

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. E050 OF 2024

DANIEL IBALEIAPPELLANT
VERSUS
REPUBLIC.....RESPONDENT

**(Appeal from conviction and sentence, by Hon. AZ Ogange,
Resident Magistrate, RM, delivered on 14th November 2024,
in Malaba MCCRC No. 1 of 2024)**

JUDGMENT

1. The appellant was convicted of housebreaking, contrary to section 304(1), and stealing, contrary to section 279(b), of the Penal Code, Cap 63, Laws of Kenya. He was alleged to have had broken into and entered a dwelling house, belonging to Margaret Adhiambo, with intent to steal, and stole therefrom Kshs. 170,000.00, belonging to Margaret Adhiambo. He denied the charges, and a trial was conducted, 4 witnesses testified.

2. PW1, Margaret Adhiambo, was the complainant. On 13th April 2023, she realized that her moneybox was missing from her house. Her landlord gave her a CCTV footage, which allegedly showed the appellant in her house. The moneybox was later recovered. It, allegedly, had Kshs. 170,000.00, before it disappeared, and when he was arrested, the appellant allegedly said that he found only Kshs. 5,000.00 in it. PW2, James Onyango, was the husband of PW1. He said PW1 informed him of the loss of the moneybox. They were given CCTV footage, in which they identified the appellant, as he entered their house. The appellant was then arrested. PW2 explained that their house was broken into. The padlock was damaged, but the door was not broken.

3. PW3, Julius Otieno, was a salesperson. He said that he met the appellant at 13th April 2023, at 12.00 midday, who asked for water. PW2 approached him, at 11.00 PM, saying he had lost his safe. He said he did not see the appellant with the moneybox, other than on CCTV. PW4, No. 244699 Police Constable James Omondi, investigated the matter. He said that he recovered the moneybox, in the toilet of the accused person, and that Kshs. 170,000.00 was stolen from the box. The appellant, allegedly, bought a motorcycle on credit, shortly thereafter. He said that there were other tenants, at the premises where the moneybox was found.
4. Judgment was delivered, on 17th October 2024. The appellant was convicted of housebreaking and stealing, and was sentenced to pay a fine of Kshs. 60,000.00, or serve 1-year imprisonment for the housebreaking; and pay Kshs. 50,000.00 fine, or 6 months' imprisonment for the stealing, with the default imprisonment sentences running concurrently.
5. He was aggrieved, hence this appeal. The grounds are that the trial court relied solely on circumstantial evidence; the principle of recent possession was improperly applied; there were conjecture and assumptions, without tangible evidence; and the sentence was excessive.
6. The charge carries 2 offences in 1. There is housebreaking and there is stealing. It is about stealing, accompanied, or preceded, or followed by breaking in or out, of the premises where the stealing happened. There should be some evidence of breaking into the premises, and of the stealing. The damage, caused by the break in or out, ought not be substantial.
7. Let me start with the breaking in. PW1, the complainant, did not testify on the break-in. She concentrated on the stealing. PW2 said that the padlock was broken or interfered with, but the door was not broken. PW3 did not talk about the break-in,

he merely testified that he had locked the door. PW4, the investigating officer, did not talk of a break-in. He merely testified that the appellant, according to his investigations, went back to the house, and went straight into the bedroom, and stole a moneybox. He never talked of anything being broken or damaged to gain entry, nor of a forced entry.

8. The housebreaking offence becomes one on account of the forced entry, which occasions some damage. In the absence of proof of a forced entry or some damage, in the effort to access the premises, the offence would not be established. As it is premises that are broken into, there ought to be tangible evidence of what was broken into, or forced open, to bring out the alleged break-in. Without that, the offence of housebreaking would not have been established. It is not enough to just give an oral narrative. There ought to be some tangible evidence of the premises broken into, or the particular item, in the premises, that was interfered with, to facilitate the access. Burden of proof, in criminal cases, is always on the prosecution, and the standard of proof remains beyond reasonable doubt.
9. The only witness, who testified about some damage, was PW2. But, was his oral narrative, alone, adequate, without any concrete or tangible or material evidence? He did not refer to any exhibit. The alleged damaged padlock was not produced. No pictorial evidence of the premises, that were broken into, was produced, showing the padlock that was interfered with, or the door that had been forced open or in.
10. Regarding the second offence, of stealing, the charge alleges that the appellant stole money from the house, after breaking in. Yet, the witnesses did not testify to money being stolen, but a moneybox or wooden safe, which, allegedly, had the money. PW1 testified that she established that her moneybox was missing, then it was recovered, and it was after that that she

said that it had Kshs. 170,000.00. PW2 also testified that PW1 had reported to him that her moneybox was missing, not her money. It was only later that he said that there was approximately Kshs. 170,000.00 inside the box.

11. PW3 talked of a moneybox, and not money. He said that the appellant was seen on CCTV footage carrying a moneybox, and that he did not know where the moneybox was usually kept. He said that he did not see the appellant with the moneybox, when he met him, on that material day. PW4, the investigating officer, testified that the appellant went into a bedroom, and stole a moneybox, and that he had a jacket and a Marvin, which he used to hide the moneybox, and the complainant later discovered that the moneybox was missing. He said the appellant led them to where the moneybox was. He later said the appellant stole Kshs. 170,000.00, and bought a motorcycle. The money box was allegedly found with the appellant, at a place where other people resided.
12. Just what exactly did the appellant allegedly steal? Did he steal money? Did he steal a moneybox? Did he steal both a moneybox and the money inside it?
13. There can be no doubt, from the evidence, that what was allegedly stolen was a moneybox. It was not alleged that the appellant took money that was in the house of PW1. It was not alleged that he allegedly removed the money from the box, and left the box behind. It was alleged that he took the box, which had the money. He did not handle the money directly, or separately from the box, but the box with the money inside. What was actually allegedly stolen was the money box and the money. Both items should have been reflected in the charge sheet, for the appellant did not allegedly directly handle any money, by way of stealing, but the moneybox. He allegedly stole the moneybox, so that he could access the money alleged to be in it. The charge, as drawn, was defective.

14. Was there concrete proof, that the appellant broke into the house, and stole the box? I do not think so. No one saw him break into the house. The evidence, that he was anywhere near the house, that day, was hazy or vague. PW3 vaguely testified that he met him, as he, PW3, was going home, but he, PW3, was incredibly vague, as to where they met. There was no indication that it was anywhere near the house of PW1, which was allegedly broken into. PW1 and PW2 were not anywhere near the house, at the material time of the commission of the offences. Indeed, they had no idea when it happened, as they only testified to establishing that the moneybox was missing. No one directly saw the appellant breaking in and entering the house. There was, equally, no circumstantial evidence, which placed him anywhere near the house, on 13th April 2023.
15. The case was built around CCTV footage, where the appellant was allegedly seen, handling the moneybox, presumably in the neighbourhood of the premises of PW1. Yet, that piece of evidence was not produced. The vagueness, in the testimonies of PW1, PW2 and PW3, should be attributed to the failure to produce the CCTV footage as an exhibit, given that that was what was meant to be the foundation of the case. Without it, they were left grasping at straws, and giving narratives that did not make much sense.
16. There was production of a picture or photograph of a motorcycle, that was allegedly bought with the money, that was allegedly in the moneybox. That evidence really amounted to a cart being placed before the horse. It would be imprudent, to provide proof of proceeds of the theft, before establishing the break-in and the theft, in the first place. That evidence was of little probative value. It did not establish the break-in and the theft.

17. Overall, it is my finding and holding that the prosecution did not establish its case, against the appellant, beyond reasonable doubt, to warrant a conviction. The evidence fell short. There was no tangible evidence of the break-in and of the theft. The appellant should not have been convicted. He should have been given the benefit of the doubt, and acquitted.
18. Consequently, I find merit in the appeal. I hereby allow it. The conviction is, accordingly, quashed, and the sentences set aside. If the appellant has paid the fines, the same shall be refunded to him. If he is in prison custody, in default of fine, he shall be set free, forthwith, unless he is otherwise lawfully held. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT BUSIA, ON
THIS 17TH DAY OF FEBRUARY 2026.**

**W MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the appellant.

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.