Warungu v Republic (Criminal Appeal E019 of 2025)
[2025] KEHC 18151 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18151 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E019 OF 2025

MA ODERO, J

DECEMBER 5, 2025

BETWEEN

PETER NDUATI WARUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant Peter Nduati Warungu has filed this appeal challenging his conviction and sentence. The Appellant was arraigned before the Mukurwe-ini Magistrates Court on 17th February 2023 on a charge of Burglary Contrary to Section 304 (2) of the *Penal Code*. The particulars of the offence were that

> " On the night of 31st day of December 2022 at around 0030 hrs at Kiangoma Village, Muhito Location in Mukurwe-ini Sub-county, within Nyeri County with another not before court you broke and entered the building used as a dwelling house by Morris Mawira Mbuba with intent to commit a felony namely theft therein."

2. The Appellant faced a second Count of Stealing in a Dwelling House Contrary to Section 279(b) of the *Penal Code*. The particulars of the charge were that:-

> " On the night of 31st day of December 2022 at around 0300hrs at Kiangoma Village, Muhito Location, in Mukurwe-ini Sub-County, with another not before court, you stole
>
> (1) one 32 inches TV set make Samsung,
>
> (2) one GOTV decoder
>
> (3) one star times decoder

(4) one woofer

(5) one laptop make Lenovo

(6) two bicycles

(7) assorted clothing and shoes

(8) one water dispenser

(9) two table room stools

(10) One iron box

(11) One button mobile phone make Techno

(12) Two floor carpets

(13) One complete meko gas and two suitcases all valued at approximately Kshs. 200,000/= the properties of Morris Mawira Mbuba.

3. The Appellant faced yet a third count of Stealing Contrary to Section 268(1) as read with Section 275 of the *Penal Code*. The particulars of the charge were that

> " On the night of 31st day of December 2022 at around 0300 hrs at Kiangoma Village Muhito Location in Mukurwe-ini Sub-county within Nyeri County with another not before court you stole a bicycle valued at Kshs. 8,000/= the property of Dorothy Wanjiru Kamau."

4. The Appellant entered a plea of 'Not Guilty' to all the charges and the trial was conducted in the Lower Court.

5. PW1 Morris Mawira Mbuba told the court that he was a teacher at Mweru Secondary School. PW1 told the Court that he was a tenant occupying two (2) rooms in a rental property in Mukurwe-ini. That during the Christmas holidays in the year 2022 he travelled with his family to their rural home in Tharaka Nithi County. On 31st December 2022, PW1 received a phone call from his Landlord informing him that the house which he rented in Mukurwei-ini had been broken into. PW1 immediately travelled back to Mukurwei-ini to assess the situation.

6. Upon arrival PW1 found police at the scene. He checked the 2 rooms he had rented. He noted that the rooms had been broken into and noted that several household goods electronics and clothes had been stolen.

7. PW1 then went to the house of the Landlord to view the CCTV footage that had been captured on the night of 30th and 31st December 2022. The entire CCTV footage covered hours from 1:38am to 2:59:32am and showed two men breaking into the houses and removing goods. PW1 states that he clearly saw one man enter his house and the second man wait outside. The man who entered the house removed items which he handed to the man who was outside. After an almost three (3) hour uninterrupted spree of theft the two men loaded the stolen items into a suitcase and left the compound at about 3:00am.

8. PW2 Dorothy Wanjiru Kamau told the court that she is a tenant in a residential compound in Kiangoma area of Mukurwei-ini Sub-county. That on the evening of 30th December 2022 she and her son retired to bed at around 9:00pm. The next morning PW2 sent her son to get milk to make tea. When her son returned he told her that his bicycle was missing from the compound where it had been

kept. PW2 went outside and noticed that a sack which her neighbour PW1 had used to cover a broken window pane had been removed yet the said neighbour was away having travelled with his family to his rural home.

9. PW2 reported the incident to the Landlord. Together they reviewed CCTV footage from the previous night. PW2 said she saw two men enter the compound and carry out a spree of theft from 12.10am to about 3.00am. She saw the two men steal her sons bicycle.

10. PW3 Grace Wanjiru told the court that she was a teacher at Kihato Primary School. That she was the Landlady of PW1 and PW2. The witness states that on 31st December 2022 she received complaints about break-ins and theft from some of her tenants. PW3 confirms that she had installed CCTV cameras at strategic points within the compound of fifteen (15) rooms. PW3 told her son to run the CCTV footage from the previous night to enable them see what had taken place.

11. PW3 states that from the CCTV footage she saw two men enter the compound at about 12.00 midnight. The two men broke into the house of PW1 and removed several household items electronics and clothes. One of the men took away the bicycle belonging to PW2. At about 3.00am having ransacked the house of PW1 the two men left the compound conveying the stolen items in a suitcase and other stolen items were wrapped up in a shawl and carted away. PW3 reported the incident to police.

12. PW4 Chief Inspector Timothy Bett is a Forensics expert attached to the DCI headquarters in the National Forensic Laboratory. He told the court that he received from Mukurwe-ini Police Station an exhibit memo dated 3rd February 2023 which memo accompanied a flash disk containing CCTV footage of an incident which occurred at Kiangoma Village on the night of 30th December 2022 extracted by the investigating officer.

13. PW4 examined the flash disk and ascertained that the footage was genuine. The footage covered time period from 12.00 midnight to 3.00am on 31st December 2022.

14. PW4 developed fifteen (15) still photographs from the CCTV footage which he produced in court as an exhibits.

15. PW5 Samuel Kamau Gatuma is the Assistant Chief of Mweru Sub-Location. He told the court that on 24th February 2023 at around 2:30pm he was asked to go to DCI Mukurweini to view CCTV footage of an incident which had occurred on the night of 31st December 2022, in order to assist police in identification of the suspects.

16. Upon viewing the CCTV footage PW5 recognized one Peter Nduati Warungu (the Appellant herein) a man who comes from his area of jurisdiction. PW5 led police to the home of the Appellants parents. The appellant was found sleeping in one of the inner rooms. Police arrested the Appellant and took him to the police station.

17. PW6 Corporal Ali Bakari of Mukurwe-ini DCI was the investigating officer.

18. At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. The Appellant gave sworn evidence denying any involvement in the incident. The Appellant called three (3) witnesses in support of his defence.

19. Vide the judgment delivered on 4th October 2024 Hon. Bosibori, Senior Resident Magistrate convicted the Appellant on counts (1) and (2) and thereafter sentenced the Appellant to serve five (5) years imprisonment on Count No. 1 and three (3) years imprisonment on Count No. 2. The sentences were to commence on 24th September 2024 and were to be served concurrently on Count No. 3 the Appellant was fined Kshs. 5,000 and in default to serve one (1) month in prison.

20. Being aggrieved by both the convictions and sentence the Appellant filed this Memorandum of Appeal dated which is premised on the following grounds;-

> " 1. That, the learned trial magistrate erred in law and fact by failing to observe that the identification of the appellant was unreliable and did not meet the required legal standards for positive identification.
>
> 2. That, the learned trial magistrate erred in law and fact by convicting the appellant without considering that the prosecution failed to adduce sufficient evidence to establish that the alleged stolen items belonged to the complainant.
>
> 3. That, the learned trial magistrate erred in law and fact by failing to note that the prosecution's evidence was riddled with material contradictions and inconsistencies which were uncorroborated and thus incapable of sustaining a safe conviction.
>
> 4. That, the learned trial magistrate erred in law and fact by failing to appreciate that there was no direct, cogent, or convincing evidence linking the appellant to the alleged offense.
>
> 5. That, in light of the aforementioned grounds, I humbly urge this honorable court to allow this appeal and quash the conviction, setting the appellant at liberty in the interest of justice."

Analysis and Determination

21. I have carefully considered the record of appeal as well as the submissions filed by both parties. This is a first appeal in which the High Court is required to review the evidence adduced before the Lower Court and to draw its own conclusions on the same.

22. In *Okeno -vs- Republic* [1972] EA 32 the Court of Appeal set out the duties of the first appellate Court 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 the conflicting evidence and draw its own conclusion..... It is not the function of a first appellate court merely to securitize the evidence to see if there was some evidence to support the lower courts finding and conclusions. 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."

23. Similarly in *David Njuguna Wairimu -vs- Republic* [2010] eKLR, the Court of Appeal stated as follows;-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case come to the same conclusion as those of the Lower Court. It may rehash those conditions. We do not think there is

anything objectionable doing so provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

24. In Kenyan Law there exists the presumption of innocence. The Accused has no obligation or duty to prove his/her innocence. The Appellant had been charged with a criminal offence. As such the burden lay on the prosecution to prove each aspect of the case beyond reasonable doubt.

25. In the case of *Republic -vs- Ismail Hussein Ibrahim* [2018] eKLR the Court held that

> " The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt but it does not mean that the defendants must be proved beyond all possible doubt."

26. In this case it was alleged that the Appellant committed the offence of Burglary by breaking and entering into the house of the 1st Complainant (PW1).

27. Section 304 of the *Penal Code* Cap 63 Laws of Kenya defines the Offence of Burglary as housebreaking which occurs during the night. Section 304 reads as follows:-

(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 house-breaking and is liable to imprisonment for seven years.

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

Therefore the ingredients of the offence of Burglary are similar to that of Housebreaking save that Burglary occurs at night.

28. In this case PW1 told the court that he was away from his rented house Mukurwe-ini on the night of 30th/31st December 2022, as he had travelled with his family to their rural home in Tharaka Nithi County. PW1 received a call from his landlord on the morning of 31st December informing him that his house had been broken into. He immediately rushed back to Mukurwe-ini.

29. Upon arrival at the scene PW1 found that indeed his house had been broken into. He found that a sack which he had used to cover a broken window pane had been removed. The main door to the living room had been broken and the door flap was bent.

30. PW2 who was a neighbour to PW1 corroborated his evidence. She told the court that on the morning of 31st December 2022, she noticed that a sack which Morris PW1 had used to cover one of his broken window panes had been removed. PW2 wondered why the sack had been moved yet PW1 was away in his ancestral home.

31. PW1 went on to narrate at length to the trial court a list of all the items which had been stolen from his house. These included various household goods, electronics like TV, laptop etc and clothes. In short

the two rooms occupied by PW1 were literally cleaned out. There was no logical reason for PW1 to claim that his possessions had been stolen if in fact no such theft had actually occurred.

32. PW3 who was the Landlady of both PW1 and PW2, told the court that she owns ten (10) rental houses in Mukurwe-ini. She confirmed that PW1 who has been her tenant for the past five (5) years occupies two (2) rooms and that PW2 has also been tenant for the past two (2) years. PW3 confirmed that a report was made to her to the burglary and theft of property. PW3 in turn made a report to the police.

33. PW6 Corporal Bakari was the Investigating Officer. He told the court that upon the report being made at Mukurwe-ini Police Station he immediately went to the scene and noted that indeed the house of PW1 had been broken into and several items taken – he noticed that most of the household items were missing.

34. More pertinently PW3 the Landlady confirmed that she had installed CCTV cameras within her rented properties. Two of the CCTV cameras faced the house of PW1. Upon viewing the footage of the night in question the witnesses all state that they saw two (2) men enter the compound and break into the house of PW1. One man waited outside whilst the other entered the house and removed items therefrom. They saw the men take away the bicycles from the compound.

35. PW2 when taking the trial court through the CCTV footage identified her bicycle at 02:59:35 am. She stated that the appellants accomplice is seen carrying away the bicycle on his shoulders, whilst the appellant was seen carting away the rest of the stolen items. At page 55 line 12 PW3 says

> " They returned and stole my child's bicycle. The incident took place at 12:10 pm until 4.00 am. The footage shows the thieves leave with the bicycle on their shoulders near my house."

36. Certainly there would be no basis for PW1 and PW2 to claim that their homes had been broken into or their property stolen if no such incident had occurred. The reports were made to the relevant authorities. The police visited the scene and confirmed the report.

37. The uncontroverted evidence is that two men acting in concert unlawfully broke into the house of PW1 and removed several items therefrom. There is also evidence that a bicycle was stolen from the compound of PW2 the same night. The thieves carted away these items which have not been recovered to date. There was a clear intention to permanently deprive the owners of these items. I am satisfied that the house of PW1 was burgled on the night of 30th/31st December 2022 and that property belonging to PW1 and PW2 was stolen as alleged.

38. The next critical question is whether there exists sufficient proof that the Appellant was involved in the burglary and theft. None of the prosecution witnesses were awake on the night in question and none actually witnessed the burglary occur. As such the prosecution is relying on circumstantial evidence which places the appellant at the scene in order to prove their case. Circumstantial evidence is that evidence that proves a fact indirectly and forms a complete chain proving the guilt or culpability of the accused.

39. In the case of *R -vs- Taylor Weaver & Donovano* [1928] Cr App it was stated that

> "It has been said that he evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

40. In *Sawe -vs- Republic* [2003] KLR 364 the Court of Appeal reiterated that:-

> "…….the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstance weakening the chain of circumstances relied upon. The burden of proving of his inference form the facts tot eh exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the accused."

41. Finally in the case of *Abanga Alias Onyango –vs- Republic* Criminal App No. 32 of 1990 (Unreported) the court set out the parameters to be met in relying on circumstantial evidence to secure a conviction as follows:-

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-
>
> i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
>
> ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
>
> iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and no one else."

42. As stated earlier PW3 told the court that she had installed CCTV cameras within the compound - she states that she had installed seven (7) cameras at strategic points in order to give a view of the entire compound. One of the cameras directly faced the door of the rooms occupied by PW1. PW4 was the forensic expert who analysed CCTV footage and found the same to be genuine. He produced a certificate as well as his report dated 15th May 2019. PW4 was a properly gazetted officer and his evidence regarding the authenticity of the CCTV footage was not challenged. As the trial magistrate noted the conditions of Section 106B of the *Evidence Act* relating to the admissibility of electronic evidence were met.

43. The witnesses all state that on the morning in question they went to the house of PW3 to view the CCTV footage which ran for three (3) hours from approximately midnight to 3.00am. On the footage they saw two men walk into the compound. The men then broke into the house of PW1 and began to remove items therefrom.

44. All the witnesses were consistent over what they saw. They all stated that one man (the appellant) stood outside while the second man (the accomplice) entered the house of PW1 and removes various items which he hands over to the appellant. The witnesses were able to see and identify the Appellant on the CCTV footage. At page 20 line 21 of the record PW2 says

> "One of the thieves is visible and it is the accused. He was in a marvin and his slim face and long nose are clearly visible. He is in gumboots……"

45. None of these witnesses knew the appellant before and none had any motive to frame him. The appellant made much of the fact that the CCTV footage did not capture a scar on his left eye. However it must be remembered that the footage was recorded at night and in monochrome. Minute features

on the appellants face may not have been visible. In any event the appellant did concede under cross-examination that one of the suspects in the CCTV footage had a limp and the appellant himself was noted by the arresting officer to be limping when he was arrested.

46. In his evidence from page 11 line 10 to page 17 line 14 PW1 gave a very clear and systematic of the events as captured by the CCTV cameras. At page 21 Line 8 PW1 states

> " The face of the accused is visibly recognizable at 1:00:56 am."

47. PW6 the Investigating Officer also told the court that he viewed the CCTV footage and confirms what the other witnesses stated. PW4 Chief Inspector Bett told the Court that he received from the Investigating Officer a flash disk containing the CCTV footage captured on the night in question. PW4 examined the footage and confirmed that it was genuine.

48. From the CCTV footage PW1, PW2 and PW5 all identify the Appellant as one of the men who was seen committing the offences in question. The witnesses were able to see and identify the Appellant because his face was not covered. They were able to specify the clothes appellant wore and stated that one of the men wore gumboots. As stated earlier the CCTV footage covered a period of about three (3) hours. This was not a situation where there was only a fleeting glimpse of the Appellant.

49. PW6 who was the Area Assistant Chief of the area told the court that he was invited by police to view the CCTV footage to see if he was able to identify any of the men. PW6 immediately recognized the appellant who was a resident in his area and led police to the home of the Appellants father from where the Appellant was arrested.

50. This court was able to see the photographs which were developed from the CCTV footage by PW4. The photograph depict a man wearing a marvin cap. The face of the man uncovered is clearly visible and is easily recognizable specifically in photographs (1) (3) (4) and (5) which provide a clear frontal view of the face of the man. I have no doubt that PW6 who told the court that he had known the appellant from childhood would have been able to recognize him in the CCTV footage.

51. It is a well established principle of law that recognition of an offender carries more weight than visual identification alone. This is because the witness had interacted with the offender before in one way or another. In the case of *Anjononi & others -vs- Republic* [1980] eKLR the Court of Appeal stated that

> " Recognition of a assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another."

52. The CCTV footage places the appellant squarely at the scene of the crime. The witnesses were able to positively identify him from that CCTV footage. The whole incident took about three (3) hours. The thieves acted in a leisurely manner and did not appear to be in a hurry to complete their nefarious mission. The Appellant did not cover his face so his features were clearly visible even to the court. The CCTV has been authenticated by PW4.

53. In his defence the Appellant claimed that he was not in Mukurwe-ini at the time when the offence was committed. He claimed that he left Murang'a on 30th December 2022 and travelled to Pangani in Nairobi County to visit an uncle. That he only returned to Kangema on 2nd January 2022. The Appellants witnesses Mary Wangui Nduati (DW2), Samuel Kaharu (DW3) Jane wa Rungu Wanjiru (DW4) and Gladys Wairimu Kigoro (DW5) all state that the Appellant was in Nairobi on 30th December 2022 visiting his uncle.

54. Thus the Appellant has raised an 'alibi defence'. An Alibi defence is a claim by an accused person that they were elsewhere (i.e not in the vicinity) when the crime was committed.

55. It is pertinent to note that in cross-examining the prosecution witnesses including the investigating officer no mention was made of this alibi. The Appellant only raised this alibi defence at the tail end of the trial after the prosecution had closed their case. As such the prosecution had no opportunity to investigate this alibi.

56. It is a principle long accepted that an accused person who wishes to rely on an alibi defence must raise that defence at the earliest possible opportunity in order to afford the prosecution the opportunity to investigate the truth or otherwise of the alibi.

57. In *R-vs- Sukha Singh s/o Wazir Singh & Others* [1939] 6 EACA 145 the Court of Appeal for Eastern Africa stated as follows;-

> " If a person is accused of anything and his defence is an alibi he should bring forward that alibi as soon as he can because, firstly if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval and secondly if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

58. Likewise in the case of *Festo Andora Asenua -vs- Uganda* Criminal Appeal No. 1 of 1998, the Supreme Court of Uganda observed as follows;-

> " We should point out that in our experience in criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused person is giving evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial or any prohibition of belated disclosure as in the statute cited above. Such belated disclosure must go to the credibility of the defence."

59. Finally on this point in *Ganzi & 2 Others -vs- Republic* [2005] 1 KLR the Court of Appeal stated that where the defence of alibi is raised for the first time in the Appellants defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence."

60. As stated earlier the Appellant in this case does not raise the defence of 'alibi' until he was giving his defence. This alibi defence was clearly an afterthought. The prosecution had no opportunity to investigate the alibi. All the defence witnesses were relatives of the Appellants. None was an independent witness. They obviously had motive to support his alibi. I find in the circumstances this alibi defence was not credible.

61. Finally I am satisfied that there has been a proper identification of the Appellant as one of the men who broke into the compound and stole the goods in question. The Appellants conviction on both counts was sound and I uphold those convictions.

62. The offence of Burglary invites a sentence of upto ten (10) years upon conviction. The Appellant was allowed an opportunity to mitigate. The trial court called for a pre-sentence report. The Appellant

was then sentenced to serve 5 years imprisonment on the first count and three (3) years on the second count. On Count No. 3 the Appellant was fined Kshs. 5,000/- in default to serve one (1) month imprisonment. The sentences imposed by the trial court were lawful and were not in my view excessive. I do uphold those sentences.

63. Finally this Appeal fails and is dismissed in its entirety. The conviction and sentences of the trial court are confirmed and upheld.

DATED IN NYERI THIS 5 TH DAY OF DECEMBER, 2025.

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MAUREEN A. ODERO

JUDGE