



REPUBLIC OF KENYA



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

**Mwangu & another v Republic (Criminal Appeal E017 of 2025)
[2025] KEHC 11564 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E017 OF 2025**

AC BETT, J

JULY 29, 2025

BETWEEN

LIVINGSTONE MWANGU 1ST APPELLANT

CALLISTERS KHASIANI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment by Hon A. A. ODAWO (PM) in Kakamega
CMCCR. Case No. E1956 of 2021 delivered on 26th November 2024)*

JUDGMENT

1. The Appellants were convicted for the offence of breaking into a building and committing a felony contrary to Section 306(a) of the *Penal Code* and consequently sentenced to three (3) years' imprisonment.
2. Being aggrieved by the conviction and sentence, the Appellants lodged an Appeal in which they faulted the decision of the trial court on the following grounds:-
 1. That the learned trial Magistrate erred in law and in fact in convicting the Appellants based solely on circumstantial evidence.
 2. The learned trial Magistrate erred in law and in fact in finding that the doctrine of recent possession was proved.
 3. The learned trial Magistrate erred in law and in fact in failing to adequately consider the material contradictions in the testimonies of prosecution witnesses.
 4. The trial Magistrate erred in law and in fact in giving undue weight to the testimony of prosecution witnesses.



5. The learned trial Magistrate erred in law and in fact in disregarding the Appellants' defence.
 6. The learned trial Magistrate erred in law and in fact in convicting the Appellants on the first count despite the prosecution failing to prove the case beyond reasonable doubt, as no witness placed the Appellants at the scene of the crime.
 7. The learned trial Magistrate erred in law and in fact in failing to apply the principle of granting the benefit of doubt to the Appellants.
 8. The learned trial Magistrate's court erred in law and in fact in imposing a manifestly harsh and excessive sentence, failed to give weight to mitigation, and did not adhere to the Sentencing Policy Guidelines 2023.
3. That being a first appeal, the duty of the court is as enunciated in *Okeno v Republic*[1972] EA 132 where it was 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 v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post*, [1958] E. A. 424.”

4. The prosecution's case was that on 15.11.2021 in the morning, someone went to PW1's house and informed him that the store had one padlock which was unusual and that people were fetching cooking oil. PW1 called the police and they went to the scene where they found that 150 jerricans litres of cooking oil and 10 by 50 Busia sugar was missing. The police commenced investigations and later called him to identify the stolen goods. Thirteen (13) jerricans of Somo oil was recovered out of 150 and 1 sack was recovered out of the sugar.
5. PW2 was Stephen Lisudza Lukhumwa who said he was PW1's storekeeper and recalled that on 12.11.2021 at around 9.00 am, he went to the store, loaded the vehicle, and returned the keys to his boss. The store normally has three locks. On 15.11.2021, his boss's cousin called him to inquire whether he had closed the store securely as 2 padlocks were missing. He went to the store and found only one padlock which was different from the one they normally use. He called the police who photographed the door then cut the padlock to gain entry. On entering the store, he noted 10 bags of 50 kgs sugar was missing as was 5 jerricans 20 litres Somo oil.
6. Another witness erroneously referred to as PW1 in the proceedings was one Silas Dennis Otieno who said that in August 2021, he hired Livingstone John to manage a tuk tuk, which belongs to the witness's mother. On 14.11.2021, he received information that the tuk tuk was impounded for the reason that Livingstone was ferrying stolen goods. He found Livingstone in custody and Livingstone said that he had been hired to carry some goods using the tuk tuk.
7. PW3 was PC Duncan Wafula who recollected that on 14.11.2021 he was on patrol with his colleague when they received a tip concerning 2 people with Somo oil and 1 sack of sugar which was suspected to be stolen. In response they went to the scene at 10 pm where they found 2 people, a tuk tuk, cooking oil and 1 sack of sugar. They arrested the 2 people as they had no receipt to prove ownership of the items.



8. PW4 was PC Bernard Ngoro who was accompanying PW3 on the material date. He testified that on 19.11.2021 at around 10 pm, they were on patrol when they came across men carrying 13 jerricans and 1 sack of sugar and since they could not explain themselves, they took them and booked them pending investigations. That the next day, they got information that Sajanand's store had been broken into and 10 bags of sugar and 15 jerricans of cooking oil were missing. They took photographs of the recovered items and arrested the Accused persons.
9. In defence, the 1st Appellant stated that on 14.11.2021 as he was closing his work at 9:30 pm while with his friend Callisters Khasiani who had asked for a lift, a male client stopped him as he reached Ola, Supa Loaf and requisitioned transport at New Star Bar along Canon Awuor Street. He went there parked and started haggling with the customer. There were 3 in total and they had luggage on the veranda comprising oil and a sack of which he did not know what was inside. Shortly, the 3 men set off while running and police officers emerged and arrested them when he was yet to load the luggage in his tuk tuk.
10. The 2nd Appellant said that on the material date, as he was going home, he, met the 1st Appellant at Muliro garden and was given a ride. At Ola area besides Supa Loaf, a customer stopped the tuk tuk and stated that he needed the 1st Appellant to ferry something for him. He boarded the tuk tuk and took them where the luggage was at Newstar Pub. The luggage was on the veranda and it was the 2nd Appellant's evidence that he stood aside as the Appellant negotiated with the three customers. He further stated that shortly, he saw the men run off and also saw the police who commanded them to sit down and arrested them after accusing them of stealing despite their efforts to explain that they did not steal.
11. The appeal was canvassed through written submissions.
12. The Appellants submitted that their conviction relied purely on circumstantial evidence and since the prosecution failed to link the Appellants to the crime scene, the conviction was unsafe. They relied on the case of *Abanga alias Onyango v Republic* (Criminal Appeal No. 32 OF 1990) and *Sawe v Republic* [2003] eKLR.
13. The Appellants further submitted that there was no proof that they were in possession of the stolen goods as the evidence led was inconsistent. Relying on the case *Kabiga v Republic* Criminal Appeal No. 272 of 2005, they argued that there was no independent corroboration of the evidence of the police officers as well as no evidence to prove that the items were the ones that had allegedly been stolen from PW1's store.
14. The Appellants contended that there were material contradictions in the prosecution's case which the court overlooked. It was their case that the contradictions prejudiced their case. They relied on the case of *Wills Ochieng Odera v Republic* [2006] eKLR and *Joseph Maina Mwangi v Republic* (Criminal Appeal No. 73 of 1993).
15. The Appellants further submitted that the trial Magistrate unjustly dismissed their defence thereby compromising fairness in ignoring the reasonable possibility that street accessibility allowed others to possess the items. The Appellants argued that they ought to have been granted the benefit of doubt.
16. In respect to the sentence, the Appellants faulted the trial court for failing to weigh the mitigating factors and failing to take the positive probation report into account in breach of the *Sentencing Policy Guidelines*. They relied inter alia on the case of *Arthur Munya Mwaniki v Republic* [2015] eKLR.
17. The issues raised for determination by the court are whether the case against the Appellants was proved beyond reasonable doubt and whether the sentence was excessive in the circumstances.



18. Section 306 of the *Penal Code* provides:-

“Any person who—

- a. breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
- b. (b)breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.”

19. Breaking is defined in Section 303 of the *Penal Code* as follows:-

- “(1) A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.
- (2) A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.
- (3) A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any aperture of the building left open for any purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building.”

20. In view of the provisions of the law, the vital ingredients to prove the charge of breaking into a building and stealing are that one must be proven to have gained entry into any part of a building by breaking in or opening any part of the building so as to gain entry therein without the consent of the owner. Further, it must be proved that upon gaining entry into the building, the person committed a felony therein.

21. The offence of theft is classified as a felony by Section 275 of the *Penal Code* which provides:-

“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.”

22. I have carefully analyzed the evidence adduced by the prosecution. No clear evidence was led to prove that the store was broken into and stolen from. The evidence of PW1 and PW2 was inconsistent and leaves some questions in the mind of a reasonable man. In the first instance, it was not clear when people broke in and stole from PW1’s stores. PW1 stated in his evidence “someone came to my home and informed me that the store had one padlock which was unusual. He also informed me that the people were fetching cooking oil. I called the police who came and we went to the scene. We found 150 litres jerricans Somo cooking oil and 10 by 50 Busia sugar missing. The police then conducted investigations”. According to PW2, he was called by PW1’s cousin on 15.11.2021 and informed that the two padlocks were missing from the store. He went and confirmed that indeed there was one



padlock on the door. The padlock was not the usual one and so it had to be cut. This evidence was contrary to PW1's evidence on cross-examination that he opened the remaining padlock using the key. PW2 also said that on entering the store he found five (5), 20 litres jerricans of Somo oil missing as well as 10 bags of 50kgs sugar. There is a vast difference between the statement 10 x 50 sugar and 10 bags of 50 kgs of sugar and the prosecution failed to clarify the difference during the proceedings. Moreover, there is a glaring discrepancy between the number of jerricans of Somo oil that was missing as testified by the two witnesses. Whereas PW1 talks of 150 jerricans of 10 litres Somo oil, PW2 talks of 5 jerricans of 20 litres Somo oil. Such a discrepancy is too huge to be ignored and went to weaken the prosecution's case. More so in view of the fact that the Appellants were said to have been found with 13 jerricans of cooking oil. The inherent weakness of the prosecution's case was compounded by the fact that the evidence adduced seem to suggest that PW2, was the person who accessed the store frequently and the complainant could not tell when he last visited the store. PW1 trusted PW2 so much that he gave him free access to the store seemingly without control. PW2 stated on cross-examination that there was a record where he would note whenever he picked items. That the record was never produced in court further weakens the prosecution's case as did the failure to adduce the evidence of the night watchman who would have shed light as to what happened to the store.

23. In a nutshell, there was no evidence that the Accused persons were seen breaking and entering the complainant's store or stealing therefrom.
24. From the judgement, the learned trial Magistrate relied on circumstantial evidence to convict the Accused. The circumstantial evidence pivoted around the doctrine of recent possession as the trial Magistrate found that it was positively proven that the Appellants were found in possession of the items which had recently been stolen from the complainant's store.
25. For the doctrine of recent possession to apply, it must be proven first, that the property was stolen, that it was recently stolen and that it was found in actual possession of the Accused so soon after the theft. Upon the proof of the aforesaid three elements, the courts will invoke the doctrine and presume that the person found in possession of the stolen items. However, the presumption is rebuttable since the suspect is at liberty to tender a reasonable explanation as to how he came into possession of the stolen property. The trial court relied on the case of *Eric Otieno Arum v Republic* [2006] eKLR where the court held that:-

“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

26. The circumstances under which the doctrine of recent possession is applicable were extrapolated by the court of Appeal in *Athuman Salim Athuman V Republic* [2016] eKLR when the court rendered itself thus:-

“The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver.”

27. A vital ingredient in the doctrine is possession. PW3's evidence was that the goods were in the street a few meters away from the 1st Appellant's tuk tuk. PW4's evidence contradicted that of PW3 as



according to him, the Appellant were holding the goods. This was a fundamental contradiction in view of the Appellant's explanation which they immediately tendered to the police officers.

28. In addition, the fact that the goods were on the veranda and not in the 1st Appellant's tuk tuk raised doubt in so far as the prosecution's averment that they were found in their possession is concerned. There was no evidence to establish that the Appellants had control over the said property nor that they were aware that the property was stolen that could lead to an inference of guilt.
29. The Appellants also argued that there was no evidence to corroborate the evidence by the police officers who arrested them nor to prove that the items were the ones that were stolen from the complainant's store. The items were cooking oil and sugar, common items that are purchased daily by the public for their consumption. No evidence was led by the prosecution to establish conclusively that the Appellants knew that the goods were stolen. These were wholesale goods that are traded daily by wholesalers and retailers and the Appellants explained that they were in the process of being hired to convey the goods when the police arrived and the alleged owners of the goods fled thus leaving the Appellants to face the police alone. This was a reasonable explanation.
30. It was common ground that the items were not found inside the tuk tuk but on the veranda. Based on this finding, the Appellants ought to have been granted the benefit of doubt in view of the explanation. There was no need for them to present any evidence to substantiate their defence as held by the trial court. All that was needed was a reasonable explanation, which they immediately gave but was dismissed by the police. It was not their duty to prove their innocence, but the prosecution's duty to prove their guilt beyond reasonable doubt.
31. In the final analysis, I find the conviction of the Appellants for the offence of breaking into a building and committing a felony unsafe and it is quashed and the sentence set aside. I order that the Appellants be released from prison forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF JULY 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Kipsang for the Appellants

Ms. Chala for the Respondent

Court Assistant: Polycap

