REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO E122 OF 2024

ISAIAH WAFULA

MSAMBAI.....APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

(Being an appeal arising from judgment in Bungoma Criminal Case No E089 of 2024 delivered on the 22nd August 2024 by Hon. T.M Olando (PM)

JUDGMENT

1. The appellant was charged with the following counts:

Count I: Burglary contrary to section 304(2) and Stealing contrary to section 279(b) of the Penal Code. The particulars are that on diverse nights of 5/12/2023 and 7/1/2024 at Kanduyi Township within Bungoma County, with others not before the court, broke and entered the dwelling house (De-Royal Canopy Bar Restaurant) of Virginia Nangekhe with intent to steal therein, and did steal therein and from the said Virginia Nangekhe, assorted brands of liquor and beer, two television screens (52-inch Vitron and 32-inch Airtel), two remote controls, and one smart DSTV decoder, the said property being of the value of Kshs 210,326/-.

Count II: Conspiracy to commit a misdemeanour contrary to section 394 of the Penal Code. It was alleged that on various nights between 5/12/2023 and 7/1/2024 at Kanduyi Township within Bungoma County, with others not

before the court, the accused conspired together to commit a misdemeanour, namely burglary and stealing of assorted brands of liquor and beer, two television screens (52-inch Vitron and 32-inch Airtel), two remote controls, and one smart DSTV decoder, all valued at Kshs 210,326/-, the property of the said Virginia Nangekhe.

Count III: Neglect to prevent a felony contrary to section 392 of the Penal Code. The particulars were that on diverse nights of the 5/12/2023 and 7/1/2024 at Kanduyi Township within Bungoma County, the appellant, being the caretaker of said premises (De-Royal Canopy Bar Restaurant), failed to prevent burglary and stealing.

2. The appellant was found guilty of the second count and sentenced to 12 months' probation.

3. The appellant is aggrieved by the decision of the trial court and has preferred this appeal on the following grounds:

1. The learned trial magistrate deliberately overlooked enormous contradictions, uncorroborated testimonies and inconsistencies in the prosecution's case.
2. The learned trial magistrate erred in law and fact when he convicted a sole accused person on the charge of conspiracy based on speculation without cogent reasons.
3. The learned trial magistrate erred in law and fact by delivering judgment disregarding the testimony and evidence of the accused.
4. The learned trial magistrate erred in law and fact in convicting the appellant when the prosecution failed to prove its case beyond a reasonable doubt.

5. The learned trial magistrate erred in law and fact when he deliberately failed to find that the investigations were skewed, careless and poorly conducted, hence could not sustain the prosecution case.

4. 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. (**Pandya v R., [1957] E. A. 336**).

5. At the trial court, Vagina Veronica Nangeka (Pw1) testified that she was the owner of Royal Canopy Bar and Restaurant. On 6/12/2023, she received a call from her manager, Catherine Nandaini (Pw2), reporting that the premises had been broken into and items stolen. Pw1 called the landlord and asked why there was an opening in the room; she was told it was the appellant's idea. The appellant reported the matter to the police. On August 1, 2024, Pw1 received another call from Pw2, who informed her that the other room had been broken into and that stock had been stolen. The thieves used the opening created by the appellant. The appellant did not produce the watchmen. Pw1 reported the matter, and upon investigation, it was discovered that the appellant had not made any report of the last incident.

6. Pw2 recalled that on 6/12/2023, the business had been broken into. Pw1 called the appellant, who told her he had gone to the police station. The appellant arrived with two people, and they began making another door. Later, on 8/1/2024, the premises were broken into. The padlocks were broken. The

appellant usually employed the watchmen. However, the appellant failed to produce the watchmen.

7. The investigating officer, No. 106368 PC Winfred Maveni Ikamati (Pw3), testified that the complainant, Pw1, reported that her bar had been broken into on two occasions. The appellant, the caretaker, could not explain what had happened but told Pw3 that he had dismissed the watchman. The appellant could not produce the watchman or provide Pw3 with the watchman's number. The owner provided documents to prove that the items were stolen, as per the inventory. The total value was Kshs 210,326/-.

8. In his defence, the appellant testified that he lives in Mabanga. He was employed by Tom Konya and worked at Sunrise in the Descensus Building as a caretaker. He was responsible for cleaning the compound and ensuring the tank was filled with water. The landlord employed the watchmen. On the two occasions when the theft occurred, he reported to the police station and was issued with OB Nos. 45/7/12/2023 and 78/8/1/2024.

ANALYSIS AND DETERMINATION

9. I have considered the submissions of the appellant and the prosecution. The only issue before the court is whether the prosecution has proved its case beyond reasonable doubt.

10. The trial magistrate held that the prosecution had not proved that the appellant committed burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code, and that the accused was not a watchman. Accordingly, the offence of failing to prevent a felony was not

proved. The appellant was convicted of the offence of Conspiracy to Commit a Misdemeanour contrary to Section 394 of the Penal Code. In Ann Wangechi Mugo & 6 others v Republic [2022] eKLR, the court held as follows on how to prove conspiracy:

> *"To prove a conspiracy, the prosecution had to establish that the respondents, together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of the accused and the evidence tendered in court (see Republic v Anne Atieno Abdul & Others [2017] eKLR). Further, Halsbury's Laws of England Vol. 25 observes that;*
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> > *It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose."*

11. However, in this case, there was no evidence that the appellant conspired with others not before the court. The prosecution's case was that the appellant hired the watchmen and failed to provide their contact information after the theft. However, Dw1 testified that the watchmen were employed by the landlord. The landlord was not called as a witness, and any evidence of what the landlord told the prosecution witnesses was hearsay.

12. In this case, since Count I depends on Count II, the failure to prove the derivative charge in Count I inevitably means that the foundational charge in Count II also collapses. The court in Republic v Musau [2024] KEMC 42 (KLR) considered an

appellant charged with the offence of conspiracy to commit a misdemeanour contrary to section 394, as read with section 36 of the Penal Code, and a second count of the offence of obtaining money by a false pretence contrary to section 313 of the Penal Code. The court, having found that the prosecution had failed to prove the second count, held as follows regarding the charge of conspiracy to commit a misdemeanour contrary to section 394:

> *"85. For this too, the prosecution bears the plausibly heavy burden to prove that the intention to agree to commit an offence existed before the offence of obtaining money by a false pretence and with intent to defraud, was committed. In other words, it was a precursor to the offence carried in Count II.*
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> *86. Drawing an inference from above eleven reasons and the conclusion, and principally, since the charge under Count II is a derivative of the charge under Count I, if the derivative charge under Count II fails, it follows that the precursor charge under Count I must fail."*

13. Consequently, I find that the prosecution failed to prove its case to the required standard. I therefore set aside the trial magistrate's orders and any consequential orders on sentence.

Dated, Signed and Delivered at BUNGOMA this 19th day of February 2026.

R.E. OUGO

JUDGE

In the presence of:

Isaiah Wafula Msambai / Appellant

For the Appellant

Miss Matere -For the Respondent

Wilkister - C/A