact that the prosecution did not go beyond the ‘finding’ the appellant with the deceased on the motor cycle in question. None of the people who intercepted the motor cycle testified to confirm on who was riding the motor cycle at the time of interception. Who between the appellant and the deceased suspect was riding the Motor cycle at the material time.
40. The appellant claimed that he was a mere passenger. There is nothing on record to rebut that possibility. It is trite that where the prosecution’s evidence manifests some doubt, such doubt should be held in favour of the accused person. This being a criminal case, a situation should not arise so as to create some doubt in the mind of the court. In the case of Pius Arap Maina vs Republic [2013] KEHC 1762 (KLR) Kimondo, J. held as follows;

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be interpreted in favour of the accused.”

41. Was it possible that the appellant herein was simply a pillion passenger and that the deceased was the thief? Was it possible that the appellant together with the deceased stole the motor cycle in question? In my view, crucial ingredients were not proven beyond reasonable doubt. The standard of proof in criminal cases require that all elements be proven beyond any reasonable doubt. Courts cannot draw inferences on issues that lack supporting evidence. Mere suspicion cannot constitute guilt without concrete proof. [See the Court of Appeal in the case of Sawe vs Republic (Criminal Appeal 2 of 2002) [2003] KECA 182 (KLR)]
42. Noting the doubts created in the mind of this court, the question that I therefore ask myself is whether the conviction and the sentence herein were safe given the obtaining circumstances. In answering the foregoing, it is my humble view that the case herein was not proved beyond reasonable doubt as there were reasonable grounds for creating a reasonable doubt that the appellant was the person responsible for the offence herein or a mere passenger. Therefore, the conviction, was unsafe.
43. To that extent, I am inclined to find that the appeal is meritorious and therefore do allow the same thereby quashing the conviction. Accordingly, I set aside the sentence and direct the appellant be set free unless otherwise lawfully held.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF NOVEMBER 2025

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J. N. ONYIEGO

JUDGE

