Mwangi & another v Republic (Criminal Appeal E009 of 2025)
[2026] KEHC 2994 (KLR) (Crim) (26 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2994 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CRIMINAL

CRIMINAL APPEAL E009 OF 2025

SC CHIRCHIR, J

FEBRUARY 26, 2026

BETWEEN

ANTONY KINGORI MWANGI ..... 1ST APPELLANT

GREGORY MUTHOMI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. Lucy Mutai (CM) in Isiolo Criminal Case No. 150 of 2017 delivered on 06th day of July, 2023)

JUDGMENT

1. Anthony Kingori Mwangi (1st Appellant) , Gregory Muthomi (2nd Appellant) and 5 Others, were charged at the chief Magistrate's court at Isiolo with the offence of robbery with violence contrary to section 295, as read with section 296(2) of the penal code. They faced an alternative charge of handling stolen property Contrary to Section 322(1) and (2) of the code. The Appellants herein were convicted of the alternative charge and each sentenced to a fine of Kshs. 2,000,000 or to serve a prison term of 7 years, in default. The Appellants were aggrieved and petitioned for Appeal.

Petition of Appeal

2. The Appellants have proffered the following grounds:

    a. The Learned Trial Magistrate erred in law and fact in convicting the Appellant even when the case against the Appellants was not proved beyond reasonable doubt.

    b. That the Learned Trial Magistrate erred in both law and fact by relying on inconsistent and shallow evidence adduced by prosecution witnesses which could not warrant a conviction.

c. That the sentence meted was excessive and unwarranted contrary to section 333(2) of the Criminal procedure code and Section 28 of the penal code.

d. That the defence and mitigation of the Appellant was not considered.

3. The Appeal proceeded by way of Written Submissions.

Appellant's Submissions

4. It is the Appellants' submissions that the case fell short of the threshold of proof in criminal cases. It is submitted that the court failed to properly scrutinize the Safaricom data, which was in any event presented by a witness who was not an Agent of Safaricom. That the authenticity of the said documents was therefore cast in doubt.

5. The Appellants further submit, the amount of the money allegedly found in their possession or/ and Mpesa Accounts did not tally with what was presented in court.

6. On the sentence, it is submitted that the same was excessive and failed to comply with the provisions of Section 333(2) and sentencing policy guidelines. They have argued that they spent 6 years, 2 months and 24 days from the date of arraignment in court until they were sentenced.

7. It is the Appellants final submissions that having been convicted under Section 322 of the Penal Code, then they should have benefited from the provisions of Section 28 of the code in as far as their sentence go.

8. The Respondent did not file any submissions.

Analysis and determination

9. This Appeal being the first, the duty of this court is as was set out in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR where the court of Appeal held: "This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. (See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L".0

10. I have considered the grounds of Appeal, the Appellant's submissions and the trial record and find that the grounds of Appeal can be reduced to two issues only. These are:

a. Whether the prosecution's case met the threshold of proof; and

b. Whether the sentence was excessive.

Whether the case against the Appellant's were proved.

11. The particulars of the charge against the 1st Appellant, (then charged as the 4th Accused) were that on the 26th day of March 2017 at Honi Village in Mweiga Location within Nyeri County otherwise then in the course of stealing dishonestly retained Ksh. 102,350, knowing or having reason to believe it to be stolen property, the property of Cooperative Bank of Kenya.

12. For the 2nd Appellant (then as the 5th Accused), the particulars of the charge were that on 26th March, 2017 at Ruiri Mituntu Vilage within Meru County, otherwise than in the course of stealing dishonestly retained Ksh 14,000, knowing or having reason to believe it to be stolen money, the property of Cooperative Bank of Kenya.

13. In a charge of handling stolen property contrary to section 322(1) and (2) of the penal code, the ingredients which the prosecution must prove are well settled . Under Section 322(1) of the Penal Code a person handles stolen goods "if otherwise that in the course of 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 the retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so." . This position was reiterated in the case of Mungai vs Republic [2006] KLR 2626 .

14. Further in the case of Tembere v Republic [1990] KEHC 43 (KLR) Justice Githinji held :One of the important elements of the charge of handling is that the accused must know or have reason to believe that the goods were stolen.....Another vital element of the charge of handling is that the accused must dishonestly receive or retain etc."

15. It is trite law that the person found in possession of stolen goods bears the burden of giving satisfactory explanation as to how he came into their possession. In the case of Paul Mwita Robi -Vs- Republic KSM Criminal Appeal No. 200 of 2008, the Court of Appeal held that:"Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.". See also the court's decision in Kaspan Lokitousa vs Republic [2018] KEHC 463 (KLR).

16. Turning to the present case, PW 11 told the court that the 1st Appellant was arrested at the junction of Isiolo/Meru road (Subuiga). He led the investigations to his home in Mweiga , Nyeri where Ksh. 102,350 were found. (The trial Court found that the notes actually totaled to 2,350, not the amount stated by the witness.) The money was wrapped in a white cloth or what appeared to be a white petticoat. On re- examination he stated that the money was buried outside the house. On the re-examination PW 11 told the court that the money had CBK level. PW 11 prepared the inventory. The Appellant thumb -printed the inventory. In his defence he never explained how he came into possession of the money save to deny it and to state that he had his own money amounting to ksh. 16,000. He however admitted that he was arrested at subugia junction referred to by PW11. He also thumbs-printed the inventory. There was no suggestion that he signed the inventory under compulsion or duress. I find that PW11 testimony was plausible and remained firm under cross- examination. The fact that the money found in his possession was less than what was indicated in the inventory did not negate the fact that he was found with stolen money.

17. In respect to the 2nd Appellant PW11 told the Court that they got information from an informer that he had been spotted counting money. They arrested the Appellant in Ruiri. A body search conducted , yielded Ksh 14,000 in the denomination of 50/= notes. He said he did not know how to write, and so he thumb-printed the inventory. On cross-examination by the Appellant PW 11 told the court that the money had Bank stick notes on it, The Appellant did not explain to PW11 the source of the money. On the other hand , PW 14, told the court that while interrogating the 2nd Appellant, he did not explain what he did for a leaving. In re- examination, PW11 stated that the money had central Bank's level on it. I have perused the 2nd Appellant's defence. Apart from a mere denial and stating that he was a miraa dealer, he did not explain the source of Ksh. 14,000 or how the money had Bank sticky notes and the Central Bank seal levels, which PW 11 referred to in her re-examination.

18. In both instances, according to PW11 testimony, the money was still tied with CBK level. The central Bank levels or indeed the sticky notes whose source is the Bank should have alerted the Appellants that the notes could not have been exchanged in the ordinary course of business or exchange, if indeed they were ignorant of the theft of funds at the Bank. The Appellants did not challenge this assertion of the labels nor give any explanation on the labels in their defence. There was sufficient evidence that money had been stolen from cooperative Bank at Isiolo about 5 days earlier.

19. In view of the aforegoing therefore, I am satisfied that, the prosecution proved that the Appellants were handling stolen property and their conviction was therefore safe.

The sentence

20. On the sen,tence the Appellant have argued that in terms of Section 28(2) of the penal code, the fine imposed on them was illegal. However, Section 28 of the Penal code only comes into play where the section of the law under which a person is charged provides for payment of a fine. Section 322, does not provide foran option of a fine, and where the Court gives an option of a fine as it did in this case, then the provisions of Section 28 do not apply.

21. Regarding the Provisions of Section 333 (2) of the criminal procedure code, I have observed that in the last Paragraph of her ruling on the sentence, (page 168 of the proceedings) the trial Magistrate stated: "I have noted the number of years which the accused have been in remand....." I have no reason therefore to doubt that she indeed factored in the number of years that the Appellants had spent in custody, prior to conviction.

22. In the end the Appeal fails in its entirety. It is hereby dismissed, and the findings of the court below, upheld.

DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 26TH DAY OF FEBRUARY, 2026

S. CHIRCHIR

JUDGE

In the presence of:-

Ismail Abdow-Court Assistant

The Appellants

Mr. Mjale – For the Respondents