REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A
HCCRA E020 OF 2024

SIMON NDUNG'U HOBA..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION..... .....RESPONDENT

(Being an appeal against the judgment and sentence of Hon. S. Mwangi – SRM delivered in Murang'a CM's Court Criminal Case No. E684 of 2023 on 15th February, 2024)

JUDGMENT

1. The appellant herein was charged as the 1st accused in the trial court with the offence **stealing contrary to section 268(1) as read with section 275 of the penal code**. The particulars of the charge were that on the 29th day of August 2023 at around 0800hrs at Mukuyu trading center within Murang'a county, jointly with others not before court, the appellant stole one vibrations machine valued at Kshs. 45,000/- and the poker machines valued at Kshs. 80,000/-, the property of Peter Warui Wambugu.
2. A plea of not guilty was entered and the matter proceeded to full trial. The prosecution called two witnesses in support of its case. The defence called four witnesses.

Facts at trial

3. PW1 was Peter Wambugu Warui, the complainant. He testified that on 30th August 2023, he went to his place of work and noted two pokers

and a vibrator were missing. That later on that day, the 2nd accused approached him with a burnt vibrator machine for sale as scrap metal. PW1 stated that he identified it as his stolen machine by marks he had previously made on it. That he then caused the 2nd accused to be arrested, and the latter led them to the appellant, alleging that the machine belonged to him. PW1 testified that the appellant was thereafter found behind his place of business and the police were called.

4. On cross-examination, PW1 stated that nothing was recovered from the appellant personally and that it was the 2nd accused who had been found with the vibrator. He maintained, however, that it was the 2nd accused who implicated the appellant and led them to him. He further denied assaulting the appellant and stated that he instead protected him from members of the public who wanted to attack him.
5. PW2 was No. 234584 PC Joseph Maina of Murang'a Police Station. He testified that on 30th August 2023 at about noon, he received a report that suspected thieves had been arrested by members of the public at Mukuyu and their lives were in danger. He proceeded to the scene and found a crowd surrounding the accused persons. He rescued them and recovered a vibrator machine at the scene, which was said to have been stolen. He testified that both accused persons, together with the exhibit, were taken to Murang'a Police Station, where the complainant identified the vibrator as his stolen property. PW2 further stated that

investigations disclosed that the 2nd accused had taken the machine to sell to the complainant, and that upon being questioned, he directed the complainant and members of the public to the appellant. PW2 thereafter prepared the file and caused both accused persons to be charged. He produced the vibrator machine as an exhibit.

6. On cross-examination, PW2 stated that nothing was recovered from the appellant and that he did not witness the theft. He maintained that it was the 2nd accused who was found with the exhibit and who led members of the public to the appellant.
7. That marked the close of the prosecution case. The trial magistrate ruled that a *prima facie* case had been established against the accused persons and accordingly put them on their defence.

Defence Case

8. DW1 was Simon Ndung'u Hoba, the appellant. His testimony was that on the material day he was on the road when the complainant, accompanied by a mob, confronted and assaulted him. He stated that he was rescued by police officers who were called by his mother and was thereafter taken to Mukuyu Municipal Hall and later to Murang'a Police Station. He further stated that, owing to the injuries he had sustained, he initially admitted the charge when first presented to court, but later asked for the charge to be read afresh and denied it, maintaining that he had not committed the offence. He denied

knowing Peter Mwangi Maina(the 2nd accused) and stated that he had not taken anything to him. On cross-examination, DW1 maintained that he resided in Kangema and that when he was found, he was on his way home. He stated that he did not know the name of the police officer who rescued him and reiterated that he had taken nothing to the 2nd accused.

9. DW2 was Lydia Wambui Hoba, the appellant's mother. She testified that on the material day she had gone to Murang'a for clinic and decided to visit her son. On the way, near Kimkan, she found a large crowd beating him and observed that he was bleeding from the head and had sustained injuries to the forehead. She stated that she sought help from a police officer at a nearby water plant, who made arrangements for a vehicle, and that her son was thereafter taken to the police station. On cross-examination, DW2 stated that the appellant stayed at St. Mary, where she had a farm, and only visited Kangema occasionally. She conceded that she did not know what he did in her absence and could not say whether or not he had committed the offence, since she did not find him with anything.

10. DW3 was Peter Mwangi Maina, the 2nd accused person before the trial court. He testified that on the material morning, at about 6.00 a.m., the appellant came to his house in the company of another person carrying a vibrator and two pokers. He stated that the appellant asked him for a sack, which he obtained from his mother's house, and

that the appellant and his companion left one item behind, saying that it was defective and they would leave it with him. He further testified that his mother later instructed him to remove the item from the house, whereupon he took it away and later attempted to sell it as scrap metal so as to obtain money for food for his siblings. He stated that he then realised he had taken it to the complainant, who identified it as stolen property. According to DW3, he then led the complainant to the appellant, but instead of being treated as a witness, he was charged with the offence; and that while in custody the appellant asked him to admit the charge so as to exonerate him.

11. On cross-examination by the prosecution, DW3 stated that he knew the appellant prior to the incident and that the appellant used to frequent the jobless corner near Kimkan. He conceded that he suspected the items brought to him were stolen, but did not report the matter to the police. He further admitted that the item he attempted to sell was the exhibit produced in court and that, after being confronted by the complainant, he volunteered information as to who had brought it to him. On cross-examination by the appellant, DW3 maintained that it was the appellant who came to his house early in the morning with the items and asked for a sack, and that his father had seen the appellant and his companion with those items. He denied any knowledge of where the items had come from.

12. DW4 was Jane Njeri Mwangi, the mother of the 2nd accused. She testified that the appellant brought a piece of metal to her home and asked that it be kept there. Since her son's house was unoccupied, he was directed to keep it there, which he did. She further testified that when she returned from her casual work, she learnt that her son had been arrested in connection with the same metal rod. She thereafter went to Kimkan, where her son had allegedly gone to sell it, and spoke to the owner, who told her that although he did not suspect her son of the theft, he had been arrested because he was the one found with it.

13. On cross-examination by the prosecution, DW4 stated that she knew the appellant well, as he had previously been her boyfriend, and that she had no grudge against him. She stated that she told her son to remove the item from her house, although she did not know how her son came to be arrested with it.

14. That marked the close of the defence case. Upon considering the entirety of the evidence on record, the trial court, in its judgment found the appellant guilty and sentenced him to five years imprisonment.

The Appeal

15. Being dissatisfied with both conviction and sentence of the trial court, the appellant lodged the present appeal vide a petition of appeal filed in court on 21st March 2024, citing the following grounds:

a. **THAT, the learned trial Magistrate erred in law and fact in ignoring a cardinal principal in criminal law and procedure that the burden of proof lies on the prosecution and that they must prove each and every ingredient of the charge beyond reasonable doubt.**
b. **THAT,_the learned trial magistrate failed to test the evidence of the prosecution witnesses and caution the circumstances thereby convicting on flimsy, inconsistent and evidence that was not watertight enough;**
c. **THAT, the learned trial Magistrate erred in law and fact by basing a conviction in relying on the suspicious and fictitious evidence of witnesses.**
d. **THAT, the learned trial magistrate erred in law and fact by relying on evidence of the prosecution without observing that there were no substantive investigations by the investigating officers thereby basing the conviction on mere allegations and fabrication;**
e. **THAT, the learned trial magistrate erred in matters of law and facts by failing to give sufficient cognizance to the appellant's reasonable defence and failing to consider that the defence raised reasonable doubt.**

f. **THAT, the learned trial magistrate erred on both law and facts by meting a harsh sentence without considering my plausible mitigation and that I was a first offender.**

g. **THAT, may the honorable court allow the appellant adduce more grounds of appeal during the hearing and the determination of this matter.**

h. **THAT, he wishes to be present during the hearing and the determination of this matter.**

16. The appeal was canvassed by way of written submissions. On record are submissions by the appellant and submissions dated 10th March 2026, filed by the respondent; both of which this court has carefully considered.

Appellant's Submissions

17. The appellant submitted that the prosecution failed to prove the charge beyond reasonable doubt and that the conviction was founded on insufficient, inconsistent and uncorroborated evidence. Counsel argued that the circumstances under which the alleged offence was committed did not disclose any culpability on the part of the appellant, and that the recognition evidence relied upon by the prosecution was

unreliable. He contended that the complainant did not properly recognize the appellant and that the evidence tendered by the prosecution was deliberately untruthful and incapable of sustaining the charge.

18. The appellant further submitted that the trial court ought not to have convicted him because the prosecution had not proved its case to the required standard, and that the particulars of the charge were not borne out by the evidence tendered at trial. In his view, the prosecution case was riddled with glaring loopholes and contradictions which were never resolved, thus rendering the conviction unsafe. It was also submitted that suspicion, however strong, could not form the basis of a conviction.

19. The appellant also faulted the trial court for allegedly failing to consider his defence. It was submitted that the appellant had clearly explained that he had not committed the offence and that the trial court did not sufficiently interrogate that defence before arriving at its decision. Counsel further argued that there was no corroboration of the prosecution case and that, taken as a whole, the evidence on record did not outweigh the appellant’s sworn defence. On that basis, the appellant urged this court to find that the conviction was not safe and could not be sustained.

20. Lastly, the appellant submitted that the sentence imposed was harsh and excessive in the circumstances, particularly bearing in mind

his mitigation and the manner in which the alleged offence occurred. He prayed for the court to allow the appeal, quash the conviction, and set aside the sentence.

Respondent's Submissions.

21. The respondent submitted that the appeal was devoid of merit and that the conviction was sound both in law and fact. It was contended that the prosecution had proven the charge beyond reasonable doubt and had established all the essential ingredients of the offence. The respondent submitted that the appellant was properly identified by way of recognition, the complainant having known him from the locality, and PW2 also being familiar with him from an earlier criminal case. In that regard, reliance was placed on **MW v Republic [2019] eKLR** for the proposition that recognition, as opposed to identification of a stranger, considerably reduces the possibility of mistaken identity.

22. The respondent further submitted that there was no doubt that the recovered vibrator machine belonged to the complainant. It was argued that the complainant positively identified the exhibit as his stolen property and gave evidence of its value. According to the respondent, the evidence adduced at the trial clearly showed that the appellant took the complainant's property without his authority, and that the prosecution evidence on that score was cogent, consistent,

and not founded on mere suspicion. It was also submitted that proper investigations were conducted and that all material witnesses who interacted with the accused persons before and after the incident recorded statements. In the respondent's view, the appellant had not pointed to any omission or inconsistency of such gravity as would cast doubt on the prosecution case or demonstrate any infringement of his right to a fair trial.

23. On sentence, the respondent submitted that the trial court considered the appellant's mitigation and even called for a presentence report, which was unfavourable to him. It was argued that the report disclosed previous records, and that the appellant was therefore not a first offender as claimed. The respondent nevertheless maintained that the sentence imposed was lawful and proper in the circumstances of the case, and urged this court to find that the trial court had exercised its discretion judiciously. In the result, the respondent prayed that the appeal be dismissed in its entirety and that both conviction and sentence be upheld.

Analysis and Determination

24. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases

of **Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570** and **Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR** where the Court of Appeal held that: -

> ***"the duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.''***

25. I have considered the lower court proceedings, the judgment of the trial court, the grounds of appeal, and the submissions filed by the parties. In my view, the issues that fall for determination are:

i. **Whether the conviction was safe, having regard to the evidence on record, the alleged contradictions, and the appellant's defence.**

ii. Whether the sentence imposed was lawful and/or excessive.

26. The appellant was charged with the offence of stealing contrary to **section 268(1)** as read with **section 275 of the Penal Code**. For such a charge to be sustained, the prosecution had to prove, beyond reasonable doubt, that the property in question belonged to the complainant, that it was stolen, and that the appellant was one of the persons who fraudulently took it or participated in its theft.

27. The first two elements are not quite contested. PW1 testified that on the morning of 30th August 2023 he discovered that two pokers and a vibrator machine were missing from his place of work. Later the same day, the 2nd accused took to him a burnt vibrator machine for sale as scrap metal. PW1 identified it as his machine by marks he had earlier made on it. PW2, the police officer, confirmed that when he arrived at the scene the machine was present and it was taken to the station together with the suspects, and the complainant identified it as his stolen property. The exhibit was produced as evidence in court. On my own re-evaluation, I am satisfied that the prosecution proved that the vibrator machine belonged to PW1 and had been stolen from his premises.

28. The pressing question is whether the theft was proved against the appellant. No witness saw the appellant steal the items. Nothing was recovered from him personally. PW1 candidly stated in cross-

examination that the 2nd accused was the one found with the vibrator and that nothing was recovered from the appellant. PW2 likewise stated that nothing was recovered from the appellant and that he did not witness the theft. To that extent, the appellant is right that the case against him did not rest on direct evidence of theft or possession.

29. However, that is not the end of the matter. The prosecution case, and indeed the defence evidence itself, placed the appellant at the center of the chain leading to the recovery of the stolen item. PW1 testified that it was the 2nd accused whom, upon arrest, led them to the appellant and stated that the vibrator belonged to him. PW2 confirmed that the 2nd accused similarly directed the complainant and members of the public to the appellant. Standing alone, that evidence would require caution, for suspicion, however strong, cannot found a conviction. The courts have repeatedly said so. In **BNK v Republic [2025] KEHC 8555 (KLR)**, the court restated the principle from **Sawe v Republic** that:

> ***"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."***

30. The present case, however, did not stop at suspicion. The appellant's own co-accused, while giving sworn defence evidence as DW3, testified that on the material morning the appellant came to his house in the company of another person carrying a vibrator and two

pokers; that the appellant asked for a sack; that the items were left there; and that he later attempted to sell one of them as scrap metal, only to discover that it belonged to the complainant. DW3 maintained that it was the appellant who brought the items to him. That account was not elicited by the prosecution in its case alone; it came from the sworn testimony of the 2nd accused himself, who was available for cross-examination by the appellant.

31. That evidence was materially corroborated by DW4, who testified that it was the appellant who brought the metal item to her home for safekeeping, and that her son later removed it from there. Her evidence was again given on oath and she was cross-examined by the appellant, but she remained firm that it was the appellant who brought the item.

32. The appellant's defence was essentially that he was merely attacked by a mob and falsely implicated. DW2, his mother, only testified as to the assault she found him undergoing. She candidly conceded that she did not know whether or not he had committed the offence, since she did not find him with anything. Her testimony therefore went only to the circumstances of arrest and assault; it did not displace the evidence of DW3 and DW4 linking the appellant to the stolen item.

33. I have also considered the complaint that the evidence was contradictory and uninvestigated. To me, the core thread in the

evidence remained consistent: the complainant's vibrator was stolen; the 2nd accused was found attempting to sell it; he immediately connected it to the appellant; and in the defence case itself, both DW3 and DW4 stated that it was the appellant who had brought the item. The contradictions pointed out by the appellant do not go to the root of that narrative. They do not create a reasonable doubt as to whether the stolen item passed through the appellant's hands. In my view, the trial court cannot be faulted for rejecting the appellant's bare denial, just as similarly raised in his submissions on appeal.

34. The appellant also argued that the evidence of recognition was unreliable. However, this was not a case that turned primarily on visual identification at the scene of the theft. It turned on the chain of possession and the direct implication of the appellant by the person found with the stolen item, which implication was then repeated and supported in the defence evidence itself. The respondent's reliance on recognition therefore did not carry the case; the totality of the evidence did.

35. I am therefore satisfied that the prosecution proved, beyond reasonable doubt, and that the conviction was, in the circumstances, safe. The grounds challenging the sufficiency of the evidence, the alleged contradictions, the alleged failure of investigations, and the complaint that the defence was not considered are without merit.

36. On whether the sentence by the trial court was excessive/unlawful, the trial court sentenced the appellant to five years imprisonment. **Section 275 of the Penal Code** provides a general penalty of three years for theft, "*unless owing to the nature of the thing stolen or other circumstances of the case some other punishment is provided.*" The stolen items comprised industrial equipment valued at Kshs. 125,000/-, which is substantial. The nature of the property and the circumstances of the case, including the pre-sentence report which disclosed that the appellant was not a first offender, justified the trial court in imposing a sentence above the default three-year maximum.

37. Sentencing is a matter of judicial discretion. The appellate court will only interfere where it is shown that the trial court acted on wrong principles, overlooked a material factor, or imposed a sentence that is manifestly excessive. The trial court considered the appellant's mitigation, the pre-sentence report, and the circumstances of the offence, including the substantial value of the stolen property and the appellant's previous record. This court finds no reason to interfere with the same.

38. Consequently, the appeal against conviction and sentence is dismissed. The judgment and sentence of the trial court is upheld.

39. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA ONLINE THIS 15TH DAY OF MAY, 2026.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Angog'a/Velma

Mr. Ndege for OPP present online.

Appellant present virtually.