



**Ombati v Republic (Criminal Appeal E140 of 2024)
[2025] KEHC 9362 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E140 OF 2024
DR KAVEDZA, J
JUNE 30, 2025**

BETWEEN

AMOS ONKUNDI OMBATI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
on 31st October 2024 by Hon. W.Lopokoiyit (SRM) at Kibera Chief
Magistrate's Court Case No. E771 of 2020 Republic vs Amos Onkundi Ombati)*

JUDGMENT

1. The appellant was charged and after full trial convicted by the Subordinate Court of the offence of stealing contrary to section 268(2)(e) as read with 275 of the *Penal Code*. The particulars were that on 4th May 2019 at Karen Township within Nairobi County, he stole Ksh.570,000 the property of Lawrence Orege Osugo. He was sentenced to compensate Lawrence Orege Osugo Ksh.330,000 within fourteen (14) days from the date of the sentence in default, to serve two (2) years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted.
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 analyse and re-evaluate the evidence which was before the trial court and 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. The prosecution's case was led by Lawrence Orege (PW1). He testified that on 13th May 2019, he was selling a Toyota Fielder registration number KCC 318F to Charles Ndirangu. They agreed to meet at Karen Shopping Centre for inspection, then proceeded to the bank. The purchaser was to pay Kshs. 570,000 through a bank transfer. As PW1 did not hold an account with Cooperative Bank, the funds



were deposited into the account of one Amos Ombati the appellant herein, at PW1's instruction. The understanding was that Amos would remit the funds to PW1 the following day. However, he only transferred Kshs. 145,000, and later an additional Kshs. 240,000, falling short of the full amount.

5. Charles Mwangi (PW2), the buyer, corroborated PW1's account. He confirmed depositing Kshs. 570,000 into the account of Amos Ombati and giving additional payments to PW1 directly via Mpesa and in cash. He was later informed by PW1 that the full transfer had not been effected. He confirmed the existence of a written sale agreement and produced a bank statement verifying the payment into the appellant's account.
6. PC Joseph Cacheshe (PW3) testified that he recorded the complaint lodged by PW1 and produced a bank statement indicating the deposit of Kshs. 570,000 into the appellant's account. He further stated that the appellant was arrested in Kisii after absconding. While at Karen Police Station, the appellant entered into a written agreement to settle the outstanding amount, having already paid Kshs. 225,000. The agreement, dated 16th June 2018, was produced. No further payment was made by the appellant.
7. In his defence, the appellant admitted receiving Kshs. 570,000 from the buyer. He claimed to have used part of the money due to financial hardship during the Covid-19 period. He stated he paid PW1 Kshs. 240,000, later an additional Kshs. 225,000, and subsequently Kshs. 15,000. He admitted to owing a balance of Kshs. 345,000, which he had undertaken to repay by December 2019. He produced the payment agreement in court and affirmed his commitment to settle the debt.
8. The appeal was canvassed by way of written submissions and there is no need to rehash them.
9. Section 268 of the [Penal Code](#) provides that:
 - (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.
10. Further, Section 275 of the [Penal Code](#) sets out the penalty for stealing as follows:

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.
11. The standard of proof in criminal cases is proof beyond reasonable doubt and not on a balance of probabilities. This was the holding by Lord Denning in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 as follows:

“That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence, of course, it is a doubt but nothing short of that will suffice.”
12. The elements of the offence of stealing are set out under section 268 of the [Penal Code](#). Section 268(1) provides that a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts it to the use of another person, other than the general or special owner, is said to steal that property.



13. Under subsection (2), such conversion is deemed fraudulent where it is done with, inter alia, intent to permanently deprive the owner of the thing, or, in the case of money, with intent to use it at the will of the person converting it, even if they intend to repay it later. Subsection (3) makes it immaterial whether the property was originally taken for the purpose of conversion, or whether it was in the converter's possession at the time of conversion, including where the person is authorised to deal with the property.
14. In this case, the prosecution led evidence that Kshs. 570,000 was deposited into the appellant's Cooperative Bank account by PW2, Charles Mwangi, pursuant to an agreement for the purchase of a motor vehicle from PW1, Lawrence Orege. The appellant was required to transfer the money to PW1 but failed to do so, instead remitting only Kshs. 145,000 and later Kshs. 240,000, while retaining a balance for his personal use.
15. The appellant admitted receiving the full amount and acknowledged failing to remit the full sum to PW1. He explained that he experienced financial difficulties due to the COVID-19 pandemic and had intended to pay back the balance. However, as provided in section 268(2)(e), the use of money at one's will without authority, even with intent to repay, constitutes fraudulent conversion.
16. The appellant's conduct fell within the meaning of section 268. He fraudulently converted money entrusted to him for a specific purpose, acted without lawful justification, and did so to the detriment of the rightful recipient. His admission, coupled with the corroborated testimony of the prosecution witnesses, leaves no doubt that the offence of stealing was proved beyond reasonable doubt.
17. Accordingly, the appellant's conviction was proper and is affirmed.
18. On sentence, the appellant was sentenced to compensate Lawrence Osugo Ksh.330,000 within 14 days from the date of the sentence, in default, to serve two (2) years imprisonment.
19. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, the fact he was a first offender, and exercised discretion. In the premises, I see no reason to interfere with the sentence.
20. In the end, the Appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE 2025

D. KAVEDZA

JUDGE

In the presence of;

Appellant Present

Mogere for the Respondent

Tonny Court Assistant.

