



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Musyoka (Criminal Case E614 of 2022)
[2025] KEMC 184 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEMC 184 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CRIMINAL CASE E614 OF 2022
YA SHIKANDA, SPM
JULY 23, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

PATRICK NDETI MUSYOKA ACCUSED

JUDGMENT

1. Patrick Ndeti Musyoka (hereinafter referred to as the accused person) is charged with the offence of Stealing contrary to section 268(1) as read with section 275 of the Penal code. The particulars of the offence are that on 4/9/2022 at Kitengei sublocation, Kibwezi Sub-county within Makueni County, the accused person stole three windows valued at Ksh. 12,000/=, property of the Republic. When the plea was taken, the accused person pleaded not guilty, where after the matter was set down for hearing.

The Evidence

The Prosecution Case

2. The entire prosecution case was heard by another Magistrate who was subsequently transferred. When the matter came up before me, the parties proposed and the court directed that the matter proceeds from where it had reached. The accused person had already been placed on his defence. The prosecution called four (4) witnesses in a bid to prove their case. PW 1 Mumbua Mulwa testified that she as an Assistant chief. That on 4/9/2022 at about 7:00 am she was called on phone and informed that the windows at her office had been removed. She went to the office and confirmed that the windows were missing. Later, the witness was informed that the accused person had been seen carrying windows on a motor cycle.
3. The accused person was later apprehended and taken to the police station. The windows were not recovered. PW 2 Daniel Kyalo testified that on 4/9/2022 at about 2:30 am, he met the accused person



herein in the company of another man. That the accused person was riding a motor cycle which had carried windows. Later, the witness informed members of community policing that he had seen the accused person ferrying windows. PW 2 was later informed that windows had been stolen. PW 3 Kioko Musila testified that he was with PW 2 when they met the accused person. His testimony was similar to that of PW 2.

4. PW 3 Robin Mbatia testified that he was the investigating officer herein. That the matter was reported to the police by PW 1 on 4/9/2025. The witness visited the scene and confirmed that three windows had been removed from the Assistant Chief's office. That the accused person was apprehended by members of public. The investigating officer took photographs at the scene.

The Defence Case

5. Upon being placed on his defence, the accused person elected to give a sworn testimony and called one other witness. The accused person denied having committed the offence. That he was a bodaboda motor cyclist at the material time. The accused person stated that on 4/9/2022 he ferried a customer to Kambu area then returned to Kilumelu market. The accused person was later apprehended and taken to Mtito Andei police station. DW 2 James Musau Nzioka testified that the accused person was his neighbour. That on 3/9/2022 he arrived home and found the accused person. They had supper then went to sleep. On 4/6/2022 at about 7:00 pm, the accused person called the witness and informed him that he had been arrested.

Main Issues For Determination

6. In my opinion, the main issues that fall for the court's determination are as follows:
 - i. Whether the complainant's items were stolen as alleged;
 - ii. Whether it was the accused person who stole the complainant's items;
 - iii. Whether the prosecution has proven its case against the accused person to the required standard.

Analysis And Determination

7. I have carefully considered the evidence on record as well as the law applicable. In my considered view, for the court to convict an accused person, the prosecution must have proved beyond reasonable doubt 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.
8. It is my further opinion that in order to prove that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. The prosecutor must offer credible and cogent evidence in support of each element of the offence.
9. Section 268 of the Penal code provides in part as follows:
 - “(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.



- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
- (a) an intent permanently to deprive the general or special owner of the thing of it;
 - (b) an intent to use the thing as a pledge or security;
 - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;
- and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.”

10. Section 275 of the Penal code provides:

“Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”

11. There is no direct evidence linking the accused person to the offence of stealing. No witness testified that they saw the accused person committing the offence. The complainant was not at her office when the offence was committed. The facts relied upon by the prosecution are that the accused person was seen carrying windows in the wee hours of the night. The windows were not recovered. This implies that the prosecution relies on circumstantial evidence. In the case of *Simon Musoka v R* [1958] EA 715, the then Court of Appeal for Eastern Africa, inter alia, held that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.

12. Earlier on, in the case of *R v Kipkering arap Koske & Another* (1949) 16 EACA 135, the same Court had, inter alia, held as follows:

“That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”



13. Similarly, in the case of *Judith Achieng Ochieng v Republic* [2009] eKLR, the Court of Appeal held as follows:

“It is trite law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.
- (ii) Those circumstances should be a definite tendency unerringly pointing towards the guilt of the accused.
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”

14. PW 2 and PW 3 testified that they saw the accused person and another ferrying windows using a motor cycle. Other than such testimony, there is nothing else linking the accused person to the alleged windows. There is no indication that the accused person was seen at the Assistant chief's office shortly before the windows disappeared. Since the alleged windows were not recovered, it would be difficult to ascertain whether they were the same windows that were being ferried by the accused person, if at all he did. Owing to the uncertainty, it would be difficult to find that the evidence irresistibly points to the guilt of the accused person to the exclusion of others. The prosecution evidence does not place the accused person at the scene of crime.

15. I have considered the accused person's defence. I am aware that the accused person is not under duty to prove his defence or innocence. The accused person was not obliged to adduce evidence to prove his allegations. The duty is on the prosecution to prove the charge against the accused persons beyond reasonable doubt. This standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see *Clarence Victor, Petitioner 92-8894 v. Nebraska*, 511 U.S. 1 (1994); *Rex v. Summers*, (1952) 36 Cr App R 14; *Rex v. Kritz*, (1949) 33 Cr App R 169, [1950] 1 KB 82 and *R. v. Hepworth*, *R. v. Feamley*, [1955] 2 All E.R. 918).

16. Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

17. I have no reason to disregard the accused person's defence. What we have on record is mere suspicion. In the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, the Court of Appeal held thus:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As



this court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No. 17 of 1998 (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence”

18. Suspicion, however grave, cannot form a basis for conviction. The evidence does not irresistibly point to the accused person’s guilt to the exclusion of all others or at all. The evidence against the accused person is not cogent. There is room for assumption. The accused person may or may not have committed the offence.

Disposition

19. Having considered and analysed the evidence on record, I find that the evidence does not meet the threshold of “proof beyond reasonable doubt.” Consequently, I make the following orders:
1. The accused person is found not guilty of the offence of Stealing contrary to section 275 of the Penal code;
 2. As the glove does not fit, I must, as I hereby do, acquit the accused person of the charge accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 23RD DAY OF JULY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

