



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. E049 OF 2025

VINCENT MUTISYA MUTUKU.....
.....APPELLANT

VERSUS

REPUBLIC
....RESPONDENT

(An appeal from the conviction and sentence by Hon. D. Kuto (SPM) at Mavoko CMCR No.594 OF 2020 delivered on 12th February 2024.)

JUDGMENT

1. The Appellant herein was the 3rd accused in the case in the court below, wherein they were charged with four counts of the offence of Shop Breaking and Stealing contrary to **Section 306(b) as read with Section 279(g) of the Penal Code.** Each of the counts had an alternative charge of Handling Stolen Property contrary to **Section 322(1) as read with Section 322 (2) of the Penal Code.**

2. They pleaded not guilty on all the charges whereupon the prosecution called seven witnesses. After considering the evidence of the prosecution witnesses, the court found that the prosecution had established a prima facie case against the accused persons sufficiently to warrant them to be put on their defence. The Appellant and his co-accused all elected to testify on oath but before the defence case was heard, the 2nd accused absconded. The Appellant and the 1st accused then entered their defence.
3. In the ensuing judgment the learned magistrate found there was no evidence to support any of the charges of shop breaking and stealing and on the 1st count of handling stolen goods and found the appellant and his co-accused not guilty and acquitted them under **Section 215 of the Criminal Procedure Code**. They were however, convicted on the other 3 counts of handling stolen property and sentenced to a term of imprisonment for eight (8) years on each count. The sentences were ordered to run concurrently and as for the appellant the time spent in remand custody was to be taken into account.
4. The 3 alternative counts upon which the Appellant was found guilty, convicted and sentenced were:-
“Alternative 2: Handling stolen goods contrary to **Section 322(1) as read with Section 322(2) of the Penal Code.”**

Particulars: On the night of 20th October 2020 at Athi River Township, in Athi River Sub-County within Machakos County, otherwise than in the course of stealing, jointly handled 8 pieces of vitenge material the property of **Dorcas Mwende** knowing or having reason to believe them to be stolen or unlawfully obtained.

Alternative 3: Handling stolen goods contrary to **Section 322(1) as read with Section 322(2) of the Penal Code.**

Particulars: On the night of 20th October 2020 at Athi River Township, in Athi River Sub-County within Machakos County, otherwise than in the course of stealing, jointly handled 2 pieces of Elite Weave, two pieces of Bobbie braids, one piece of Supa diva weave, one piece of Galaxy weave, two pieces of bona twist and one piece of Everest weave the property of **Cecilia Philip** knowing or having reason to believe them to be stolen or unlawfully obtained.

Alternative 4: Handling stolen goods contrary to **Section 322(1) as read with Section 322(2) of the Penal Code.**

Particulars: On the night of 20th October 2020 at Athi River Township, in Athi River Sub-County within Machakos County, otherwise than in the course of stealing, jointly handled one blanket, 9 girls dresses, one jacket, two ladies sweaters and one baby blanket the property of **Moses Wondero Keya** knowing or having reason to believe them to be stolen or unlawfully obtained.”

5. The evidence adduced against the Appellant and his co-accused was that they were found in possession of goods stolen from the shops of the complainants barely a week after the shops had been broken into. It was alleged that they were found in a motor vehicle carrying the goods by police officers on patrol and although they had escaped they were later arrested and charged.
6. In his defence the Appellant contended that he had gone to Athi River to visit his brother - Athi River is where the shops had been broken into and also where the stolen goods, which were positively identified by the complainants, were recovered. He contended that he was arrested alone and that nothing was recovered from him. He denied knowing his co-accused and stated that he was at home on all the nights material to the case.
7. His appeal is premised on grounds that:
- “(1) The learned trial magistrate erred in matters of law and facts by convicting the accused person in a case where the standard of prove was lower than what is required in criminal trials.**
- (2) The learned trial magistrate erred in matters of law and facts by convicting the appellant while relying on a prosecution’s evidence which was doubtful and wanting.**

- (3) The learned trial magistrate erred in both law and facts by convicting the appellant where investigation was inept.**
- (4) The trial magistrate erred in both law and facts by failing to consider the appellants firm defence.**
- (5) The trial magistrate erred in matters of law and fact by stage-managing the case for prosecution in his judgment thus arriving to a wrong decision.**
- (6) The trial magistrate erred in matters of law and fact by not evaluating the evidence of the prosecution and realizes that the appellant was arbitrary arrested without a cogent reason and falsely incriminated with an offence he did not commit.”**

8. The appeal which is vehemently opposed seeks to have the conviction quashed and the sentences set aside.

9. Parties to the appeal consented to canvass the appeal through written submissions. The Appellant appeared in person while Ms Nyauncho appeared for the State/Respondent.

10. The Appellant faulted the trial magistrate for what he described as failure to evaluate the evidence. He contended that the evidence adduced was too remote and wanting hence leading to the conviction of an innocent man. He also submitted that the case was based on suspicion and frame ups and that suspicion no matter how strong cannot sustain a conviction. He further submitted that the evidence of identification was not reliable given that the police officers intercepted the vehicle at

night and the officers could have seen them only for a short duration before they allegedly escaped. He contended that the officer who arrested him could not prove that he was the same man who fled on the night the motor vehicle was found with the stolen goods. He asserted that the case was not proved beyond reasonable doubt and urged this court to allow the appeal.

11. On her part, Ms Nyauncho learned Prosecution Counsel, urged this court to find that the prosecution had proved the charges against the appellant beyond reasonable doubt; that the stolen goods were positively identified by the complainants and that the accused did not give a plausible explanation on how he came into possession of the same.

Analysis and determination

12. As the first appellate court, I am enjoined to reconsider and evaluate the evidence in the court below, so as to arrive at my own independent conclusions albeit bearing in mind that I neither saw nor heard the witnesses who testified as did the learned magistrate. I have also considered the rival submissions, the cases cited thereat and the law.
13. The crux of the case against the Appellant is that he was identified by Pw7 as one of the persons who were in the vehicle which they intercepted on the night of 19th October 2020 and

which as it turned out, was packed with some of the items which had been stolen from the complainants shops after they were broken into on various dates between 13th and 29th September 2020. Those goods were positively identified by the various complainants at the trial so there is no doubt that their shops were indeed broken into and goods stolen from therein. According to the officer (PW7), their encounter with the three men who were in the vehicle took place at around 4 a.m. He explained that there were bright security lights at the scene. He also identified the Appellant in the dock. In his defence, the Appellant's co-accused, conceded that police officers in fact intercepted the vehicle and that at that time he was together with two men. He was however emphatic that the Appellant was not one of those two men. Indeed in cross-examination it was his evidence that he did not know the Appellant (referred to the appellant as the accused person now in court as their other co-accused had absconded/jumped bail).

14. The evidence against the Appellant was therefore that of a single identifying witness. It is instructive that it was deep into the night or very early in the morning, if you may, and the witness (PW7) did not know the Appellant before. In my considered view, the circumstances were difficult and not favourable for a positive identification. This coupled with the fact that no one asked PW7 the duration of his encounter with the Appellant renders the identification unsafe more so given

that the appellant's co-accused was emphatic that the appellant was not one of the two men who were with him. Moreover, PW7 was in the company of other officers yet none of them were called to testify. It is my finding therefore, that the circumstances of this case are such that one can safely conclude that the reason they were not called was because their evidence would have been detrimental to the prosecution's case.

15. A cursory reading of the judgment of the court below reveals that the learned trial magistrate did not apply his mind to the law applicable to identification. In his defence - see cross-examination - the Appellant expressly denied that he was with his co-accused on 20th October 2020 which is the day on which PW7 alleges to have found them in the vehicle, yet the learned magistrate alleges that the Appellant did not deny he was in the vehicle. It is therefore my finding that the learned magistrate fell into error. The case against the Appellant had not been proved beyond reasonable doubt in any of the counts to require him to give an explanation. In the premises, I am satisfied that appeal has merit. Consequently the same is allowed. The convictions on all the three charges is quashed and the attendant concurrent sentences are set aside.

16. The Appellant should be released forthwith unless otherwise lawfully held.

It is so ordered.

**Judgment signed, dated and delivered virtually on this
19th day of March, 2026.**

**E. N. Maina
Judge**

In the presence of:

Mr. Motende for the State

Appellant - Absent

Mary -Court Assistant/Interpreter

ORIGINAL