



REPUBLIC OF KENYA



KENYA LAW
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**Obora v Republic (Criminal Appeal E039 of 2021)
[2026] KEHC 4890 (KLR) (17 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 4890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E039 OF 2021
WM MUSYOKA, J
APRIL 17, 2026**

BETWEEN

JAMES OWINO OBORA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence, by Hon. PY Kulecho, Senior Resident Magistrate, SRM, of 23rd December 2021, in Busia MCCRC No. E1738 of 2021)

JUDGMENT

1. The appellant was convicted of stealing, contrary to section 268, as read with section 279(b), of the Penal Code, Cap 63, Laws of Kenya. He was alleged to have had stolen computer accessories, being 10 mice, 19 IP links and 13 keyboards, valued, in aggregate, at Kshs. 85,550.00, which belonged to Bunyala Model Secondary School, headed by Joseph Muzee Oriko. The theft was alleged to have had happened on 10th March 2021 and 21st April 2021.
2. He denied the charges, and a trial was conducted, 7 witnesses were presented by the prosecution.
3. PW1, Joseph Mzee Oriko, the Principal of the complainant school, testified that the appellant had been employed as a computer teacher, and was in charge of the computer laboratory. When PW1 took over as Principal, sometime in 2020, he found the appellant in service. It was established that on 10th March 2021, the computer laboratory had been vandalised, and some equipment was missing. Upon internal investigations, it was established that the appellant had been removing items from the laboratory piecemeal, whereupon PW1 withdrew the laboratory key and the computer assigned to him, from him. It was established that some 7 original keyboards, received as a donation, were missing, and had been replaced with 7 inferior ones. 7 mice were also missing, and had been replaced with 7 pieces that were nonfunctioning. 17 TP links were also missing. The appellant came to school on 21st April 2021, to assist the computer students sit examinations. He was with the examination supervisor.



After the examinations, the remaining TP links were also found to be missing. The appellant was said to have absconded his duties once the items were disclosed to be missing.

4. PW2, Oscar Ouma, was a teacher at the complainant school. He was appointed Director of Studies at the school in March 2021, and his office was within the computer laboratory. From interactions with computer students, he learnt that some computer accessories were missing, in particular computer mice. He informed the school accounts clerk, advising her to inform PW1. He later established that 2 TP links, used to access Wi-Fi, were also missing. He informed the Deputy Principal. He stated that students and other teachers also had access to the computer laboratory.
5. PW3, Humphrey Were Odonge, was a gateman at the complainant school. He stated that the school had received a donation of computers from a donor, which were placed in the computer laboratory. The appellant was a Board of Management, BOM, teacher at the school. PW3 heard that the appellant was stealing computer accessories. He made a report of the same to PW1 and the Deputy Principal.
6. PW4, Sophia Ojune Ogaga, was a secretary at the complainant school. She was on duty, in 2019, when the school received 20 desktop computers, from a donor, which were installed in the computer laboratory. The appellant was a computer teacher, who used to use the computers. In March 2021, she was informed, by PW1, that some of the computer parts were missing. She and others went to the laboratory, and confirmed that some mice and keyboards were missing, and had been exchanged with strange ones. The missing items were established to be 10 mice and 19 TP links. She said that the key for the computer laboratory was in the custody of the appellant, who was the sole computer teacher.
7. PW5, Brenda Malia Inziani, was an accounts clerk at the complainant school. She testified that the school had received a computer donation. She explained that the school was given funds to buy computers, and she paid for the computers. She had the inventory of the computers and the accessories that were bought. Sometime in March 2021, PW2 informed her that some of the items were missing from the computer laboratory. She confirmed that some strange keyboards had replaced the original keyboards. She also noted that 6 mice were missing, and some TP links too. She described the appellant as the custodian of the computers.
8. PW6, No. 237870 Police Inspector Constantine Chepno, investigated the matter, and detailed the steps that he took in his investigations. PW7, No. 61853 Police Corporal Gabriel Kosgei, was the scenes of crime officer, who processed photographs that PW5 had taken at the computer laboratory.
9. The accused was put on his defence, and he made a defence statement, on 20th January 2022. He testified that he was a computer teacher at the complainant school, having been employed in 2020. He also stated that he operated a cybercafé at the local shopping centre. He explained that he worked at the computer laboratory with a teacher who later became the Deputy Principal, who, upon his promotion, moved out with a computer and 2 TP links. He stated that other teachers also had access to the computer laboratory. He said that a Ms. Melly allocated herself a computer and a TP link, and so did a male teacher. He stated that students too had access to the laboratory.
10. He said that there was only one key to the computer laboratory, which he was not allowed to go home with. He said that when schools opened in January 2021, he discovered that some items were missing, but he did not report to the authorities, except that he pointed it out to PW2. When examinations were being done, in March 2021, PW1 asked him to assist with invigilation. He noted that one student used to sleep at the laboratory, and that he only exited after the examinations. He said that he could not tell when the computer items went missing. He said that he was in charge of the computer laboratory, and was in a position to tell if some of the computer items were missing.



11. Judgment was delivered, on 23rd December 2024. The appellant was convicted of stealing, and was sentenced to pay a fine of Kshs. 100,000.00, or serve 2 years in prison for it.
12. He was aggrieved, hence this appeal. The grounds are that the trial court erred in holding that the ambiguous and imperfect charge was not prejudicial to the appellant, for it led to a conviction for an alleged offence committed on an uncertain and unspecified date; there was no evidence to support the finding that the appellant stole the computers; the trial court relied purely on circumstantial evidence and suspicion; burden of proof was shifted to the appellant; and the defence was dismissed without justification.
13. The appeal was canvassed orally, at the request of Mr. Okutta, for the appellant. Mr. Okutta submitted on 17th March 2026. Mr. Onanda for the respondent left it to the court.
14. Mr. Okutta argued that there was no proof that the computers or their components existed; that it was not established that the appellant was in situ, for he had been since sacked, and other people had access to the computer laboratory; no one saw the appellant steal the computer accessories, and no recoveries were made; and the prosecution was premised on suspicion, and the conviction was based on mere suspicion.
15. Let me start with the propriety of the charge. It charged the appellant with committing thefts on 2 specific dates; 10th March 2021 and 21st April 2021. The evidence adduced did not zero in on those 2 dates, as the dates when the thefts were committed, but as when the thefts were discovered. The evidence pointed to that. None of the witnesses were able to tell when the thefts occurred, and no evidence was presented that the alleged thefts happened on 10th March 2021 and 21st April 2021. The evidence presented did not establish that any thefts occurred on those dates, but what emerged was that the thefts occurred on diverse dates, prior to 21st April 2021, and that 10th March 2021 and 21st April 2021 were dates when the thefts were discovered.
16. The case that the appellant expected the prosecution to present was one that demonstrated that he stole the items on 10th March 2021 and 21st April 2021, for that was what he was accused of. No such evidence was presented. What emerged was allegations that the thefts occurred on unknown dates, before 10th March 2021 and 21st April 2021. The ideal way of approaching such should have been to frame the charge differently, by alleging that the thefts occurred on diverse dates around 10th March 2021 and 21st April 2021.
17. Was the appellant prejudiced, in his defence by that? I do not think so. The case was about loss of computer components during the period when he was in charge of the computer laboratory. It did not cover the period when he was not engaged by the complainant. It required him to account for what transpired within the period of engagement. I am not persuaded that the trial court erred, in holding that no prejudice was suffered.
18. The next issue is about whether the evidence disclosed the offence of theft or stealing, and, if it did, whether the stealing was by the appellant. Was there evidence that the computer accessories were stolen?
19. Theft or stealing connotes the taking or retention of property, belonging to another, with an intention of permanently depriving the owner of it. The prosecution would be required to establish that the property alleged to have been stolen existed, and belonged to another, the complainant, and that the same was capable of being stolen, and was, in fact, stolen. The key elements are the ownership of the property, its existence, and the act of it being stolen, by way of taking or retention.



20. On the first element, whether the said computer accessories existed, in the first place, and were owned by the complainant school, there is evidence that the accessories existed, and belonged to the complainant. Exhibit 1 was an invoice, endorsed paid, dated 3rd October 2019, with respect to purchase of 20 HP Compaq computers with HP 19-inch monitors; 1 Erion printer; 20 TP link wireless adapters and 1 router. The invoice indicated the purchaser, from Marksonic Computers Limited, was the complainant, Bunyala Model Secondary School. The charge was about theft of 10 mice, 19 TP links and 13 keyboards. From the material above, the prosecution established that the complainant had computers, with accessories, which were capable of being stolen.
21. The next consideration was whether there was a theft of those items. Theft or stealing of the said items could only be in the context of taking, and not retention. The said items were housed within the premises of the complainant, at a computer laboratory or room. Stealing could only be by way of those items being taken away from that computer laboratory, and not being retained within the laboratory. Retention is about conversion, which was not an issue in this case. Therefore, the case was about the items being taken away or removed from where they were supposed to be, at the computer laboratory.
22. The evidence tendered was that the items were established to have had disappeared from the computer laboratory. It would appear that no records of any sort were kept of the contents of the computer room, and of the handling of the said contents. The only concrete evidence presented was pictorial, photographs taken by the police, on the contents of the computer room, showing furniture and computers.
23. None of the principal witnesses, that is to say the colleagues of the appellant, that is PW1, PW2, PW3, PW4 and PW5, were shown those photographs, to confirm whether they reflected the computer laboratory they were testifying on. Essentially, to explain what the pictures were showing or demonstrating. The person who allegedly took the photographs, PW6, did not bespeak them. He merely said that photographs were taken. None were shown to him. He did not refer to them. The person who processed the photographs, after the films were given to him, PW7, testified after the alleged photographer, PW6. He, PW7, was not at the scene himself, and he could not bespeak the contents of the said photographs. He testified last, after all the other witnesses had testified, and introduced and produced the photographs.
24. The taking of the photographs was a good aspect of investigation. To give the court a pictorial or situational view of what the dispute was all about. To establish that the computer laboratory existed, and it was equipped with the computers that the witnesses talked about. Beyond that, however, that pictorial evidence was of little utility. Parties ought not simply throw pictures on the table, and expect the court to interpret the photographs. Life can only be breathed into the photographs by the witnesses, not the court. The photographs are evidence belonging to the witnesses. It should be the duty of the witnesses to explain the contents of the photographs to the court. The best persons to explain the contents ought to be the witnesses who were familiar with the contents. In this context, that would be the teachers and other staff at the school, and not the police witnesses, least of all police officers who never even set foot at the school.
25. The photographs ought to have been placed before PW1, PW2, PW3, PW4 and PW5, who were workers at the school. These were the only witnesses who could bespeak the photographs, to explain the story behind them. To confirm whether the room depicted was the computer laboratory they were talking about, and whether the computers in the photographs were what they were speaking about, and details about missing keyboards, mice and adapters. The pictures could not show or demonstrate that a theft had happened. They could not explain what was missing, or had been replaced.



26. Was there a taking of the items the subject of the charge? The witnesses stated that some items were missing from the laboratory. Some said that some had been replaced with others, described as “strange.” The appellant conceded that some computer components were indeed missing. The fact that the said items were missing, meant that they were removed from the room, and, therefore, they had been taken away. The element of stealing was, therefore, established.
27. The next consideration should be whether the taking was by the appellant. It was not in dispute that he had some control or was in charge of the computer room, in his capacity as the computer teacher. He had custody of the key to the room. Was he the only one with sole access? No. The computer room was not just a store for computers, but a computer laboratory, a space where teaching about computers was conducted. That meant that students had access to the room. It also operated as an office, for other members of teaching staff, and PW2 was one of such staff. The fact that it was accessible to many people meant that the taking could be by either of them, that is to say the appellant, PW2 and the students.
28. In his defence, the appellant stated that he was not keeping the key to that room for 24 hours. He used to surrender it at the end of the day, to the administration office, which meant that there was the possibility of other individuals accessing the room in his absence. He also mentioned that other members of the teaching staff, apart from himself and PW2, also accessed the room, and handled the computers, for the purpose of conducting research. He went on to speak about some of the teaching staff allocating computers and accessories to themselves.
29. The picture that emerged was of a computer room for which the appellant had custody, but not total control; and for which the appellant had access, but was not the only person with access.
30. As the custodian, he was accountable to the administration, for the contents of that computer room. That meant that should anything be established to have had disappeared from the room, during his stewardship, he was bound to account or answer for it. He was in the position of a servant, to whom the property of the employer had been entrusted. As a trustee, he was a fiduciary, who was expected to account for whatever was entrusted upon him. It would appear that the appellant did not discharge his duties as trustee properly, for upon discovery that some of the items under his stewardship were missing, he did not account for them to his employer, as a faithful trustee or steward or servant should or is expected to. This was a failure on his part in that score.
31. Did that failure, as a steward or servant or trustee, make him a thief? I do not think so. He could be considered to be a thief, even in his capacity as a trustee or steward or servant, if there was evidence that he stole or converted to his own use the items that were under his stewardship or trusteeship. No evidence was adduced, to establish that the appellant stole, by either taking or conversion, any of the items that were under his charge. None of the witnesses testified to seeing him taking away any of those items out of the computer room or the school compound. None of them spoke about seeing or finding him, outside of the school compound, with any of the said items, in a manner that suggested that he had taken or converted them.
32. I agree, with the submission, that the case herein was founded solely on suspicion, that since the appellant was in charge of the computer room, then whatever was found missing, from that room, must be deemed to have been taken or stolen by him. Put differently, the circumstance of him being the custodian of the computers meant that, in the event of disappearance of a computer or its accessories, he would be responsible for the taking or disappearance. Holding him liable, in criminal law, for such disappearance, would hold where it is established that he had sole control and access to the computer room. In this event, he did not.



33. There is also the larger context. It should not be lost that the appellant was a relatively junior officer in the establishment, perhaps of fairly young age and little exposure to administration, which gave him relatively little control over whatever he was placed in charge of. He was a temporary employee, as he was engaged by the BOM and not the Teachers Service Commission. It should be a matter of judicial notice that teachers in such a circumstance, temporary BOM teachers, hold far too little influence, compared with their colleagues, employed by the TSC, who are engaged on permanent and pensionable terms.
34. Overall, it is my finding and holding that the prosecution did not establish its case, against the appellant, beyond reasonable doubt, to warrant a conviction. The evidence fell short. There was no tangible evidence of the taking or conversion and retention of the items allegedly stolen. The appellant should not have been convicted. He should have been given the benefit of the doubt, and acquitted.
35. Consequently, I find merit in the appeal. I hereby allow it. The conviction is, accordingly, quashed, and the sentence set aside. If the appellant paid the fine, the same shall be refunded to him. If he went to prison, he must have served out his term by now, hence there shall be no need to make orders on his release. Orders accordingly.

DELIVERED, VIA MICROSOFT TEAMS, DATED AND SIGNED AT MILIMANI, NAIROBI, ON THIS 17TH DAY OF APRIL 2026.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Okutta, instructed by Ouma-Okutta & Associates, Advocates for the appellant.

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

