



**Njau & another v Republic (Criminal Appeal E033 & E034 of 2025  
(Consolidated)) [2026] KEHC 5558 (KLR) (30 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E033 & E034 OF 2025 (CONSOLIDATED)**

**DKN MAGARE, J**

**APRIL 30, 2026**

**BETWEEN**

**DAVID NJENGA NJAU ..... 1<sup>ST</sup> APPELLANT**

**DAVID WACHIRA NYORO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the decision of the Hon. Cheruto C. Kipkorir (PM) given on 5.06.2025. The appellants were charged with another, who was acquitted of the offence of stock theft contrary to section 268(2) as read with section 278 of the Penal Code. The particulars were that on 24.05.2024, at 1830 hours, in the Pembe Tatu area, Nyeri Central Sub-County, Nyeri County, jointly stole 13 sheep, all valued at Ksh 172,500/=, the property of Christine Muthoni Kanake.
2. There was an alternative charge of handling stolen goods contrary to section 322(1) and (2) of the Penal Code. The particulars were that on 24.05.2024, at 1830 hours, at Othaya Township, in Nyeri South Sub-County within Nyeri County, otherwise than in the case of stealing, dishonestly retained 13 sheep, knowing or having reason to believe them to have been stolen or unlawfully obtained.
3. The court heard witnesses and the appellants. Subsequently, the court found the appellants guilty and acquitted the other accused person. They appealed on both the sentence and the conviction. They were sentenced to 5 years imprisonment.
4. The appellants pleaded not guilty on 27.05.2024. The matter thereafter proceeded for hearing with 4 witnesses. The trial court was transferred, and directions under section 200(3) were taken. All the accused preferred the matter to proceed from where it had reached.



5. The Appellants were convicted on all main counts and sentenced to imprisonment of five years. The court noted that they had been in custody for one year and 8 days. Nevertheless, it is unclear what the court did to the period.
6. The 1<sup>st</sup> appellant preferred an appeal and set out the following grounds:
  - a. That the learned magistrate erred in both law and fact by failing to find that the prosecution had failed to prove its case against the appellant to the required standard of beyond reasonable doubt thereby arriving at a finding that is grossly unjust.
  - b. That the learned magistrate erred in law and fact by proceeding to arrive at a conviction when the material ingredients of the charge were not proved against the appellant.
  - c. That the learned magistrate erred in law and fact by convicting the appellant on evidence that was grossly inadequate and material corroboration.
  - d. That the learned magistrate erred in law by meting out an excessive sentence
  - e. That the learned magistrate erred in law and fact by failing to evaluate the appellant's defence and according it the weight it deserved, thus arriving at an unjust and untenable conclusion.
7. The 2<sup>nd</sup> appellant preferred an appeal and set out the following grounds challenging both the conviction and sentence;
  - a. That the learned magistrate erred in both law and fact by failing to find that the prosecution had failed to prove its case against the appellant to the required standard of beyond reasonable doubt thereby arriving at a finding that is grossly unjust.
  - b. That the learned magistrate erred in law and fact by proceeding to arrive at a conviction when the material ingredients of the charge were not proved against the appellant.
  - c. That the learned magistrate erred in law and fact by convicting the appellant on evidence that was grossly inadequate.
  - d. That the learned magistrate erred in law by meting out a harsh sentence to the appellant.
  - e. That the learned magistrate erred in law and fact by failing to evaluate the appellant's defence and according it the weight it deserved, resulting in an unjust conclusion.

## **Submissions**

8. The 2<sup>nd</sup> appellant filed submissions on 24.12.2025. He stated that the conviction was unsafe, unsupported by evidence, and in violation of well-established principles of criminal justice. He also submitted that the sentence was manifestly excessive and disproportionate.
9. They placed reliance on the case of *Okeno v Republic* [1972] EA 32 on the duty of the court. He raised five issues: whether there was evidence of the theft; whether there was recent possession; whether the recent possession was accompanied by identification, participation, and possession; and whether the information was credible and corroborated. The last issue was whether the sentence was lawful and proportionate.
10. He submitted that the burden of proof does not shift. He placed reliance in the most oft quoted English decision by Viscount Sankey L.C in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C 462 pp 481. It was his case that there was no exclusive possibility of theft. Other people had access, and the compound was locked. He was not photographed with sheep.



11. He thus submitted that the evidence was circumstantial evidence which should be considered as per case law as set out in *Kipkering arap Koske & another* 16 EACA 135 (1949) and *Abanga alias Onyango v Republic* CA CR. A NO. 32 of 1990 (UR). In the latter case, the court of appeal sitting in Kisumu held as follows:

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

- i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
  - ii. those circumstances should be of 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 none.
12. It was his submission that suspicion is not enough to prove guilt. Reliance was placed on the case of *Sawe v Republic* [2003] KECA 182 (KLR), where the court of appeal sitting in Nairobi [RO Kwach, AA Lakha & EO O’Kubasu, JJA] held as follows;

In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. 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. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

13. On recent possession, the 2<sup>nd</sup> appellant relied on the case of *Isaac Ng’ang’a Kahiga & another v Republic* [2006] KECA 137 (KLR), where the Court of Appeal [P.K. Tunoi, S.E.O. Bosire and E.M. Githinji] stated:

It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.”

14. The second was not found in possession; hence, the doctrine of recent possession does not apply when the court subsequently misdirects itself on matters of law. Appellant proceeded that the evidence was not credible or corroborated. There were no eyewitnesses, and the prosecution’s evidence was weak.
15. He submitted that the inconsistencies went to the root of the charge. Such a witness, with such a kind of inconsistency, should not be relied on, and his evidence cannot be credible. He relied on the case



of Joseph Ndungu Kimanyi v Republic [1979] KECA 5 (KLR), which the Court of Appeal [Madan, Miller & Potter JJ A] decided on other issues that were posited by the appellant herein. He submitted that the photographs were taken 5 days after the arrest and at the complainant's home.

16. The first appellant filed identical submissions on the issues as submitted entirely in the preceding paragraphs. He added that the defence tendered was consistent and plausible. The court thus erred in summarily rejecting the same. This was said to offend principles in Okeno (supra) and H.L. (E) Woolmington vs. DPP(supra).
17. On the sentence, he submitted that the sentence was excessive. Reliance was placed on the case of Bernard Kimani Gacheru Vs. Republic (2002) eKLR, where the Court of Appeal stated that:

On appeal, the appellate court will not easily interfere with a sentence unless that sentence is manifestly excessive in the circumstances of the case, or the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.
18. The respondent filed submissions dated 13.03.2026. They submitted that the prosecution's evidence was cogent. They submitted that there was direct evidence proving that the appellant took the complainant's sheep with the intention of permanently depriving her of it. The appellant had both the opportunity and the means to commit the offence, as he was the complainant's employee. This not only gave him access to the complainant's premises but also knowledge of how the complainant ran her affairs.
19. Further, it was submitted that PW3 and PW4 confirmed that the appellant was the complainant's employee. Finally, PWs 1, 2, and 3 confirmed that the complainant's sheep had indeed been stolen and that they were the same sheep recovered in the possession of the 2<sup>nd</sup> appellant at Othaya.
20. It was their take that the appellants' defence could not shake the prosecution's evidence. Further, the appellant's defence was not corroborated by any witness; therefore, the same carries little evidentiary value. They concluded that the lower court was right in determining that, indeed, the appellant was guilty of the offence of stealing stock.
21. The third issue they addressed was that of the alleged contradiction of the number of sheep that were stolen. They submitted that the contradiction does not arise since PW 2 and PW3, who were more familiar with the sheep, indicated that 13 sheep had been stolen, 5 male, 5 female, and 3 kids, as per page 13, line 20 of the proceedings. They relied on the case of Richard Munene v Republic [2018] KECA 186 (KLR), where the court of appeal [Ouko, (P), Sichale & Kantai, JJ.A)] held as follows with regard to contradiction or inconsistency in the evidence of the prosecution witness:

As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies, and inconsistencies in a witness's evidence serve to discredit that witness as unreliable. Where contradictions, discrepancies, and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law, however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
22. They submitted that the offence of stealing stock carries a maximum penalty of 14 years imprisonment. The appellants were sentenced to 5 years' imprisonment, taking into account that they had been in



custody for 1 year and 8 days. They submitted that the sentence is very lenient given the circumstances of the case. However, the same should be upheld.

## Evidence

23. PW1 was Kennedy Munyiri Wamai, a taxi driver. He stated that he had a Probox vehicle. He was called by Wachira, whom they used to work with, when he was a taxi driver. Wachira told the witness to meet him at Pembe Tatu, at a home. Wachira and another man opened the gate. They packed 12 goats, and they were taken to Othaya. He did not know the man Wachira was with, but it was 6 pm. When they were about to offload the sheep in Othaya, they were arrested and taken to Othaya police station. Wachira directed him to drop the sheep. The person to take the sheep was delayed. He was to be paid Ksh 3,000/=, but was not paid. He identified Wachira as the first appellant and did not know the other two.
24. On cross-examination by the first appellant, he stated that the sheep was in the vehicle when they were arrested. He explained his position as a taxi driver. On cross-examination by the second accused, he stated that he did not see him anywhere. He only saw the second accused at the police station.
25. On cross-examination by the second appellant, he stated that he saw the second appellant with Wachira.
26. On re-examination, he stated that the second appellant was present when loading sheep but remained in the homestead.
27. PW2 was the complainant who is a clothes seller. On 24.05.2024, one of the tenants, Juhana, called her to say that a goat was very noisy. They had goats on the farm and had some tenants. At 7:00 pm, she received a call from Muriithi that the goats were missing. He was the one taking care of the goats. There was another worker called Wachira.
28. She called a friend that goats had been stolen. Later, at 9.00 pm, she received a call from the Othaya police station saying they had been found. She went to Othaya with two officers. She was with Muriithi and Antony. They saw the goats at the police station. They found that Wachira was among the people who had been arrested. She stated that there were 13 sheep in all. (She appears to use goats and sheep interchangeably). These were 5 males, 5 females, and three kids. They were all Hampshire breed.
29. She stated that the first appellant had worked for 4 months, but Muriithi stayed overnight. She identified the first appellant in the dock. They stated that Muriithi had a key to the farm.
30. On cross-examination by the first appellant, she stated that the first appellant was arrested with the goats. On cross-examination by the second accused, she stated that she had been told that Muriithi stole the sheep. She was not in Othaya at the time of arrest.
31. On cross-examination by the second appellant, she stated that she had been told that the second appellant had been arrested with the first appellant and another person.
32. PW3 was Peter Muriithi Njugi. He stated that he is a driver, PW2's driver, and performs other duties, such as tending sheep. He was taking care of sheep on 24.04.2024. They woke up as usual and waited for a new team of three who were hewing wood. They did their work and waited for PW2 to pay their team.
33. Later, the first appellant came at 5.30 pm with PW2. PW2 paid the three people. PW2 asked the appellant to drop the witness at the King'ong'o area in a Toyota Hilux. The appellant dropped the witness and was to proceed to Gamerock to park the vehicle. At 6.30 pm, he was called by a tenant who said he had locked a lamb outside. The witness told the tenant that he had not taken sheep outside, but was to check. The said lamb was bleating because it could not find other sheep.



34. The witness went back to the farm and did not find 12 sheep. Only a lamb was running outside. He called PW2 and told her that the sheep was missing. At 9.00 pm, the police informed them that they had been found in Othaya. They went and found the 13 sheep. These were five males, five females, and three lambs. The witness had worked in the home for 36 years. He had worked with the first appellant for about three months.
35. He identified the first appellant in the dock. The witness had not seen the second accused before.
36. On cross-examination by the first appellant, he stated that on the day, the appellant was working out of the homestead. The witness was not present when the first appellant was arrested.
37. On cross-examination by the second accused, he stated that the tenant did not know that the sheep had been stolen. On cross-examination by the second appellant, he stated that he was told that the sheep was found inside the probox vehicle. He stated that the photos showed only sheep. He stated that he was not there when the sheep was stolen.
38. PW4 was Anthony Maina Chege, a businessman. He received a call at 1955 hours reporting that 13 of his 14 sheep were missing. He asked that he accompany Muriithi to the police station. They went to the police station, where they found the appellant had been arrested and the sheep had been recovered. On cross-examination by the second appellant, he stated that they found sheep at the police station and the three accused persons.
39. Directions were taken as the Hon. Kipkorir took over from Honourable E. Angima.
40. PW5 PC Nancy Moloh testified that she is attached to the Nyeri Police Station Crime Department. She stated that a case was reported on 24.05.2024 involving the theft of goats. She was told that suspects were arrested from Othaya Police Station. Suspects had been arrested and escorted to Nyeri. The goats numbered 13 and were transported in a motor vehicle registered as KBU 348 Z.
41. They took the photos of the goats at the scene. Showed photo exhibits 1(a-g). On cross-examination, she stated that one of the accused was hired by the company, but she did not know if he had keys to the boma. She was not the arresting officer, but stated that the first appellant was found with sheep at Othaya Police Station. The arresting officer was to be a witness. On cross-examination by the second accused, she stated that she was taking photos of the probity. There were other such sheep in the county.
42. On cross-examination by the second appellant, she stated that she went to the scene. She stated that the owner had left the compound locked, but when she returned, it was open. She stated that there were two employees, and one of them was found with stolen sheep.
43. On re-examination, she stated that the second appellant was found with the Probox, but it is not in the photo. The case was closed. The appellants were placed on their defence upon complying with section 211 of the Criminal Procedure Code.
44. The court found the appellants to have a case to answer. The other accused was acquitted under Section 210 of the Criminal Procedure Code. The court complied with section 211 of the Criminal Procedure Code. On being put to the defence, the Appellants gave sworn testimony.
45. The second appellant was DW1. He testified that he was a driver and worked as usual on 24.05.2024 at Gamerok. Christine Muthoni came from her house and told her to take the car to Kingongo for cleaning. He worked until 4 pm, when PW2 called him to her home. PW2 sent him to pick a cheque from someone in Othaya and gave him Ksh 500/=. At 6:20 pm, he had not met the person and was arrested by the police and, 2 days later, arraigned in court with two men. He said he saw Kennedy Munyiri for the first time in court. He said that PW1 was never arrested and thus lied.



46. The first appellant was DW2. He testified that on 24.05.2024, he was in Othaya town waiting for work. A person wanted him to transport his goods from Kiganjo to Kanga. He loaded stones and offloaded them to the person's house. Then went to Othaya. He left the key at a petrol station and left the key for the boss, together with the money he was paid. He entered a club, watched football, took alcohol, and left at 2300 hours. He was arrested and ransacked. The next day at 2 pm, he was taken to Nyeri, requested Ksh 1,000/=, and taken to Othaya Police Station. He was told that he stole sheep. He did not know about the theft.

### **Impugned Judgment**

47. The state submitted that the case before court is that all the eight complainants had their stock stolen from them between the 2<sup>nd</sup> March, 2022 and 17<sup>th</sup> of June, 2022. It is their testimony that none of them saw who stole them. One thing is clear though throughout their testimonies, that they all found their stolen stock at the compound of the appellant's home.

48. They submitted that the offence was proved. They stated that the prosecution was able to prove that the appellant was in possession of the recovered stock thus relied on the principle of recent possession.

49. On this they were guided by the case of David Mugo Kimiinge Vs Republic [2015] eKLR, where the court when commenting on the doctrine of recent possession stated that:-

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in criminal case, the possession must be positively proved.

50. In summary the prosecution must have positive proof:

- a. That the property was found with the suspect:
- b. That the property is positively the property of the complainant:
- c. That the property was stolen from the complainant,
- d. That the property was recently stolen from the complainant.

51. It was their case that the Appellant was in possession of all stock in the compound. It was their case that the Appellant has not pointed out any inconsistencies.

52. The Appellant argued the appeal orally.

### **Analysis**

53. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The Court of Appeal for Eastern Africa in *Pandya vs Republic* [1957] EA 336 held as follows:

On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question



turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

54. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of *Okeno v Republic* [supra], the East Africa Court of Appeal stated on the duty of the court on a first appeal:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.

55. The legal burden is the burden of proof on the prosecution and remains constant throughout. According to established principles, burden of proof rests upon the prosecution to prove the guilt of an accused person beyond reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

56. Brennan J, addressed the standard of proof required in Criminal cases in the case of *Re Winship* 397 US 358 {1970}, at page 36164 that:

The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.



57. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say:

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

58. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. The section reads as follows:

82: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

59. Within these boundaries, the Court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair reevaluation of the case.

60. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”



61. In the case of R vs. Lifchus {1997}3 SCR 320, the Supreme court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

62. The offence of stock theft is set out in section 278 of the Penal Code as follows:

Stealing stock if the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, cannel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.

63. This section is read with Section 268, which states 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.
3. When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who



converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

4. When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
  5. A person shall not be deemed to take a thing unless he moves the thing or causes it to move.
64. The evidence that came to the fore was that 13 animals were stolen from PW2. These were sheep. There was an interchange between sheep and goat, but it appears to arise from translation. It was agreed that 13 sheep were stolen: 5 rams, 5 ewes, and 3 lambs. The said animals were carried in a vehicle belonging to PW1. Therefore, the question is not what was stolen, but whether any of the appellants stole them. The court considers it prudent to start with the question of whether the court below considered the appellant's defence.
65. The appellants set out an alibi. It is true that in certain cases, an alibi needs to be set out early. However, the duty to prove the falsity of an alibi still remained with the prosecution. The appellant, as an accused, has no duty to help the state prove its case, as he remains innocent until proven otherwise. The accused was arraigned and denied the charges. A plea of not guilty was consequently recorded. In the case of *R vs. Lifchus* {1997} 3 SCR 320, the Supreme Court of Canada explained the standard of proof as follows:-
- The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”
66. If evidence was tendered that was surprising to the state, they had a chance under section 212 of the Criminal Procedure Code to call for rebuttal evidence. The section provides as follows:
- If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.
67. The question of the rights of the prosecution to receive in advance defence evidence was addressed in the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] KECA 319 (KLR), where the court of appeal [R.S.C. Omolo, E. O. O’Kubasu and J. W. Onyango Otieno] posited as follows:
- So, if at the beginning of the trial, *the Constitution* obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko’s position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we



may so designate them, of the accused person are conferred on him by *the Constitution*. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced. ...

That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of *the Constitution*. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: "If you rattle a snake, you must be prepared to be bitten by it." ....

We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by *the Constitution*. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in *the Constitution* and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words, there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and *the Constitution*, wisely in our view, does not give the prosecutors such powers.

They cannot be given through the inherent power of the court. Even in civil matters, there is a specific provision in the *Civil Procedure Act*, Chapter 21 Laws of Kenya, recognizing the existence of the inherent power of the court:

"to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." – see section 3A.

There is no similar provision in the Criminal Procedure Code, Cap 75 Laws of Kenya and we think the omission is deliberate. But even if there was such a power with regard to criminal matters, we do not accept that a judge would be entitled to create non-existent rights and confer them upon a party as the learned Judge purported to do here.

68. The appellants were not under a duty to disclose their defence before being put on the defence. However, in matters within the witnesses' knowledge, the accused must cross-examine them. The question of having been given Ksh 500/= is a matter within the second appellant's knowledge and that of PW2 and PW3. These questions ought to have been put to the witnesses. PW3 gave evidence that, at 5.30 pm, David Wachira was driving a motor vehicle with registration number KAX xx3K. He was dropped by the second appellant at Kingongo. The second appellant went to park the vehicle. No questions were put to PW3 regarding the events on the evening of 24.05.2024. This is as opposed to the generalities, even of time, by the second appellant.



69. The burden of proving the falsity of an alibi was addressed in case of Victor Mwendwa Mulinge –v- R, [2014] eKLR as follows:

It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution....”

70. In another persuasive South African case of R - v - Biya 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:

If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.

71. There was nothing for the state to call rebuttal witnesses on. The nature of the first appellant’s defense is a non-alibi alibi. He set out an alibi, which is not an alibi. He testified as DW2. He stated he was working for an unknown customer, who he took to an unknown house, left money in an unknown petrol station to be picked up by an unknown boss, after being paid by an unknown person, after looking for an unknown vehicle to drive to an unknown place. He then went to an unknown club at an unknown time to drink alcohol. The only item identified in the whole charade is alcohol.

72. Such generalities do not then place any burden on the state to displace a generalized alibi. However, an alibi that cannot be falsified or proved is not an alibi. The defence raised did not answer the case before the court. The alibis were so non-specific that they do not amount to alibis.

73. The evidence of PW1 was that he was instructed by DW1 to load the sheep. He was loaded together with DW2. The evidence of PW1 corroborated the testimony of PW3 and PW5. PW1 carried the sheep in the company of the second appellant. The second appellant did not explain that he had decided to graze the employer’s sheep anywhere other than the kraal. The second appellant had an opportunity and was found in possession of the Appellant. The animals were found in the possession of PW1 and DW1. It is not possible that the sheep were stolen by anyone else. The span of less than three hours between arrest and loss of sheep, ipso facto, shows irresistibly that the possessor was a thief. David Wachira dropped off PW3 at Kingongo and went home. He owed an explanation for how he left home and found himself in the middle of stolen sheep.

74. It is important to warn oneself of the dangers of relying on a single identifying witness. However, the identity of the accused was not raised in cross-examination.

75. Premium was made out of failure to produce a photograph of the Probox vehicle. The said vehicle was not stolen. The owner was called to show that he was instructed to ferry the sheep. The sheep were loaded by and in the presence of the appellants. PW1 was succinct that they were arrested at 6 pm with the sheep. He was not shaken in cross-examination. Nothing was placed to question the amount of PW1. Given that possession was proved, the next question is whether it constituted recent possession. The Court of Appeal set out the elements of the doctrine of recent possession in the case of Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006]eKLR, as follows:

“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof,

First; that the property was found with the suspect;



Secondly, that the property is positively the property of the complainant;

Thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

76. The burden of explaining the recent possession is on the Appellants. The state had a duty to prove the occurrence of the offence. Its burden is evidential only and does not relieve the prosecution of the need to prove its case to the required standard. That explanation needs only to be plausible. This was set out in *Malingi v Republic* [1988] KLR 225. In *Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008, where the Court of Appeal observed 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.

77. In the case of *William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v Republic* (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) (21 January 2022) (Judgment), the Court of Appeal stated as follows regarding the doctrine: -

We start with the question whether the doctrine of recent possession was properly invoked. As regards the circumstances under which the doctrine of recent possession may apply, in *Athuman Salim Athuman vs. Republic* [2016] eKLR, this Court held that:

“The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See *MALINGI V. REPUBLIC* (1989) KLR 225 H.C and *HASSAN V. REPUBLIC* (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in *ISAAC NG’ANG’A KAHIGA ALIAS PETER NG’ANG’A KAHIGA V. REPUBLIC*, CR. APP. NO. 272 of 2005, where this Court stated: “It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.”

78. The possession itself must be sufficient. It cannot be that the good must be physically in the hands. Even having control over the same is adequate. The Supreme Court of Uganda in *Bogere Moses & Another vs. Uganda*, Cr. App. No. 1 of 1997 stated that:

“It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness.



79. The second question relates to the first appellant. He posited that he was working in an unknown place. He was identified by PW1. PW1 maintained that he saw the first appellant with the second appellant. This particular evidence was not impeached. PW1 and PW3 placed the first appellant in close proximity to the occurrence of the offence. The appellant chose to present diametrically opposed evidence.

80. On the other hand, circumstantial evidence also places the Appellants as the thieves. The sheep were safely tucked away. The same were found in the second Appellant's control. The third appellant was seen in the locus in quo loading sheep. No explanation was given for why he was loading sheep that were not his into a Probox. There was no explanation for the shift of places from their pen to Othaya. Circumstantial evidence must be inconsistent with an accused's innocence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, Court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

81. Looked at wholesomely, I find that the conviction was safe. The appellants were properly recognized.

82. Like the court below, I find that the appellant was recognized by PW1 during the day. PW1 knew DW1 and saw DW2. He was not cross-examined on this aspect. In the case of *Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic* [1980] KECA 23 (KLR), the court of appeal [Madan, Law & Potter JJ A]) posited as follows:

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).

83. I therefore find and hold that the appellant was properly recognized. The appeal on conviction is accordingly dismissed for both appellants.

84. On sentence, the appellant laments that the same is harsh. However, a test of a harsh sentence has been determined as follows by the court of appeal in *Shadrack Kipchoge Kogo vs Republic*, Eldoret Criminal Appeal No 253 of 2003 where it was observed as follows: -

“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that



a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

85. The two appellants were not in the same status. The second appellant was an employee, hence having a position of trust. The first appellant was not an employee. The court must regard similar circumstances before meting out the sentence.
86. The offence was a result of meticulous planning that led to theft that was only foiled after the sheep were on the verge of disappearing. The sentencing guidelines provide as follows: -
- “ 4. 5.1 In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.
4. 5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).
4. 5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.
4. 5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.
4. 5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.
4. 5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.
4. 5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.
4. 5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children’s officer (where applicable), and any victim impact statement, the court should:
- i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.
- ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders.”
87. The second appellant mitigated that he had a wife and children. While the first appellant mitigated that he required only the period spent in custody. The appellants had no prior record.



88. The second appellant was the mastermind and the worker of PW2; therefore, the five-year sentence is proper. The court indicated that the appellants will serve 5 years. It noted that one year and 8 days had been spent in custody. The court did not say anything about this. However, it is not indicated when the sentence should start. Section 333(2) of the Criminal Procedure Code provides as follows:
1. A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
  2. Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.  
Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
89. Therefore, in regard to the second appellant, David Wachira, the appeal on sentence is dismissed. However, the 5-year sentence will commence on 24.5.2024, the date of arrest.
90. The first appellant lacked one aggravating factor. He was not in breach of trust, but a thief. He will thus serve one year less; that is, a 4-year sentence, commencing on 24.5.2024, the date of arrest.

### **Orders**

91. I make the following final orders:-
- a. The appeal on conviction is dismissed for both appellants.
  - b. The second appellant's appeal on sentence is dismissed. However, the 5-year sentence shall commence on 24.5.2024, the date of arrest.
  - c. The first appellant's appeal on sentence is allowed. The five-year sentence is substituted with a 4-year sentence, which shall commence on 25.5.2024, the date of arrest.
  - d. Right of appeal 14 days.
  - e. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30<sup>TH</sup> DAY OF APRIL, 2026.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

1<sup>st</sup> Appellant present

2<sup>nd</sup> Appellant present

Mr. Kihara for the Respondent

Court Assistant – Martin/Michael

