



REPUBLIC OF KENYA



KENYA LAW
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**Bundi v Republic (Criminal Appeal E064 of 2024)
[2025] KEHC 18247 (KLR) (3 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E064 OF 2024
AK NDUNG'U, J
DECEMBER 3, 2025**

BETWEEN

DUNCAN BUNDI APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki
CMCR E1039 of 2022 - Hon. B.M. Mararo – SPM)*

JUDGMENT

1. The Accused, Duncan Bundi was charged with stealing stock contrary to section 278 of the Penal Code. The particulars of the offence being that on 19th day of August 2022 at Juakali area in Laikipia East sub-county within the Laikipia county, stole three (3) she-goats valued at Kshs.20,000/- the property of Jackson Kithinji Wanjiku. The accused faced an alternative count of handling stole goods contrary to section 322(2) of the Penal. The particulars of the offence being that on the 19th day of August 2023 in Juakali area in Laikipia East Sub-county within Laikipia County, otherwise than in the course of stealing, dishonestly detained three (3) she-goats knowing or having reasons to believe them to be stolen goats. The accused also faced another count of attempt to escape from lawful custody contrary to section 388 as read with section 123 of the Penal code. The particulars of the offence being that on 21st day of August 2022 at Nanyuki police station in Laikipia county within Laikipia county, being in lawful custody Nanyuki Police station cells attempted to escape from the said custody. After conviction he was sentenced to serve three (3) years imprisonment.
2. Aggrieved by the judgment, conviction and sentence, the Appellant has filed these grounds of appeal based on the following grounds;
 1. That the learned trial magistrate erred in law and fact by convicting the appellant on a case full of contradictions, inconsistencies and lack of corroboration.



2. That the learned trial magistrate erred in law and fact by convicting the appellant without appreciating that the suspect goats were grazing in the market centre which was their usual grazing ground and appellant was not arrested in their possession.
 3. That the learned trial magistrate erred in both law and fact by allowing the prosecution to adduce photographic evidence that was illegally and unprocedurally adduced thus contravening Section 78 of the *Evidence Act* as no certificate of print accompanies the photographic evidence.
 4. That the learned trial magistrate erred in law and fact by failing to appreciate that the Appellant was not afforded a fair trial as envisioned by Article 50(2)(j) of *the Constitution* as he was not supplied with the said photographic evidence of the suspect stolen goats.
 5. That the learned trial magistrate acted on wrong principle by failing to consider and account for the time the Appellant spent in custody as guaranteed by section 333(2) of the CPC thus rendering the sentence patently illegal, harsh and excessive.
3. The appeal was canvassed by way of written submissions which submissions I have considered at length even on propositions that I may not mention in this judgement.
 4. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.
 5. This duty was set out in *Okeno vs. Republic* [1972] EA by the Court of Appeal as follows

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424.”
 6. Similarly, in *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.
 7. The key testimony in the matter was that of PW1 who stated that she saw the Appellant pushing 3 goats which belonged to PW1. Pw2 confronted the Appellant and as she escorted the goats to her brother’s



place (PW1's), the Appellant was following her. PW1 was at Jua Kali. PW2 pointed the Appellant to PW1.

8. PW1 confirmed he was away when incident happened. He came and the Appellant was pointed out to him. PW3 and PW5 add no value to the prosecution's case. They perceived nothing.
9. PW6, the investigating officer relied on the evidence of the sister of PW1.
10. I have re-evaluated the evidence adduced as well as the submissions made. The anchor evidence in this case is that of PW2. My view of that evidence is that it is hazy and unclear. The explanation given is one of an attempt to steal the goat. The stealing, if at all, had not been completed.
11. The matter is compounded by what transpires after. PW2 states she drove the goats away and the Appellant followed her. One wonders how someone who had been caught stealing followed the captor. PW1 comes to the scene when he was called. He comes and finds the Appellant there and the Appellant was pointed out to him. What kept the Appellant at the scene yet ordinarily he ought to have fled?
12. There is indication like a mob came to the scene and wanted to lynch the Appellant. This is according to an account by PW3 that he heard shouts and on going to the scene he found the Appellant arrested and he could have been lynched. Who arrested him and in what circumstances remains unexplained.
13. It was the duty of the prosecution to prove its case beyond reasonable doubt. The Appellant bore no duty to prove his innocence.
14. Addressing the legal principle on burden of proof, Mativo J, (as he then was) in the case of David Wahome Wanjohi v Republic 2015] eKLR, expressed himself as follows;

“The legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C in the Celebrated case of Woolmington Vs. DPP in a subtle and mastery fashion stated the law on legal burden of proof in criminal matters, that:-

'throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of the insanity and subject also to any statutory exception... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.“

15. The above quotation expresses the correct legal position, which is the legal burden of proof in criminal cases rests on the prosecution and this burden must be discharged at all material times. Thus, the legal burden is the burden of proof that remains constant throughout the trial; it is the burden of establishing the facts and contentions which will support a party's case.
16. In the present appeal, it is my finding that the evidence was organised and adduced very casually with no discernible conscientiousness.
17. The said evidence fell short of proving the case to the required degree with the result that the appeal succeeds and is allowed. I quash the conviction and set aside the sentence and substitute thereof an order of acquittal. The Appellant is to be set at liberty unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF DECEMBER 2025.

A.K. NDUNG'U



JUDGE

