



REPUBLIC OF KENYA



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

**Mutuku v Republic (Criminal Appeal E065 of 2022)
[2025] KEHC 9695 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E065 OF 2022**

TM MATHEKA, J

JUNE 30, 2025

BETWEEN

EMMANUEL KITENGA MUTUKU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged with two others Stephen Mwangela & Peter Kioko in Makueni MCCRC E105 of 2021 with burglary contrary to Section 304(2) and stealing Contrary to section 279 (b) of the *Penal Code*. The particulars were that on the night of 9/4/2021 jointly with others not before court broke and entered into the dwelling house of Fredrick Mutinda Mbeke with intent to steal and did steal therein assorted household goods valued at Kshs. 150,000 the property of Fredrick Mutinda Mbeke. The first accused person/appellant had an alternative charge of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the *Penal Code* where the particulars were that on 16/4/2021 otherwise than in the course of stealing he dishonestly retained a sofa set, cupboard, 2 mattresses, bed, 10 plastic chairs, pillow, wall unit, basin 2 sufurias, 2 tables and assorted appliances knowing them to be the stolen property of Fredrick Mutinda Mbeke.
2. The matter proceeded to full hearing where PW1 Fredrick Mutinda Mbeke the complainant said the house broken into his rural home. That first accused was a suspect and he went in company of other people to first accused's home and the first accused took off and upon search in the house several stolen items which he identified as his were recovered including a sofa set. He said other stolen items were recovered from other houses in the accused's compound including mattresses, blanket, wall unit, basins, plastic chairs, sufurias and wiring items. He said when arrested, the second accused said some stolen cement was at his house but that nothing was recovered from his house.

He said the second and third accused were named as accomplices by the first accused. He identified his stolen and recovered items in court.



3. PW1 Johnstone Nzioka the complainant's brother said he got to know about the breaking and theft from complainants house on 10/4/2021 . He visited the house and found it broken and house hold items stolen.

He said a search for the stolen items commenced and the search team visited the first accused's home and who was a suspect and a known burglar. That accused took off when the search team comprised of the area village elder and nyumba kumi members went to his home at night. He said several of complainants stolen house hold items were recovered from accused's house and others from other houses in the compound.

He said it was the first accused who named the second and third accused persons as accomplices. The witness identified the items recovered in court.
4. PW4 Monica Mwalimu an area village elder gave similar evidence to that of PW1 and PW2 in regard to recovery of the stolen items. She said she had warned the first accused severally about his engagement in crime and that the public was tired of his criminal tendencies and wanted to kill him. He said the people wanted to lynch the first accused person but the police intervened.
5. PW5 police constable Kelvin Sila said he did visit the complainant's home and confirmed the breaking . He said there were others suspects other than the accused persons who had been arrested but released when the first accused who had named them as accomplices said he had named them for fear of the public and that they had not been involved. The officer identified and produced as exhibits the items recovered.
6. In his sworn defence, the first accused/appellant stated that he was invaded at his home on the night of 14/4/2021 by a mob. That his house was set on fire and he took off. That the same mob arrested him the following day and beat him up and joined him with other suspects. He said they were told some goods had been recovered from his house.
7. On cross-examination, he said no items were recovered from his house. That he was not a criminal and that he did not know the first and second accused persons and that he never implicated them.
8. The testimony of DW4 Silver Kavinya who was third accused defence witness is relevant here . He said he was a village elder and was the one who called police officers to the scene to rescue the suspects He said the third accuse was arrested when he joined a group of people making noise and searching for stolen goods. That he was arrested as he donned rasta hair style. His testimony was that the items stolen were recovered from the first accused's house.
9. Upon considering the evidence the learned trial magistrate found that it was not in dispute some of the stolen items were recovered. That evidence showed that some items were recovered from the first accused's house from which he had taken off when the search team raided his home. Other items were said to have been recovered from houses within the compound the first accused house is situated. Regarding the second and third accused he found that they were suspects because they had been implicated by the first accused from whose house some stolen items were allegedly recovered. Standing on the well-established principle that Suspicion, no matter how strong cannot be a basis of conviction he found the case against them un established and acquitted them.
10. Standing on the doctrine of recent possession, the learned trial court found that the first accused/appellant acquired the said possession in the manner narrated in court by the prosecution witnesses, that is by breaking into complainants house in concert with others and stealing the items therefrom. He found that the prosecution has proved the charge against the first accused person/appellant on count one(1) to the required standard of beyond any reasonable doubt. The first accused/appellant



was convicted on the principle charge of burglary and stealing and sentenced on 10/8/2021 to 7 years imprisonment on each limb to run concurrently .

11. Aggrieved by both the conviction and sentence he filed this appeal on the following grounds:-
 1. That I am opposed to the sentence imposed on this case.
 2. That the crime was framed on me by the village elder.
 3. That some stolen items were recovered from my house which does not prove that I am the thief.
 4. That there were no witnesses who saw the stolen goods being brought to my house.
12. The appeal was canvassed by way of written submissions.
13. He argued that there was no eye witness to the alleged burglary and theft, no one saw them bring the items to his house.

He submitted that the village elder was his enemy who could have arranged for the stolen goods to be taken to his house so that he could be arrested and so as “to do away with me from my own community”
14. He submitted that the villagers were influenced by their hatred from him, and had fabricated the charges against him.
15. He wondered whether it was practical for thief to steal, then store the goods in his house where he knew that the same could be found upon search, that it was impossible for one person to carry all those items, and he wondered why the prosecution had not produced a single eye witness who had seen him ferrying the goods.
16. He submitted further that it was his defence that he ran away from his house when a mob attacked his home and that the goods were moved there after he ran away. He denied breaking into the house and contended that the prosecution had failed to prove that he had broken into the complainant’s house.
17. The prosecution submitted on the authority of *Okeno V. Republic* [1973] EA 31 and *Kiilu & another vs. Republic* [2005] 1KLR 174, that this court is obligated to re-evaluate the evidence adduced before the trial court, analyze it, and come up with its own independent finding. That the court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to assess their demeanor.
18. On whether the offence of burglary and stealing was proved, the prosecution cited Section 304(2) of the *Penal Code*.

Housebreaking and burglary

1. Any person who –
 - a. Breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
 - b. Having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building , tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.
2. If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.



19. It was submitted that the complainant's door and windows were broken, metal grills removed, door latch broken. A path had been made in the fence. This evidence established the breaking.
20. On the stealing – items were removed from the house of the complainant and taken to the house of the appellant where they were found. Further that it was not in dispute that the items belonged to the complainant.
21. The prosecution relied on *Marknon Masika Wafula V Republic* [2021] eKLR where the court relied on *Wyclife Anyona Nyabuto vs Republic* (2014) eKLR where the court stated that:-

“Essential element in charge of theft is that the person accused fraudulently converts a property which is capable of being owned so as to deprive the owner of such property.”
22. Regarding the appellant's contention that he was convicted on hearsay evidence - the prosecution relied on *Republic v Langat & Another* (Criminal Case E026 of 2020) [2024] KEHC 5016 (KLR) (17May, 2024) (Ruling) the court relied on the case of *Kinyathi v Republic* [1984] e KLR and urged the court to find that the learned trial magistrate relied on the direct evidence of the witnesses.
23. On the whether the conviction and sentence were proper. It was submitted that sentences are imposed to meet the following objectives: retribution, Deterrence, rehabilitation, restorative justice, community protection and denunciation. Additionally, that the sentencing policy guidelines state at Paragraph 4.2 that when carrying out sentencing all the aforementioned objectives should be considered in totality.
24. It was argued that the appellant was found in possession of the complainant's household goods in his house. The prosecution cited Section 304(b) where the penalty for burglary is up to 10 years and Section 279(b) – for theft – up to 14 years. That the appellant got 7 years imprisonment and that the trial court considered the evidence, prevalence of the offence, and the mitigation by the accused person/appellant. That that the sentence was lawful. The prosecution relied:- *Nicholas Mukila Ndetei v Republic* [2019] e KLR where the court stated:

“the need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not...”
25. This court was urged to dismiss the appeal.
26. I have carefully considered the evidence, and the submissions, and the duty of this court as the first appellate court. The issues that arise for determination are;
 1. Whether the appellant was convicted on hearsay evidence
 2. Whether the prosecution proved the charges against the appellant
 3. Whether the sentence was proper
27. Section 63 (1) of the *Evidence Act* provides that Oral evidence must in all case be direct evidence. In *Kinyatti v Republic* [1984] KECA 78 (KLR) the Court of Appeal emphasized that hearsay evidence is inadmissible unless it falls within the allowed exceptions
28. On the 1st issue it is very clear that complainant's house was broken into and items stolen from therein. This was confirmed by the four witnesses from the prosecution who visited the scene and saw that the house was broken into. Secondly, the same witnesses (except the complainant and the police officer) were present when the items were found in the appellant's house. The evidence on record shows that



the village elder and others went to the house of the appellant - the appellant ran away but the items were found inside his house- These are testimonies of eye witnesses. This was not hearsay but direct evidence.

29. On whether the two charges were proved – it is clear from the evidence that the appellant was not found at the scene he was not seen breaking into the house - the only thing that is clear from the evidence is that stolen items were found in his house.
30. The offence of burglary house. The only thing that is clear from the evidence is that stolen items were found in his house.
31. The offence of burglary and stealing – requires that the prosecution proves that the accused actually broke into the house at night and stole the items therein. It cannot be an assumption. In this case the prosecution had only had the evidence of the accused having possession of the stolen items in his house – the learned trial magistrate applying the doctrine of recent possession arrived at the conclusion that the accused person must have been the one who broke into the house of the complainant and stole the items.

The break in and theft were discovered on 9/4/2021. The recoveries were made on 14/4/2021.

32. Evidently this was recent – barely a week after the burglary and stealing. The appellant offered no explanation at all of the possession of the stolen property.
He simply denied the same – yet the evidence of eye witnesses including the village elder established that the items were recovered from his house.
33. He submits that the whole case was a set up by the village elder, and the community. He however did not lay a basis for the alleged hatred against him by the community or the village elder. He did not put it to the village elder when he testified. Submissions cannot take the place of evidence when the issues were not raised at trial.
34. In the circumstances though there was no eye witnesses, the doctrine of recent possession applies to the applicant and established that he was the thief or one of the thieves on the night the same happened.
35. Having found that, I am of the view that the trial court was not in error in finding the appellant guilty of burglary, and stealing.
36. Was the sentence lawful?
37. Burglary attracts the sentence of up to 10 years, and stealing Contrary to section 279(b), up to 14 years.
38. The appellant was sentenced to 7 years imprisonment on each limb.
39. The sentence was lawful. The magistrate took into account the mitigation by the appellant, the period spent in custody – among other factors.
40. I find no reason to interfere with the same.
41. In the circumstances, I find that the appeal has no merit. The conviction is sustained, the sentence is upheld.
42. The appeal is without merit and is dismissed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH JUNE 2025

MUMBUA T MATHEKA

JUDGE



CA Chrispol

Appellant Present at Makueni Main Prison

Mr. Kazungu for State

