REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. E018 OF 2025

VICTOR OKELLO OWAWA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

[Being an appeal arises from the Judgment of Hon. S.N. Mutava (RM) delivered on 14.09.2023 in Rongo PMCC No. E027 of 2023]

JUDGMENT

1. This an appeal arises from the Judgment of Hon. S.N. Mutava (RM) delivered on 14.09.2023 in Rongo PMCC No. E027 of 2023. The entire edifice of the judgment is based on a misconception of law. The Appellant was charged with burglary contrary to section 304(2) of the penal code and an alternative count of handling stolen property. The Appellant was convicted with stealing contrary to section 279(b) of the Penal Code and sentenced to serve 7 years for the burglary

and 5 years for the offence of stealing. Given the findings herein, it is unnecessary to address the issue of submissions.

2. The proceedings themselves were based on breach of the law the entire case was based on the evidence of PW2 who was described as a wife of the Appellant section 127 of the Evidence Act provides as follows:

> 1) …
> 2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:
>
> Provided that-
>
> i. The person charged shall not be called as a witness except upon his own application;
> ii. Save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;
> iii. The failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.

3) In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged-
    a. with the offence of bigamy; or
    b. with offences under the Sexual Offences Act (Cap. 63A);
    c. in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.

4) This section husband and wife mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.

3. PW2 was the Appellant ’s wife. They had differences with the husband. She was neither competent of compellable witness as against the husband. She was the source of information of purported theft by the husband. There was no other event. The Appellant was not found in possession of any of the goods alleged to have been stolen. There is no evidence that is

independent of PW2. The rest of the evidence was hearsay. This was inadmissible evidence. Consequent upon the foregoing, there is no evidence to analyse.

4. There is direct evidence having the Appellant as the thief. Was there circumstantial evidence? Circumstantial evidence must be inconsistent with the accused's innocence. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR**, [P. Kihara Kariuki, PCA, M'inoti & Murgor, JJ.A], the Court of appeal, 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.

5. The threshold as stated in **R vs Kipkering Arap Koske** [1949] 16 EACA 135 is that such evidence must exclude coexisting circumstances which would weaken or destroy the inference of guilt. In **Sawe vs Rep** [2003] KLR 364, the Court of Appeal expressed 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. There must be no other coexisting circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

6. 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 stated 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.

7. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, as held in the case of **Okeno v Republic** [1972] EA 32 at 36 where 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.

8. There is no evidence to place the Appellant as the thief. It must be remembered that the duty to prove a criminal case was on the state. The Appellant entered proceedings having the presumption of innocence. The 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.''

9. An accused enters these proceedings presumed to be innocent. 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.

10. The legal burden refers to the burden of proof, which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. 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.

11. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of **In re Winship 397 U.S. 358 (1970**), at pages 361–364, where he stated 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.

12. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in **Elizabeth Waithiegeni Gatimu vs. Republic** [2015] eKLR expressed himself as hereunder:

> To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the Appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances

creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

13. Reasonable doubt need not reach certainty, but it must carry a high degree of probability. It was held by the Court of Appeal in **Moses Nato Raphael vs. Republic** [2015] eKLR as doth:

> What then amounts to reasonable doubt? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-'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.

14. Without evidence, there is nothing to rely on to convict the Appellant. The conviction in the circumstances was not safe. It is accordingly set aside. the conviction is not based on any evidence. the conviction is set aside.

Determination

15. I make the following final orders:
    a) This appeal succeeds. The conviction is quashed, the sentence is set aside and the Appellant be and is hereby set free unless lawfully held.
    b) Right of appeal 14 days.
    c) File is closed.

DELIVERED, DATED and **SIGNED at NYERI** on this **27th day of April, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant present

Mr. Kihara for the State

Court Assistant – Martin/Osoo

Sgt. Kitur at Kisumu Maximum present