



**Njenga v Republic (Criminal Appeal E021 of 2023)  
[2025] KEHC 6984 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6984 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E021 OF 2023  
JK NG'ARNG'AR, J  
MAY 28, 2025**

**BETWEEN**

**PATRICK NJENGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Criminal Case Number 284 of  
2022 by Hon. Cheruto C. in the Chief Magistrate's Court at Kerugoya)*

**JUDGMENT**

1. The Appellant was charged with the offence of stealing contrary to section 268 as read with section 275 of the *Penal Code*. The particulars of this offence were that on 21<sup>st</sup> June 2022 at Kagumo Village within Kirinyaga County stole ½ kg of sugar valued at Kshs 80/= the property of Kagumo Girls High School.
2. The Appellant faced an alternative charge of handling stolen goods contrary to section 322 (i) (2) of the *Penal Code*. The particulars of this offence were that on 21<sup>st</sup> June 2022 at Kagumo Village within Kirinyaga County otherwise than in the cause of stealing dishonestly, retained a ½ kg of sugar knowing or having a reason to believe them to be stolen goods.
3. A trial was conducted where the Prosecution called four witnesses in aid of its defence. The trial court found that the Appellant had a case to answer and placed him on his defence. In his defence, the Appellant gave sworn testimony and did not call any witness.
4. In a Judgement dated 13<sup>th</sup> April 2023, the trial court convicted the Appellant for the offence of stealing and fined him Kshs 30,000/= in default to serve 6 months imprisonment.
5. Being aggrieved with the Judgement, the Appellant filed his Petition of Appeal on 14<sup>th</sup> April 2023 appealing against his conviction and sentence.



6. This being the first appellate court, it has a duty to re-evaluate and scrutinize evidence on record and draw its own independent conclusions. See *Mark Ouiruri Mose vs. R* (2013) eKLR.
7. I now proceed to analyse the parties' case in the trial court and their submissions in the present Appeal. Prosecution and Defence cases in the succeeding paragraphs.

#### **The Prosecution's case.**

8. It was the Prosecution's case that the Appellant stole ½ kg of sugar valued at Kshs 80/= belonging to Kagumo Girls High School. Elizabeth Wanjiru (PW1) testified that her students complained that their uji did not have sugar, she tasked Irene Wanjiru (PW2) to commence investigations. It was PW2's testimony that she found ½ kg of sugar in the Appellant's jacket which was in gents' washroom.
9. Through their written submissions dated 17<sup>th</sup> August 2024, the Respondent submitted that the Appellant took the ½ kg of sugar, a thing that was capable of being stolen with the intention of permanently depriving its owner, Kagumo Girls High School of it. They further submitted that the Appellant in his defence stated that he did not come with any food stuff from home and the only source of sugar was the school kitchen.
10. It was the Respondent's submission that the matron (PW3) testified that she gave the Appellant 11kgs of sugar in the morning and the Appellant confirmed receipt of the same. That it was logical that the ½ kgs of sugar was part of the 11kgs that the Appellant had been given. They relied on the doctrine of recent possession and *John Kioko Mwau vs Republic* (2012) eKLR.
11. The Respondent submitted that the trial court considered the Appellant's defence and that the trial court was correct in convicting the Appellant. That the Appellant's defence of ill motive from the complainant was not based on any evidence. They further submitted that the trial court convicted the Appellant for the offence of stealing.
12. It was the Respondent's submission that the trial court was not obliged to call for a pre-sentencing report before sentencing. That the trial court had the discretion to call for such a report and they relied on *Ebwangany vs Republic* (Criminal Appeal E005 of 2023) [2023] KEHC 25302 (KLR) (16 November 2023) (Judgment). It was the Respondent's further submission that the sentence was sufficient.

#### **The Appellants' case.**

13. The 1st Appellant (DW1) denied committing the offence. He testified that on the material day, he was on duty having reported to work at 3 a.m. He testified that he changed his clothes and put his home clothes in the washroom.
14. It was the Appellant's testimony that he was given sugar in a sack by the matron (PW3). It was his further testimony that the bursar (PW2) put the sugar in his jacket and that the complainant (PW1) had a grudge with him.
15. In his written submissions dated 7<sup>th</sup> June 2024, the Appellant submitted that when PW3 was cross examined, she stated that Joseph Maina, Teresia Mwangi and the Appellant were in the kitchen and that all of them may have had access to the sugar. He further submitted that he did not carry anything in his jacket from home and that anyone could have had access to the gents' washroom. That PW2 put the sugar in his jacket when she purportedly undertook investigations as she was the last person to enter the said washroom.



16. It was the Appellant's submission that there was no evidence that he entered the washroom and put sugar in his jacket and further that there was no evidence that the Appellant was wearing the jacket when the search was conducted. It was his further submission that PW1 had a grudge with him and other employees. That PW1 experienced resistance from the school board of management and she blamed her tribulations on workers and promised to sack all of them.
17. The Appellant submitted that the Prosecution failed to provide any nexus between the school store, the sugar issued to the cooks and the sugar found in the Appellant's jacket. That the Appellant was not found in possession of the ½ kgs of sugar. The Appellant further submitted that the police did not conduct investigations but they were conducted by PW1 and PW2.
18. It was the Appellant's submission that the fine of Kshs 30,000/= was harsh compared to the value of the alleged stolen sugar which was Kshs 80/=.
19. I have gone through and given due consideration to the trial court's proceedings, the Record of Appeal, the Appellant's written submissions dated 7<sup>th</sup> June 2024 and the Respondents written submissions dated 17<sup>th</sup> August 2024. The following issues arise for my determination: -
  - i. Whether the Prosecution proved its case beyond reasonable doubt.
  - ii. Whether the Defence places doubt on the Prosecution case.
  - iii. Whether the sentence preferred against the Appellants were excessive.

**Whether the Prosecution proved its case beyond reasonable doubt.**

20. The elements of stealing are contained in Section 268 of the *Penal Code* which provides: -
  - (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.
21. I am persuaded by Nyakundi J. in *Robert Onchwari Orina & another v Republic* [2021] KEHC 8223 (KLR), where he held that: -

“.....For an accused person to be convicted of the offence under Section 268 of the [Penal Code](#), it's incumbent upon the prosecution to prove (sic!) that he or she dealt with the property of the complainant fraudulently without any claim of right or converts it into his or her own use, other than the general or special owner thereof. That intention is executed in a manner to deprive the rightful owner of the property permanently.

In *R v Jones* (1976) KLR 1 the Court observed that:

“On a charge of theft, it was necessary to prove a fraudulent taking or conversion without claim of right, and a person was deemed to have taken or converted money fraudulently if he did so without a claim of right and with intent to use it at his will, even if he intended to repay the money to the owner.”

22. Elizabeth Wanjiru (PW1) testified that she was the headteacher at Kagumo Girls High School. She testified that on the material day, students complained that the uji did not have sugar. PW1 further testified that she tasked Irene Wanjiru (PW2) to trace any hidden sugar and that PW2 told her that she found sugar hidden in the Appellant's jacket pocket which was in the gents' washroom. When PW1 was cross examined, she stated that she did not call the Appellant during the inspection.
23. Irene Wanjiru (PW2) corroborated PW1's testimony by stating that she found the ½ kgs of sugar in the Appellant's jacket. When PW2 was cross examined, she stated that she did not see the Appellant steal the sugar.
24. Monica Mwangi (PW3) testified that she was the school Matron and on the material day, she gave the Appellant 11kgs of sugar in the morning. PW3 stated that the Appellant reported to work at 4 a.m., change into work clothes and put their clothes in the bathroom. She further testified that she did not see the Appellant put sugar in his jacket and only saw the sugar when PW1 came with it.
25. No. 229022 Cpl Anastacia Wairimu (PW4) testified that PW1 reported to then that they found ½ kg of sugar in the Appellant's jacket and that it was against the school's regulations. When PW4 was cross examined, she stated that PW1 called her fellow officer to report the stolen sugar and that she did not go to the school to carry out investigations. She then testified that she went to the school to carry out investigations after her colleague had made the arrest.
26. In his defence, the Appellant admitted that he was on duty and that reported to work, changed his clothes and left then in the gents' bathroom. The Appellant further testified that he did not carry anything in his jacket when he left his house.
27. In analysing the above, it is clear that the ½ kg of sugar was found in the Appellant's jacket. This jacket was in the gents' washroom as stated by PW1, PW2 and the Appellant. The question then becomes whether the Appellant was found in possession of the ½ kgs of sugar?



28. It is my view that the Appellant was not found in possession of the 1/2kgs of sugar. I say so because firstly, the sugar was found in his jacket and this jacket was hang in the gents' bathroom and was not being worn by the Appellant. Secondly, the circumstances surrounding the recovery of the sugar were suspect to this court. To elaborate on this point, it was suspicious in my view for Irene Wanjiru (PW2) to go to the gents' bathroom alone and recover the ½ kgs of sugar in the Appellant's jacket. This left plenty of room for manipulation and doubt.
29. The Respondent relied on the doctrine of recent possession which would have placed evidential burden on the Appellant to explain how he came into possession of the sugar. In my humble view, the doctrine of recent possession only comes into play if one is found in actual or physical possession of a stolen item and as I have stated earlier in this case, the Appellant was not found in physical possession of the ½ kg of sugar.
30. Having analysed the Prosecution's evidence in its entirety, I am of the view that the Prosecution tendered insufficient evidence and failed to demonstrate that the Appellant was in actual possession of the ½ kgs of sugar. At best, the Prosecution's evidence created suspicion and it was trite law that suspicion no matter how strong cannot be used as a basis for a conviction.
31. I agree with Mrima J. in Republic v JOO [2015] KEHC 1978 (KLR), where he stated: -

“ .....it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”
32. In the final analysis, it is my finding that there was insufficient evidence adduced by the Prosecution to sustain the charge of stealing against the Appellant thus the Prosecution failed to prove its case beyond reasonable doubt.
33. In the end, I find the Appeal merited. The Appellant's conviction was unsafe owing to insufficiency of evidence. I hereby quash the conviction and set aside the sentence. The Appellant is to be refunded his Kshs 30,000/= paid as fine in his sentence.

**JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF MAY, 2025.**

.....  
**J.K.NG'ARNG'AR**  
**JUDGE**

Judgement delivered in the presence of Heyi for the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).

