Republic v Joshua (Criminal Case 765 of 2018) [2025] KEMC 181 (KLR) (10 July 2025) (Ruling)

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REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CRIMINAL CASE 765 OF 2018

YA SHIKANDA, SPM

JULY 10, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

LINEX KAVOI JOSHUA ..... ACCUSED

RULING

1. Linex Kavoi Joshua (hereinafter referred to as the accused person) is charged with the offence of Stealing contrary to section 275 of the *Penal code*. The particulars of the offence are that on the night of 14th and 15th July, 2018 at Lani village in Kibwezi Sub-county within Makueni County, the accused person with another not before court stole two N100 batteries, assorted spanners, one pressure pipe, one fan motor and 160 litres of diesel, all valued at Ksh. 163,400/= the property of David Sheldrick Wildlife Trust. The accused person was alternatively charged with the offence of Handling stolen goods contrary to section 322(1) and (2) of the *Penal code*. The particulars of the offence are that on 19/7/2018 at Lani village in Kibwezi Sub-county within Makueni County, the accused person, otherwise than in the course of stealing, dishonestly retained one Freebatt N100 battery knowing or having reason to believe that it was stolen. When the plea was taken, the accused person pleaded not guilty. The matter was then set down for hearing.

The Evidence

2. The entire prosecution case was heard by another Magistrate who was subsequently transferred. When the matter was placed before me, parties agreed and the court directed that the matter proceeds from where it had reached. The prosecution failed to call more witnesses and closed their case. At the close of the prosecution case, only two witnesses had testified. The brief facts of the prosecution case are that on 15/7/2018, information was received to the effect that some components had been stolen from a machine belonging to the complainant herein. A search was conducted and a battery and some spanners were recovered from the accused person. It was alleged that the recovered items belonged to the complainant. The accused person was arrested and later charged.

Main Issue For Determination

3. The main issue for determination at this stage is whether the prosecution has established a prima facie case to warrant the accused person to be placed on his defence in respect of the offence(s). The parties did not make any submissions.

Analysis And Determination

4. I have carefully considered the evidence on record as well as the law applicable. I have further considered the submissions filed by the defence. A prima facie case is defined in the *Mozley and Whiteley's Law Dictionary* 11th Edition as:

> "A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side." Emphasis added

5. The locus classicus on what constitutes a prima facie case is to be found in the celebrated case of *Ramanlal Trambaklal Bhatt v. R* [1957] E.A 332 at 334 and 335, where the court stated as follows:

> "Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence..... It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."(Underlining mine)

6. In the authority of *Ronald Nyaga Kiura v Republic* [2018] eKLR, the court observed that a prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. In my considered view, for the court to find that a prima facie case has been made out against an accused person, the prosecution must have established the following:

    a. That the offence complained of was indeed committed; and

    b. That the evidence links the accused person to the offence complained of.

7. It is my further opinion that in order to show that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. A prima facie case is an early screen for a court to determine whether the prosecution can go forward to try the accused person fully for the crime. As such, the standard of proof that the prosecution must satisfy at the prima facie case stage is lower than that for proof that the accused is guilty, that is, lower than proof beyond reasonable doubt. In order to establish a prima facie case, a prosecutor need only offer credible evidence in support of each element of a crime.

8. In the case of *Joshua Munyao Kiilu & another v Republic* [2016] eKLR, the accused person had been charged and convicted of the offence of Robbery with violence contrary to section 296(2) of the *Penal code*. It was alleged that the robbers took Ksh. 5,000/= and a mobile phone from the complainant at the time of the alleged robbery. On appeal, Nyamweya J (as she then was) held as follows:

> " The prosecution must therefore prove theft as a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft..... As regards the phone that was stolen, Charles did not provide any evidence of the existence of the phone or ownership of the same. The other witnesses did not give any evidence of the existence of the phone, other than the account given to them by Charles of the phone having been stolen..... This evidence by Charles as to the robbery is therefore uncorroborated, and in light of the gaps and irregularities noted in the evidence on the items that were alleged to have been stolen by the Appellants, this Court finds that the robbery was not proved beyond reasonable doubt."

9. The court quashed the conviction of Robbery with violence and set aside the sentence and substituted the same with the offence of Assault causing actual bodily harm.

10. Similarly, in the case of *Peter Munene v Republic* [2009] eKLR, the accused was, inter alia, charged and convicted of the offence of stealing of a cell phone, wrist watch and money in cash. While quashing the conviction on the offence of stealing, J.B Ojwang J (as he then was) held as follows:

> " Did the appellant also steal personal items and money from the complainant? Without necessarily doubting the single-witness evidence on the charge of theft, it is to be noted that the proof placed before the Court had focused on the first count of the charge, while little had been shown to prove the theft charge. No attempts were made to convince the Court that the items allegedly stolen had existed, or were in the complainant's custody on the material night. The mode of proof, in his regard, conveys doubts which, by the standard practice in criminal law, will have to be resolved in favour of the appellant."

12. Being guided by the above authorities, I affirm the position that where there is no recovery of items alleged to have been stolen, there must be evidence to show that the items existed and were in the custody or possession of the complainant or other person before being stolen. The evidence may be in the form of purchase receipts, photographs, packaging material, testimony of persons who knew of the existence and ownership of the items or other evidence other than mere oral testimony of the complainant. I say so because it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt. If such proof is not called for, the court process would be open to abuse such that a complainant would make all manner of allegations without bothering to prove them.

13. An accused person should not be found guilty of the offence of stealing just because the complainant alleges that he lost some property. Existence and prior possession of the property by the complainant ought to be established. Even where property said to have been stolen is recovered, there must be positive identification of the same by the complainant and proof that indeed the property was stolen. I am guided by the provisions of sections 107 and 109 of the *Evidence Act* which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. It is not enough to allege that items were stolen, the allegation must be proved or established.

14. Other than mere oral testimony, no other evidence whether documentary or otherwise was adduced to show the existence of the items as well as ownership of the same by the complainant. The machine

operator who allegedly reported the loss of the items was not called to testify. There is no direct evidence linking the accused person to the offence. Nobody testified that they saw the accused person stealing the items. The prosecution relies on the fact that the stolen items were recovered from the accused person. The evidence on recovery was given by PW 2 KWS Corporal Paul Maina. The record indicates that the items said to have been recovered from the accused person were marked for identification but the same were not produced in evidence. In *Des Raj Sharma v Reginam* [1953] 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence.

15. Furthermore, in the case of *Gerald Munyao Ngaa v Republic* [2018] eKLR, the court observed thus:

> "I have also considered the evidence in respect of the recovery of other stolen items. As pointed out by the appellant counsel and admitted by the respondent's counsel, the evidence in that respect was full of contradictions. It was said that the appellant led the police to his house in Nakuru where the items were recovered. On the other hand, the complainant says that he saw the items at the police station, while the appellant says that he was forced to sign an inventory. More critically, none of the items were produced in court and positive possession was not proved." (Emphasis supplied)

16. Similarly, in the case of *Moses Macharia Kiarie v Republic* [2014] eKLR, the court held as follows:

> "The rest of the prosecution case appears to be that the Appellant led police officers from Kigumo Police Station to PW2 and PW4 to whom he had allegedly sold some of the stolen items, and from whom the police recovered those stolen items. No police officer from that police station or anywhere else testified. The investigating officer of the case never testified and the alleged stolen items were never produced in evidence as they should have been. There was thus no good evidence of recovery of the stolen items properly linking the Appellant to them. In criminal trials the chain of evidence and sanctity thereof is absolutely important. In the present case a proper chain of evidence is lacking. To begin with, the persons who allegedly saw the Appellant breaking into the complainant's house never testified, and no reasons were given why they did not. Secondly, the police officers who arrested the Appellant, and whom the Appellant allegedly led to the stolen items, never testified. Again, no reasons were given why they did not testify. Thirdly, the allegedly stolen items that were recovered were never produced in evidence before the trial court. The investigating officer who should have produced them never testified. It is also to be noted that there is no evidence of the complainant's positive identification as his of the alleged stolen items that were recovered. They were all common household and personal goods readily available to anyone. With all the lacunas highlighted above, it is clear that the offences in count 1 were not proved against the Appellant beyond reasonable doubt. He should have been acquitted." (Underlining mine)

17. The foregoing reveals the importance of production in evidence of recovered items. Assuming that the items were recovered from the accused person, without production of the recovered items, there would be no evidence of recovery and ultimately, no evidence to link the accused person to the offence. The test in determining a prima facie case was laid down in *Republic v Galbraith* [1981] WLR 1039, in the following words:

    1. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case;

2. The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence;

   (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

   (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

18. It is the duty of the prosecution to prove the charge against the accused person. To this end, the prosecution must satisfy the key ingredients of the offence at a prima facie level before the accused person is called upon to offer an explanation. In my view, before the court places an accused person on their defence, there must be credible evidence to show that the offence complained of was committed and that the evidence links the accused person to the offence. I think I have said enough to show that the charge is untenable. If I were to place the accused person on his defence and he opted to remain silent in defence, this court would not convict him. It is not the duty of the accused person to fill in the gaps or tie up the loose ends in the prosecution case.

19. I agree with the observation made by the High Court of Malaysia in Criminal Appeal No. 41LB-202-08/2013 – *Public Prosecution v Zainal Abidin B. Maidin & Another* that the defence ought not to be called merely to clear or clarify doubts. In the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, Sharma J held:

> It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence, to rule that there is a case for the accused to answer."

20. I may be curious to know what the accused person has to say about the allegations but curiosity is not a reason enough to place the accused person on his defence. The foregoing illustrates that the prosecution has failed to establish all the key ingredients of the offence. It therefore follows that the evidence on record does not disclose the offence(s) with which the accused person has been charged.

Disposition

21. Having considered the prosecution evidence on record, it is my finding that the prosecution has failed to establish a prima facie case against the accused person. In view of the foregoing, I make the following orders:

   a. The accused person has No Case To Answer in respect of the charge of Stealing contrary to section 275 of the *Penal code*;

   b. The accused person has No Case To Answer in respect of the alternative charge of Handling stolen goods contrary to section 322(1) as read with 322(2) of the *Penal code*;

   c. As the glove does not fit, the accused person is hereby Acquitted of both counts under section 210 of the *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 10TH DAY OF JULY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.