

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE’S COURT OF KENYA AT MIGORI
HCCRA NO. E101 & 102 OF 2024

ELFAS SIMWA WASONGA.....1ST
ACCUSED

GODFREY ABWAO.....2ND
ACCUSED

Versus

REPUBLIC.....
DPP

**(Being an appeal from the judgment of Hon. Naomi Wairimu
SPM in Migori CMC CR C NO E317 OF 2023 delivered on 9th
October 2024)**

JUDGMENT

The two Appellants Elphas Simwa Wasonga and Godfrey Abwao were jointly charged with the offences of burglary and stealing contrary to Section 304(2) of the Penal Code in Count 1.

The particulars are that on diverse dates between 1st October 2023 and 9th October 2023 at Chamkombe area in Suna EastSub-County within Migori County in the Republic of Kenya they jointly with others broke and entered the dwelling house of Linet Kamadi with intent to commit a felony namely theft.

In the 2nd count the Appellants were charged with the offences of stealing contrary to Section 279(b) of the Penal Code.

The particulars are that on diverse dates between 1st October 2023 and 9th October 2023 at Chamkombe area in Suna EastSub-County within Migori County in the Republic of Kenya they jointly with others stole one refrigerator make Lamtons, one TV 21 inch make Sony, 3 duvets, one M-Kopa solar panel and its components and 3 high density mattresses all valued at Kshs. 83,000/= the property of Linet Kamadi.

The Appellants were also charged with alternative counts of handling stolen property.

The trial Magistrate considered the evidence of 3 prosecution witnesses and the Appellants' sworn testimony as well as the evidence of the 2nd Appellant's witness and concluded that the prosecution had proved that the Appellants broke into the Complainant 's house and stole the items mentioned in the charge sheet some of which were recovered from them and some which they sold to PW3. The Appellants were sentenced to serve 5 years imprisonment each in the 2 counts to run concurrently.

The Appellants were aggrieved by the conviction and sentence and they preferred appeals vide petitions dated 5th November 2024 for both Appellants in CRA No 101 & 102 of 2024.

The grounds which were jmxraised by both Appellants are similar and are that:

1. THAT the Trial Magistrate erred in law by convicting the Appellants while there were instructive no sufficient evidence to sustain the offence

2. THAT the Trial Magistrate erred in law by relying on contradictory evidence of the prosecution witnesses
3. THAT the Trial Magistrate erred in law by failing to analyze all the evidence tendered by the Appellant before court.
4. THAT the Trial Magistrate's decision was arrived at cursory and perfunctory manner and was biased.
5. THAT the sentence meted out was harsh and excessive having regard to the circumstances of the case.
6. THAT the Learned Trial Magistrate failed to consider the time the Appellants had already spent in custody during hearing and determination of the case.
7. THAT the Learned Trial Magistrate failed to consider mitigation of the Appellants.

The Appellants prayed that the conviction be quashed and sentence set aside and they be set at liberty and/ or in the alternative the sentence should be reduced.

The prosecution's evidence in the trial court was that Daniel Karafa the caretaker at Linet Kamadi's home in Kakrao. That he was at home with my wife on 9/10/2023 when at 10pm he heard the door being banged and he thought it was animal. That he went out and went to the back door of the main house where he found a sack with two dinning tables next and he thought it was for his wifes.

That he checked the padlock and saw a hand of a person who was inside the house holding the door. That he raised alarm and neighbours responded. That when they went into the house they found the ceiling board had been broken, chairs had been disarranged and

beds had been opened. That they saw one of the people in the ceiling and when a neighbour cast a touch light it was the 1st accused his home is near Msalaba Church near Ranganya.

He said the thieves were trying to go through the roof. They managed to go through and run away. PW1 told the neighbours to go with him to the home of the 1st accused and when they got to his home they found the door locked from outside. They broke into the house and found some items mattresses, gas cylinder, cooker and other household items which were still wet. PW1 identified the items as belonging to his boss and they took them back to the scene but some were left behind and the police Officer went and took some of the items to the station.

Later the police took photos of the damage That the accused father went to the police station and the accused was traced at Stellah. That when the accused saw them he started running away but they managed to arrest him. PW1 said he did not know the 2nd accused. He also said he did not see the photos the police took.

In cross examination by the accused PW1 said he had never been to 1st Accused home while own his way from church and he did not see A1 carrying away any of his employers property. He said he got to A1's house at about 11pm and he was not home. PW1 said they took a woofer, green cylinder, brown table and bedsheets which he identified as his bosses property. PW1 further said that they did not carry everything from 1st Accused person's house. He said that when A1 was arrested he was not at his place of work.

In cross examination by 2nd Accused PW1 said he knew A2 was arrested with a mattress but he did not know how much it was worth. He said the mattress was brown in colour.

In re-examination PW1 said that 1st accused was arrested at Stellar where he was hiding but he did not know where the 2nd accused was arrested. That when they broke into the 1st accused house they took away the land lady's property. The mattresses for his boss were red, blue and brown.

PW2 Linet Makungu Kamadi I am a teacher by profesion and Secretary KUPPET Mombasa County testified that on 9/10/2023, she was at her house in Mombasa when she got a call from Daniel O. Karafa Oromi her caretaker at home in Chamkombe Kakrao. That the caretaker asked for permission to break a window since there were some people in the house and the people had locked themselves in the house.

She said she could hear many people in the background. That she gave permission after questioning him and 2 hours later PW1 called her and her neighbours also called to inform her that the person had stolen her property but they were able to identify one of them whom they chased and went to his home.

They took photos of items found in a house and sent her for 2 coffee tables 8 stools, books, a set of sale agreements for land, utensils and other items.

That later the police went to the scene and found some of the items had been returned to her house. PW2 travelled home after about 5 days on 17/10/2023.

PW2 said that she found some items which did not belong to her including voters card for Elfias Simwa Wasonga and she gave it to the police Officer at Migori police station where she also found her fridge Ramtons grey MFL 1, 3 Mattresses 2 maroon and 1 blue MF12(a) & (b) and MFL3; 1 black bag containing tools MFI4, cross-mf15 ID for Elias Simwa Wasonga No. 33923261 MFI16; 4BOLTS MFI 17(a) and(b) pipple range MF1 8; spanner no. 14 MFI 9; Star screw drive green MF1 10 flat yellow screwdriver mfi I 1; Black pair of gum boots MFL 12; rusted hummer MFI 13; black tumper MF1 14 and 1 sock MF1 15.

PW2 said she found the items at the police station and took the voters card for Elfias to the police station. She said that her house is a permanent 3 bedrooms and the thieves cut the grills in her bedroom and gained access into her bedroom. That they broke the door to her room damaged her locks and ceiling board.

That they broke her dinning table and removed accessories like mirrors, soap holder and tissue holders, a suit case and sketter shoes among others. The police took photos of the house. That the mother of Elphas Simwa called PW2 to apologies and his father brought back one of her kitchen tables.

PW2 said that the 2nd Accused is the one who took the police to where he had sold her Television. She said she did not know the accused persons one of their parents.

In cross examination by A1 PW2 said that the person who broke into her house was identified by those who went to the scene. She said she found A1's your voters card in her house and she gave it to the police.

She said her items were recorded from A1' house among other items. She said she had photos which show the items in her house before it was broken into. She said she did not label items that were in her house and they are items which can be found in any shop in the country. She said she did not know if A1 is capable of buying similar items from the shops. She said A1's house was not broken into and it is his mother who allowed access into the house. She said none of A1's items were in her house.

In cross examination by A2, PW2 said that mattresses were recovered including a new maroon mattress. She said her mattress cost 7,500/= . She said she knew her property and she had many new mattresses and some have not been recovered.

In Re-examination PW2 said that items stolen from her house were recovered from the accused persons.

PW3 Joel Abere Lamwenya Assistant Chief Lower Kakrao Sub- Location testified that on 10/10/2023 at 1.20 am he was called by a resident of Chamkombe and told the house of Linet Kamadi had been broken into

He called OCS Migori police and who sent a vehicle and they visited the home of Linet Kamadi and found the house had been broken into through the roof and many items had been stolen.

PW3 said that they were informed by the members of public that they had gone to a house at Rangenyia where some of the stolen items had been recovered.

That the Caretaker directed them to the house where they found some of the household goods and 2 mattresses and the items were taken to the police station. PW3 identified the 2 mattresses, MF13 and MF1 2(a) &(b), black bag MF14 and gumboots MF112 , hammer MF113, black jumper, MF14 ID No 33923261 which were found in the house that was broken into MFI 5 to MF115.

PW3 said that police officers took photos which he identified in Court showing the compound where house was broken and the places it was broken into 14 photos MF116(a) and (n).

PW3 said they went to Ranganya where they found members of the community had recovered house hold goods and were taking them back to where they had been stolen.

That they went to the house of the 1st accused where they found his mother trying to move some items from the accused house to the house of his mother.

PW3 said that the 1st accused was arrested at Stella and he was taken to the police. He said he knew the 2nd accused. He said that he was called and told that Abwao had been mentioned by the 1st accused and he was at Ranganya. He said he knew A2 well as he is from his area. He said he had tried to intervene with Abwao many times over theft claims. He said that since the 2 accused were arrested he did not have cases of burglary in his area.

In cross examination by A1 PW3 said that when he arrived at the scene he called the OCS. He said he had never been given briefing about A1. He said he was told not told when A1 was breaking into the house. He

said A1 tried to escape but was arrested. He said he was at A1 home where items were recovered. PW3 said he knew A1's father well. He said the caretaker told them where A1 had gone. He said 2 mattresses and house hold goods were taken from A1 house. PW3 also said that he did not communicate with the investigation Officer. He said he called the complainant. PW3 said he did not carry A1's property and his jumper was recovered from the scene.

PW4 Hashim Kasavuli Adenya testified that he lived at Aida in Migori. He said that in October 2023 he was selling sweets and had a place for play station.

That on 3/10/2023 at about 9am he was at his shop when Abwao and Wasonga came. That they were on a motor cycle and had a fridge they were selling.

That the accused said he was selling the fridge because he had a problem . That paid him 5000/= which he gave to Abwao.

That on 11/10/2023 the police went and asked whom the shop belongs to and he was arrested and he gave the officer the fridge MF11. He said Abwao was a customer and 1st accused was not known to me.

PW4 said he knew A1 and that Abwao was the one riding the motorcycle. He said he did not know if the owner of the motorcycle A1 was riding is the one they negotiated with. He said he gave the money to Abwao. He said that he was found with the fridge that A1 sold him. He said bought the fridge for 5000/= but didn't get the receipt. The Court will decide whom the thief is. He said he was also arrested and then released.

PW5 No.67065 P.C. Mavoko Lutambo based at Migori police station was the investigating Officer in this case. He testified that on the morning , 10th of October, 2023 he was on stand by when the Assistant Chief Kakrao(Joel) called him at 1:30am and told him that the house of Linet Kamadi had been broken into. That they went to the scene at Chamkombe and found the house had been broken into through the roof and cielings. That one of the inner doors had been damaged the ward robes had been broken and items scattered next to the main door. We found a bag with arranged items, MF14 4 EXHI 4; Gumboots MF112 EXL 12; 8 hummer MFI13 EXH13; Spanner MF19 EXH.9; Screw and nails; MFI 10 & 8 11 EXH. 10 & 11 respective pipe range MF18 EXH 8; Bolt and nut MFI 7(A) AND (d) now exh .7 (a) to(d); Jumper MFI14 now exh. 14; Socks MFI is now exh 15; MFI 5 EXH.5; ID No. 33923261 for accused 1. Mf I 6 now exh '6'.

He said that members of public of public had gone to Rangenyia to the home of the 1st accused where they had taken items which were on a pickup. They said they are from accused home.

That they went to accused home and recovered two mattresses a dark blue one and red dark blue mattress MF13 now exh 3 red mattress Mf12(a) now exh 2(a)

Several other households , blankets and clothes were recovered and the complainant was able to identify her items and later they headed after the accused family. That the items recovered were recorded in inventory dated 12/10/2023 MF I 17 and exh 17 the fridge recovered MFI 1 NOW EXH 1

I wrote a list of the items we recovered and which were returned to the first accused person's relative. That upon return to the station at 11 am they got information that the 1st accused was at Stella and they were able to identify him through his father and the chief and he was arrested. That on being questioned he told the police that there were three others with him including the 2nd accused. That on 11/10/2023 they went to the home of accused 2 after we got into that he was in the shamba .

A2 was arrested and taken to his home where he lives with grandmother and on searching the house a red mattress MF12(b) was recovered. On being asked about fridge he took the police officers to a house at Apida where he identified the person they had sold the fridge to known as Kasuvuli PW4 herein.

That they went to PW4's house and recovered the fridge and Kasuvuli therefor became their witness. PW5 said he took several photos at the house of the complainant and he produced them as Ex P16 (a) & (b), (c) to (i)

PW5 said that he did not know the accused before the date of their arrest. He said that when they recovered the fridge he found out that the house had been broken into on several occasions since the fridge was sold on 3/10/2023 and the incident were following was on 13th . they kept going back for the items.

In cross examination PW5 said his investigation was based on some facts and some he was told. He said he did not dust the scene for finger prints. He said he went to A1's house led by the chief and they

did not know what was stolen. He said they found A1's identification at the scene of crime after members of public had already taken the items from his house. He said the complainant could not get her receipt and there was no CCTV footage. He said that he showed A1 his bag, jamper and gumboots. He said the the recovered items could be bought by him and his property was returned to him. He said A1's Your identification was not found in his house.

At the close of prosecution case the Appellants were placed on their defense and A1 gave sworn statement as follows;

A1 Elphas Simwa Wasonga testified that he was charged with Burglary. He said he did not commit the offence. He said that at the time of the offence he was at Sigweno's home in Stella where he had work and was installing floor files. He said he got a call from his father who told him that some people wanted to see him. That he asked his father to take the people where he was and the father went with 2 people who told him they should go outside and when they did, he found 4 other people. That they walked to the road where he was put in a landcruiser then brought to court. He said he was arrested on 9.10.2023 and was brought to court later on 11.10.2023. He said the arresting officer asked him if he knew the items they had and he said the items were his. He said that 2 other people were arrested and he was charged together with them. A1 said he had a wife and children who depend on him. He told the court that his witness had not arrived.

DW2 the 2nd Accused Godfrey Abwao testified that he was a boda boda rider and lived in Kakrao. He said that on 11.10.2023 in the morning at 10am he was in the shamba planting maize when he saw the Assistant

Chief coming with 2 officers. They told him they needed to talk to him. That he asked the chief what was wrong and he asked why he had not gone to work. That he told Assistant Chief he had been asked to plant maize. That he was asked where the fridge was and they said A2 had carried a fridge. That he told them he did not know the name of the client whose fridge he had carried. He said that they entered his house to search and took his mattress saying it must have been stolen. He said he had carried first accused to a house with the fridge. That he told the chief he had been at the stage when the 1st accused went to him and asked to be taken to carry a fridge. A1 said he carried the fridge on his motor cycle and took it to Nyasare to Kassim. That he was asked to bear witness. That A1 wanted Kshs. 10,000 but was given Kshs. 5,000. That he then took 1st accused back to the stage and he paid. He said they went to Kassim and he was arrested. A2 said he did not know 1st accused had been arrested. He said Kassim paid Kshs. 20,000 and he became a witness. The mattress I was arrested with was bought for him and he produced a receipt DEXH 1

DW3 Mebo Kadenyi Aima told the court that Abwao was arrested with a mattress yet he had been bought a mattress by his mother. The witness said she had a receipt which shows the mattress was bought on 28.8.2023. Original for Exh 1 seen. That is all

The appeal herein was canvassed by way of written submissions

The Appellants filed submissions on 19th June 2025 and argued that they were not informed or accorded the right to legal representation and their rights were therefore violated.

It was also submitted that the I/O failed to dust scene for finger prints in order to identify the real culprits instead of incriminating the Appellants and the court relied on contradictory and inconsistent evidence.

It was also submitted that the trial court failed to consider the period spent in custody. They urged the court to give them another chance to take care of their young family.

The Respondent filed submissions dated 29th July 2025 are to the effect that the 2nd Appellant was arrested in possession of stolen items and it can only be concluded that he and the 1st Appellant committed the offence together. Further more 2nd Appellant took the police to where he had sold the fridge stolen from the Complainant's house and did not give plausible explanation on how he came by the said stolen items.

It was submitted that the prosecution had proved beyond reasonable doubt that the Appellants broke into the house and stole from therein.

Regarding the claim that the Appellants were not enlightened on the right to fair trial as stipulated in Article 50(2)(g) & (h) the Respondent submitted that the Appellants were informed of the right to an advocate. The Respondent counsel submitted that period spent in custody was not factored in the sentence and the same should be considered. It was however contended that the conviction and sentence should be upheld.

ANALYSIS AND DETERMINATION

The evidence presented by the Prosecution consistently narrate a sequence of events surrounding a burglary at the home of Linet Makungu Kamadi on the night of 9/10/2023 at Chamkombe, Kakrao. For the court to convict the prosecution should prove the charge beyond reasonable doubt. Having considered the grounds of appeal, and submissions of rival parties and having re-evaluated the evidence in the trial court as well as the judgment of the Trial Magistrate the issues identified for determination are:

1. Whether burglary and stealing occurred at complainant's house.
2. Whether the 1st accused participated in the burglary and theft.
3. Whether the 2nd accused participated in the burglary and theft or handled stolen property.
4. Whether identification and recovery evidence meets the threshold for conviction.
5. Whether the defence raises reasonable doubt.

Section 304 of the Penal Code provides:

- (1) Any person who—
 - a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
 - b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks

out thereof,

is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

Section 275 of the Penal Code provides:

General punishment for theft

“Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years”

3. Handling stolen goods

Section 322 Penal Code provides:

(1) 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.

(2) 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.

(3) For the purposes of this section—

(a) goods shall be deemed to be stolen goods if they have been obtained in any way whatever under circumstances which amount to felony or misdemeanour, and “steal” means so to obtain;

(b) no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the stealing.

(4) Where a person is charged with an offence under this section—

(a) it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods;
[Rev. 2012] CAP. 63 Penal Code 95 [Issue 1]

(b) at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that the goods were stolen goods—

(i) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realization of, stolen goods from any offence taking place not earlier than twelve months before the offence charged;

(ii) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of stealing or of receiving or handling stolen goods.

1. Burglary and stealing occurred

From the evidence of PW1, PW2, PW3, PW5 it is shown that the roof and ceiling to the Complainant's house was cut open and items were found to be scattered in the house and doors broken. Several household goods were found to be missing missing. The tools used in the burglary recovered inside the subject house. There is absolutely no doubt that the Complainant's house was broken into on the material night.

The 1st Accused's involvement was recognized by PW1 as the person he saw in the ceiling board of the house during the commission of the offence. As held in the case of

The evidence against the 1st accused is overwhelming. PW1 recognized him inside the ceiling during the commission of the burglary. Recognition evidence is the most reliable form. In the case of **Anjononi v R (1980) KLR** it was held that recognition evidence is stronger than mere identification. His ID card was found inside the

complainant's house. This piece of evidence is strong corroboration placing him at the scene.

When the 1st Accused person's house was searched recently stolen items were recovered. These included mattresses, tables, gas cylinders, cooker — all identified by PW2 and PW1. The doctrine of recent possession applies fully in the circumstances..

When the 1st Accused was traced at Stellaah through his father and the Chief when he saw PW1 and the police he attempted to escape but he was apprehended and taken to the police Station. His attempt to escape coupled with recovery of stolen items from his house and the fact that he accompanied 2nd Accused to go and sell a refrigerator to PW4 shows consciousness of guilt.

The 1st Accused person's own parents returning stolen property and his mother apologized. His father returned a stolen kitchen table. The 1st Accused person's family members were aware of the presence of stolen items in his home.

The 1st accused clearly participated in the burglary and multiple thefts.

He is criminally liable for Burglary (S.304(2)) and Stealing (S.279(b)).

The 2nd Accused's involvement in the offence is in relation to transportation of the stolen fridge on motorcycle. He is the one who knew PW4 and he negotiated sale of the fridge with PW4. He led police to recovery point of the fridge. Coupled with recovery of the fridge the 2nd Accused was also found in possession of a mattress that the Complainant identified as hers. the mattress was bought for him the

coincidence that he was involved with the 1st accused in sale of fridge and also found in possession of mattress makes this court find that the the burglary and stealing was so recent that no other explanation can be given than that he also committed the offence of burglary and stealing. The receipt produced by DW3 was not given to the investigating officer early enough to interrogate and the witnesses were not cross examined and shown the alleged receipt to confirm it was authentic.

The fact that the fridge was carried at night/odd circumstances and sold cheaply (Kshs. 5,000 for a Ramtons fridge) makes this court find that makes this court find that the 2nd Appellant was involved in the burglary and stealing.

In conclusion this court finds that the appeal by the Appellants in CRA No. E101 of 2024 and E102 of 2024 on conviction and sentence lacks merit and the same is dismissed save that the sentence should factor in their remand period from 12th October 2023.

DATED, SIGNED, AND DELIVERED AT MIGORI THIS 28th DAY OF November, 2025.

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ANNE ONG'INJO

JUDGE