



**Mwaura & 2 others v Republic (Criminal Appeal 48 of 2024)
[2025] KEHC 4983 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 48 OF 2024
DR KAVEDZA, J
APRIL 28, 2025**

BETWEEN

JAMES KAMAU MWAURA 1ST APPELLANT

VICTOR KIMANI NJOROGE 2ND APPELLANT

JOSEPH MWANGI MAINA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by Hon.
M. Maroro (PM) on 9th September 2024 at Kibera Chief Magistrate's Court
Criminal Case No. E1376 of 2023 Republic vs James Kamau Mwaura and 2 others)*

JUDGMENT

1. The appellants were jointly charged and, after a full trial, convicted for the offence of preparation to commit a felony contrary to section 308(1) of the *Penal Code*. On Count II, the second appellant was charged and convicted for the offence of conveying suspected stolen property contrary to section 323 of the *Penal Code*. All appellants were sentenced to serve four (4) years' imprisonment on Count I. However, during sentencing, the trial court erroneously sentenced the 3rd appellant instead of the second appellant to an additional one-year sentence on Count II, to run concurrently.
2. Aggrieved, they filed an appeal challenging their conviction and sentence. In their appeal, they challenged the totality of the prosecution's evidence against which they were convicted. They urged the court to quash their conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence



before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. PW1, Inspector Stephen Kanyi of Waithaka Police Station, testified that on 11 September 2023, while patrolling Kawangware Kikuyu Road, he received information about a gang mugging the public. Upon arrival, the gang fled, but he apprehended the 2nd appellant under streetlights. He recovered a Vivo phone from his front pocket and a knife from his back pocket. The 1st and 2nd appellants were arrested, and the 2nd appellant later led them to the 3rd appellant's house, where they recovered a motorbike linked to the crimes. An error in recording the motorbike's registration was noted (KMFY 152C instead of KMFY 152F). On cross-examination, PW1 stated the appellants failed to explain their presence at that hour. He denied assaulting them.
5. PW2, PC Isaiah Wamalwa, corroborated PW1's account. He confirmed seeing the motorbike (registration KMFY 152Z) used in the crimes and the public identifying the 1st and 2nd appellants. On cross-examination, he stated that a knife was recovered from the 2nd appellant, and although nothing was found inside the 3rd appellant's house, the motorbike linked them to the offences.
6. PW3, Corporal Danson Mugo, testified that he investigated the matter and produced the prosecution exhibits. He confirmed the 2nd appellant could not explain possession of the phone which did not belong to him.
7. In their defence, DW1, James Kamau Mwaura, stated he was selling food after a football match when officers interrogated and arrested him without informing him of any offence. He denied knowing his co-accused.
8. DW2, Victor Kimani Njoroge, testified he was waiting for transport to town when officers arrested him. He admitted possession of the phone but denied knowing the 1st appellant.
9. DW3, Joseph Mwangi Maina, a boda boda rider, said he was woken by his wife and found officers and Victor Kimani at his gate. He was searched, arrested, and charged. He denied knowing the 2nd appellant.
10. DW4, Emily Muthoni, DW3's wife, corroborated his account, adding that she was asked for Kshs 50,000 at the police station, which she could not pay.
11. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them. The issue for determination is whether the prosecution proved their case and the conviction was proper.
12. Section 308 (1) of the penal code under which the appellants were charged provides: "Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit a felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years".
13. From the above section, the ingredients of the offence of preparation to commit a felony are:
 - i. That the accused is found armed.
 - ii. With a dangerous or offensive weapon.
 - iii. In the circumstance which indicates an intention to commit a felony.
 1. In the instant case, it was the prosecution's evidence that the appellants the appellants were armed: PW1 testified that, upon arresting the 2nd appellant during routine patrols, he recovered a knife from the appellant's right back trouser pocket, evidence corroborated



by PW2. Secondly, the recovered knife constitutes a dangerous or offensive weapon, being inherently capable of causing grievous harm and commonly employed in violent offences.

2. Thirdly, the appellants' intent to commit a felony was sufficiently demonstrated: PW1 and PW2 confirmed they received reports of a gang robbing members of the public along Kawangware Kikuyu Road and Muthama. Upon the police's arrival, the suspects attempted to flee, a conduct consistent with guilt. Moreover, the 2nd appellant was found in possession of a Vivo phone, the ownership of which he could not account for, and a motorbike linked by the public to the criminal acts was recovered from the 3rd appellant's residence. The appellants' failure to provide a credible explanation for their presence at the scene during the early hours further fortified the prosecution's case. The essential elements of the offence were, therefore, fully satisfied.
3. In the premises, the prosecution adduced cogent and credible evidence establishing the offence of preparation to commit a felony contrary to section 308(1) of the *Penal Code*.
4. In count II, the 2nd appellant was charged and convicted for the offence of Having suspected stolen property Contrary to Section 323 of the *Penal Code*.
5. Section 323 of the *Penal Code* provides that any person detained under Section 26 of the *Criminal Procedure Code* who is found in possession of, or conveying, anything reasonably suspected of being stolen or unlawfully obtained, and who fails to satisfactorily account for it, is guilty of a misdemeanour. Section 26 of the *Criminal Procedure Code* authorises police officers to stop, search, and detain individuals reasonably suspected of possessing or conveying stolen property.
6. In *Koech v Republic* [1968] EALR 109, it was clarified that under Section 323, mere possession of suspected stolen property does not constitute the offence; rather, it is the failure to satisfactorily explain such possession that gives rise to criminal liability.
7. In the present case, PW1 and PW3 testified that Victor Kimani Njoroge (the 2nd appellant) was found in possession of a Vivo phone. Upon questioning, he failed to provide a reasonable explanation for how he acquired it. PW3, who conducted further investigations, corroborated this fact.
8. Once possession of suspected stolen property was established, the burden shifted to the 2nd appellant to offer a satisfactory account. However, in his defence, the 2nd appellant merely admitted possession without producing any supporting evidence, such as receipts or witness testimony.
9. Accordingly, his failure to satisfactorily explain possession rendered him guilty under Section 323 of the *Penal Code*. His conviction was therefore proper.
10. On count I, the appellants were lawfully sentenced to four years imprisonment, the trial court having considered their mitigation, pre-sentence reports, and their status as first offenders. I find no reason to interfere. On count II, the trial court erred by sentencing the 3rd appellant instead of the 2nd appellant. Accordingly, I set aside the one-year sentence against Joseph Mwangi Maina (3rd appellant) and impose a one-year concurrent sentence on Victor Kimani Njoroge (2nd appellant).
11. Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF APRIL 2025



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D. KAVEDZA

JUDGE

In the presence of:

Appellants Present

Mr. Chebii for the Respondent

Tonny Court Assistant

