



REPUBLIC OF KENYA



**Mohamed v Republic (Criminal Appeal E062 of 2022)
[2024] KEHC 4260 (KLR) (26 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E062 OF 2022
JN ONYIEGO, J
MARCH 26, 2024**

BETWEEN

HARET YUSUF MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon.R.Aganyo delivered on 8th November 2022 in criminal case number E194 of 2022 Wajir PM's Court)

JUDGMENT

1. The appellant herein was on 12th May 2022 together with three others charged with various offences before Wajir PM's court:
2. Count I, he was charged with Stealing contrary to section 268(2) as read with section 275 of the Penal Code. Particulars were that he together with, Abdinoor Mohamed Issack and Mohamed Noor Ahmed on 08.05.2022 at Wagberi Location in Wajir East Sub County within Wajir County stole a mobile phone make Samsung J.T. IMEI No. 35220508144540 valued at twenty-seven thousand Kenya shillings (Kes. 27,000/-), the property of Noor Moulit Hujale.
3. In respect to Count II, he was also faced with Stealing contrary to section 268(2) as read with section 275 of the Penal Code. The particulars were that he together with Moahmed Noor Ahmed on 08.05.2022 at Wajir Township location in Wajir East Sub County jointly stole a mobile phone make Techno Cammon 15 of IMEI No. 35775109587227 valued at twenty-seven thousand Kenya shillings (Kes. 27,000/-), the property of George Ochieng' Onyango.
4. Count III, he was charged with House breaking contrary to section 304(1)(b) and stealing contrary to section 279(b) of the Penal Code. Particulars were that he together with Mohamed Noor Ahmed on 09.05.2022 at Barwaqo location in Wajir East Sub County within Wajir County jointly stole one



mobile phone make Samsung A025F of IMEI No. 3565525683577403 valued at twelve thousand five hundred (Kes. 12,500/-), the property of Hussein Ibrahim Adan.

5. Count IV, he faced the charge of Burglary and stealing contrary to section 304(1)(b) as read with section 304(2) of the Penal Code. The particulars of the offence being that on 06.05.2022 at Got Ade location in Wajir East Sub county within Wajir County jointly with Mohamed Noor Ahmed broke and entered into a dwelling house of Jimaale Mohamed Rashid with intent to commit a felony therein namely stealing and did steal one mobile phone make Samsung A-12 IMEI No. 350797847099120 valued at Kes. Eighteen thousand shillings (Kes. 18,000/-), the property of Jimaale Mohamed Rashid.
6. Prosecution lined up a total of 6 witnesses to prove its case and via a judgment delivered on 05.10.2022, the appellant was found guilty and consequently convicted and thereafter sentenced to 3 years imprisonment in respect of count II.
7. It is the said conviction and sentence that precipitated the filing of the appeal herein. The grounds of appeal as per the petition of appeal filed in court on 24.11.2022 were listed as hereunder:
 - i. That the prosecution's evidence was riddled with inconsistencies that were material hence his conviction remained unsafe.
 - ii. That the trial court convicted and thereafter sentenced him despite the fact that the prosecution did not shift the burden of proof.
 - iii. That the trial magistrate upon conviction meted out a harsh sentence in the circumstances herein.
8. At the hearing, both parties prosecuted the appeal by way of written submissions.

Appellant's submissions

9. The appellant in his written submissions filed in court on 26.09.2023 faulted the trial court for relying on the contradictory and unreliable evidence by the prosecution to convict and thereafter sentence him. He contended that the witnesses did not identify him as a thief as it was the evidence of PW1 and PW3 that he was unknown to them.
10. He urged that despite stating his mitigation, the trial court failed to register the same as the court proceeded to mete out stiff sentence contrary to the obtaining circumstances. He further urged that the trial court failed to note his defence yet the same was not only cogent but also rebutted the evidence by the prosecution.
11. In the same breadth, it was his case that the charges before the court were as a result of bad blood between him and PW6 who testified that he was a regular thief. That the trial court placed reliance on the said evidence without testing the veracity of the same thus leading to an unsupported determination. He contended that he was convicted and thereafter sentenced yet the prosecution did not prove their case to the required standards. He thus urged this court to allow the appeal as prayed and quash the conviction and thereafter set aside the sentence herein.
12. However, the respondent did not file their submissions.



Analysis and Determination

13. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated thus;

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

14. Briefly, PW1, Noor Mowlid Hujali testified that on 08.05.2022 at around 8.30 p.m., he was on his way to work when he was accosted by two people who were on a motor cycle. That the pillion the two pillion passengers alighted and thereafter snatched his phone away. It was his evidence that he saw the persons who snatched his phone as the the 1st (appellant) and 3rd accused person.
15. He further stated that he reported the matter to the police station and further recorded his statement and commenced investigations. It was his case that his stolen phone was of Samsung make and of IMEI No. 3522050855144540 which was produced as Pex 1. He stated that he knew it was his phone as the same still had a notification message confirming his Covid -19 vaccination. On cross examination, he stated that he did not see the persons who snatched his phone as it was dark and he could not therefore see properly. He further stated that the police told him that the second accused person was the person found with his phone.
16. PW2, Jimale Mohamed Rashid testified that on 06.05.2022, he was asleep at his house but upon waking up, he realized that his phone was missing. That he made a report to the police on the following day. He stated that the phone that got lost was a Samsung by make and that he had kept Kes. 5,000 on the cover of the phone at the time the said phone was stolen.
17. He testified that the police called him on 09.05.2022 requesting him to go to the station and upon reaching there, he was shown several phones and thereafter told to pick his. That he positively identified his phone as the same had his photo and stocks of mattress as screen saver. The said phone was produced as Pex 2. On cross examination, he stated that the police informed him that the said phone was found with the 2nd and the 3rd accused persons.
18. PW3, Hussein Ibrahim Adan stated that on 09.05.2020 while at his house, he realized that his phone had been stolen. That on 10.05.2022, he reported the same to the police who called him back after a period of one day. He stated that he was told to go to the police station to identify his phone of which he did identify as Samsung A02S of IMEI No. 356525683577403, black in colour. It was recorded that the witness positively identified his phone as he had the box for the phone as well as the receipt issued during the purchase. That the box of the phone bore his KRA Pin and therefore, the same was produced as Pex. 4.
19. PW4, Steven Mburuko testified that on 08.05.2022 at around 9.30. p.m., he was heading home from work, while talking on his phone when a motor cycle passed by and the pillion passenger grabbed his phone. He stated that he was able to see the person who snatched his phone as the 2nd accused person. He was categorical that he easily identified him as the accused was short, his beard while before the court was the same as at the time when he snatched his phone, he had a ‘kipara’ and that he was light skinned.



20. It was his evidence that he tried to call his line but realized that the same had already been switched off. That he reported the loss of Samsung A12 black in colour and on 11.05.202, he was called by the DCI informing him to visit the station to help identify his phone. He stated that he managed to identify his phone as he had a box of the said phone; that the phone had his photo. It was his case that his phone was Samsung Galaxy A12 black and the same was identified as Pex 7. On cross examination, he stated that he saw the 2nd accused person as the place where the incident happened was lit with security lights.
21. PW5, George Ochieng' Onyango testified that on 08.05.2022 at around 9.45 a.m, he realized that a phone that he used to use to run his business was missing. It was his case that he reviewed the CCTV camera where he was able to identify the face of a person who was responsible for the same. He stated that he shared the said photo with a friend in order to help track the person responsible.
22. That a friend later called him informing him that his phone had been found and upon interrogating the person who was in possession of the same, the said person agreed to take him and others to a friend's place who was by then running phone business. That upon going to the said house, together with police officers, his phone was amongst the ones found. He testified that his phone was of Techno make and serial number 35775110987227/01. On cross examination, he testified that he knew the 1st accused person from appearance but that it was the 2nd accused person who took them to a house where his lost phone was found.
23. PW6, No. 10011 PC David Mutua stated that he was the investigating officer in the matter. It was his evidence that on 11.05.2022, they had remandees at the station when someone arrived and reported that they had locked a man who had tried to steal from them. That the man that had been arrested and locked was the 1st accused person (appellant). It was his evidence that he had previously arrested the said accused person on different occasions of having committed different offences there before.
24. He further stated that upon interrogation, the 1st accused person (appellant) opened up by stating that he colluded with the 2nd accused person, who was also a known thief in carrying out such criminal acts. The witness testified that the two accused persons later took them to the house of the 3rd accused person as they stated that they used to take the stolen phones to his house.
25. He continued to state that they used the 1st accused (appellant) to call the 3rd accused person informing him that he had other phones and had wanted to meet him and so, the 3rd accused person agreed to meet with the 1st accused. That later on, when they visited the house of the 3rd accused person, they forced it open and found a bag and in it were six phones. He listed the same as: Samsung A7, IMEI No. 3522050855144540, Techno Camon 15 IMEI No. 357751109597227, Samsung A02 IMEI No. 3565525643577403, iPhone 5 Model A1687, Samsung A12 IMEI No. 351797847099120 and Samsung A12 IMEI No. 35054339194826.
26. It was the witnesses' evidence that they found in the said house, three Kenyan IDs and an Ethiopian ID belonging to Mohamed Noor Ahmed Osman with his phot engraved thereof. That the Kenyan ID also had the photo of the 3rd accused person as well. He reiterated that he knew all the three accused persons as responsible for stealing people's phones and that previously, he had charged the 1st and 2nd accused persons but had never processed the 3rd accused to court. On cross examination, he was categorical that the said phones were recovered from the 3rd accused person's house.
27. Upon considering the evidence by the prosecution, the trial magistrate placed the accused persons on their defence.
28. DW1, Haret Yusuf Mohamed the appellant herein gave unsworn evidence where he stated that on 11.05.2022 he had taken firewood to Wajir High School when he was arrested and thereafter accused



- of wanting to steal phones. He denied knowing the 2nd and 3rd accused persons as he claimed that he was framed.
29. DW2, Abdinasir Mohamed Issack in his unsworn testimony testified that on 10.05.2021, he woke up and went to visit his mother who operated a shop. That he stayed there till 0600 pm when he suffered asthma attack and as a result, was rushed to the hospital. He denied being involved in the offences herein.
30. DW3, Mohamed Ahmed Osman in his sworn evidence testified that he operated a tuk tuk and that on either 09 or 10th of May 2022, someone called him seeking for transport and upon reaching the agreed pick up point, he was instead arrested. He denied the charges herein. On cross examination, the appellant stated that he knew why he was presented before the court in as much the police did not tell him anything. He stated that the police took him to his home but denied that anything was found there. He proceeded to state that the 2nd accused did not sell him any phone. He conceded that the six other phones recovered from him did not belong to him.
31. I have considered the grounds of appeal herein and the submissions thereof. The issues for determination are; whether the prosecution proved its case against the appellant beyond any reasonable doubt; whether the court convicted the appellant based on contradictory evidence and; whether the sentence meted out was excessive in the circumstances.
32. The appellant herein was convicted and thereafter sentenced to serve three years' imprisonment in jail in respect to Count II.
33. On Counts I, II, III and IV, the appellant was charged with the offence of stealing contrary to section 268(2) as read with section 275 of the Penal Code. Section 268 provides that:
- (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) a) an intent permanently to deprive the general or special owner of the thing of it;
- (b) b) an intent to use the thing as a pledge or security;
- (c) 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) 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) 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.
34. 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.
35. Bearing in mind that the appellant was only convicted in respect of count II, I will only direct my mind to the grounds of appeal challenging the conviction and sentence in respect of that count.



36. PW5 the complainant in respect to count II, testified that on 08.05.2022 at around 9.54 a.m., he was at County Classic Hotel with his wife resting as there were no more customers to serve when he realized that his phone was missing when he wanted to confirm payments made by their customers. It was at that point that he reviewed the CCTV footage which showed the appellant stealing the said phone.
37. It was his case that the person who stole the phone was someone known to him as he had been seeing him walking around in as much as he did not know his name. He testified that he took the photo of the said person and shared with his friends and after three days, the appellant herein was arrested. That upon arrest, the appellant offered to take him to the place where the phone was thus leading to the arrest of the 3rd accused person.
38. Further to the above, PW6, the investigating officer equally testified that he knew the appellant as a thief. That while dealing with the remandees at the police station, someone reported that a person had been locked at their home after the said person had allegedly gone there to steal. Upon PC Oketch and him paying a visit to the said home, the appellant was arrested and upon further interrogation, he divulged that he did not operate alone as a thief but in conjunction with the 2nd accused person, equally a well-known thief. On cross examination, the evidence of the witnesses remained unshaken as the appellant did not offer any rebuttal to the said accusations.
39. From the CCTV footage and the evidence on record by pw5 and pw6, there is no doubt that the appellant was identified positively stealing pw5's phone and that it was through his effort that the stolen phone was recovered from his co-accused (3rd accused). From this bit of electronic evidence and the recovery of the phone from the 3rd accused person through his effort, am convinced that the appellant was involved in the stealing of the phone in question and that his conviction was safe.
40. On the grounds that the prosecution's evidence was riddled with inconsistencies, the Court of Appeal in *Richard Munene v Republic* [2018] eKLR set the law on what inconsistency or contradiction would sway the court when it said: -
- “It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.” (Emphasis added).
41. Applying the above tests coupled with the evidence of the prosecution witnesses, it is my finding that the appellant did not specify the inconsistencies that were not considered by the trial court. In any event, if there was any inconsistency which was not considered, the same did not dislodge the otherwise strong prosecution case.
42. On the ground that the prosecution did not shift the burden of proof, it is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The degree/standard of proof is always that of “beyond any reasonable doubts” (See *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373). As already discussed, the prosecution proved the case against the appellant in regards to Count II only as Counts I, III, IV and V were not supported by the evidence on record.
43. It was also submitted that the sentence meted out by the trial magistrate was harsh given the circumstances herein. It is trite that sentencing is at the discretion of the court to which the appellate court cannot interfere with unless the same is excessive; arrived at upon considering irrelevant factors or application of wrong legal principles. Of importance to note is the fact that the sections under which



the appellant was charged as already noted in the judgment makes provision for imprisonment of three years upon being found guilty.

44. For this reason, I hold the view that the finding and thereafter sentencing by the trial court in regards to Count II was not only legal but also appropriate in the given circumstances. Accordingly, the appeal herein is dismissed in its entirety.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MARCH 2024

J.N.ONYIEGO

JUDGE

