



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lwambia v Republic (Criminal Appeal E028 of 2023)
[2025] KEHC 7491 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E028 OF 2023
AN ONGERI, J
MAY 30, 2025**

BETWEEN

CLEMENCE MWANYALO LWAMBIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. C. K. Kithinji
(PM) in Voi CMCC Case No. E494 of 2022 delivered on 18th October 2022)*

JUDGMENT

1. The Appellant was convicted with the offence of stealing contrary to Section 268 as read with Section 275 of the [Penal Code](#) and he was sentenced to 6 months Probation Sentence.
2. The particulars of the charge were that on 5th August 2022 at around 17:30hours at Voi town, Voi Subcounty of Taita Taveta County, the Appellant stole one identification card number 291435334 (2) A mobile phone make Samsung A2 and Kshs. 5,100/= at Jai Hari Supermarket receipt and a black porch all valued at Ksh. 24,300/= the property of Damaris Joseph.
3. The Appellant pleaded not guilty to the charge and the prosecution called 3 witnesses.
4. The prosecution evidence in summary was that the complainant in this case (PW1) in the company of PW2 Nelly Kidede Mkachuka were in the market at Voi around 6p.m on the material day.
5. The complainant and PW2 both had babies on their backs.
6. The Appellant followed the complainant and took her black porch with the items. The complainant asked the Appellant to return the porch but the appellant refused.
7. The complainant reported the matter to the police, the police accompanied her to the Appellant's shop where they recovered the porch with Kshs. 1,140/= and the other items.



8. The Appellant was told to go to the police station where she was charged.
9. The Appellant in her defence that she did not steal the porch. That it was the complainant who left the porch in her shop and went to talk to her husband concerning a long outstanding debt owed to the Appellant by the complainant.
10. The complainant returned with police officers and said the Appellant had stolen her porch.
11. The trial court found the Appellant guilty as charged and convicted her and sentenced her to 6 months probation sentence.
12. The Appellant has appealed to this court on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact by failing to consider the inconsistencies in the prosecution evidence.
 - ii. That the learned trial Magistrate erred in both law and fact by holding that the prosecution had proved its case against the Appellant beyond a reasonable doubt whereas, the evidence on record did not support such a finding.
 - iii. That the learned trial Magistrate erred in both law and fact by failing to consider the Appellant's testimony under oath supported by witnesses.
 - iv. That the learned Magistrate erred in both law and fact in convicting the Appellant on trumped-up charges.
 - v. That the sentence meted out against the Appellant is harsh and excessive in the circumstances.
13. The parties filed written submissions as follows:- the appellant submitted that although she served the 6-month probation, she desired to seek justice and have her conviction overturned.
14. In her submissions the appellant argued that the charges against her were a frame job. She argued that the evidence produced in court was not sufficient to garner a conviction.
15. It was the appellant's contention that there were inconsistencies with the prosecution witness testimonies and as such she maintained that she was innocent.
16. The prosecution alternatively argued that the subject matter forming part of the theft was PW1's black bag that had assorted items in it. Both the prosecution and defense witnesses confirmed the same.
17. Further, that at the time of securing the subject black Bag, the money in it amongst other items were missing as per the evidence of PW1 which was not rebutted in anyway during cross examination.
18. PW1 and PW2 indicated on the material day there was commotion between PW1 and the appellant on the material day that led to the latter unlawfully retaining the complainants/PW1's bag without her consent.
19. The appellant and PW1 were known to each other for about one year and thus the appellant was properly identified.
20. The prosecution argued that it was the appellant's case that PW1 owed an outstanding debt and that it what necessitated PW1 to leave the bag. However, the appellant did not provide any evidence to prove the same.
21. It was the prosecutions position therefore that the trial court considered all the evidence that was presented and come to a correct conclusion.



22. This being a first appeal, the duty of the first appellate court is clear. The Court of Appeal in *Okeno vs Republic* [1972] EA 32 held that:

“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 vs Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 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 finding and conclusion; 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 vs Sunday Post* [1958] EA 424.

23. The issues for determination in this appeal are as follows:-

- i. Whether the prosecution proved the charge of stealing against the Appellant to the required standard.
- ii. Whether the appeal should be allowed.

24. I find that there was a witness (PW2) who saw the Appellant taking away the complainant’s porch.

25. The intention was not to steal but to claim a debt owed by the complainant.

26. I find that the prosecution failed to prove the charge of stealing against the Appellant beyond reasonable doubt as required under Kenyan law.

27. The evidence presented was inconsistent and did not conclusively establish that the Appellant had the requisite intent to permanently deprive the complainant of her property, a key element of the offence of stealing under Section 268 of the *Penal Code*.

28. The Appellant’s defence that she retained the porch due to an outstanding debt, while not fully substantiated, introduced reasonable doubt as to her intentions.

29. Furthermore, the trial magistrate erred in failing to adequately evaluate the inconsistencies in the prosecution’s case and the plausibility of the Appellant’s testimony.

30. The conviction is therefore unsafe. Although the sentence of six months’ probation has already been served, the interests of justice demand that the Appellant’s conviction be quashed to rectify the miscarriage of justice.

31. The Appellant is exonerated of the charge, and any criminal record as a consequence of the conviction be and is hereby is vacated.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF MAY, 2025 IN OPEN COURT AT VOL.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

