



REPUBLIC OF KENYA



**Nzuki v Republic (Criminal Appeal E110 of 2022)  
[2024] KEHC 17196 (KLR) (23 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 17196 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E110 OF 2022  
TM MATHEKA, J  
MARCH 23, 2024**

**BETWEEN**

**PAUL MUTUNGA NZUKI ..... APPELLANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was arrested on 1st January 2021 and charged with the offence of Breaking into a building with intent to commit a felony contrary to section 307 of the [Penal Code](#). The particulars of the offence were that on the 1st day of January 2021 at around 0500hrs at Syatu market, Thavu Sub-Location, Thavu Location Kathonzwi Sub-County within Makueni County, he broke and entered a shop “Jackline shop” belonging to one Jackline Kimanthi Ndunda with intent to steal from therein.
2. He was presented to court on 4/1/2021 and pleaded not guilty, was tried, found guilty convicted and sentenced to 4 years imprisonment.
3. Aggrieved by that decision, the appellant filed a homegrown appeal and raised the following grounds which I have quoted verbatim;
  - a. That I am in dispute with the sentence which was imposed by the law court magistrate.
  - b. That I was convicted and sentenced when I had not pleaded guilty to the offence.
  - c. The law points and facts used in the appeal were all framed and not true.
  - d. That I humbly pray this Hon. Court to come up with its own findings and decision in this appeal application
4. The prosecution’s case was that; the appellant gained access to the complainant’s shop by cutting the roof. On the material day, the complainant received a call at 6.00am from one Charles and she



- proceeded to the shop where she found the appellant tied with ropes. The police were called by the chief and informed of a mob justice at Syathi Market. The police arrived and took the appellant to the station after which he was prosecuted.
5. The prosecution called 6 witnesses to wit; the complainant (PW1), the appellant's neighbor (PW2), a pastor of a church next to the complainant's shop (PW3), the investigating officer (PW4) and the investigating officer (PW5). The following exhibits were produced; Business permit & receipt (P.Ex 1), Bundle of receipts (P.Ex 2), Photos (P.Ex 3) and Photographic Report Certificate (P.Ex 4).
  6. The appellant was found to have a case to answer and was put on his defence. He gave a sworn statement of defence and called one witness. DW1 was Boniface Mbela, a Clinical Officer at Capital Memorial home in Kathonzweni at the material time. He testified that on 03/01/2021, the appellant was taken to the facility with a history of mob attacks. He was accompanied by police officers who had rescued him. He was sick looking with labored breathing. He had torn clothing soiled with blood and dust and had a deep cut on the back of his head. The impression was multiple cut wounds and hematoma. They stabilized him and arrested the bleeding. They sutured the cut wounds and put him on pain killers, antibiotics and tetanus. He said that he was the first person to attend to the appellant. He produced a medical report as D ex 1.
  7. On cross examination, he said that the alleged history was robbery but he could not respond to the issue of mob justice. He said that the injuries were not inflicted by a fall and were consistent with being mishandled.
  8. The appellant testified as DW2 and his case was that on 01/01/2021, he left home for the market to buy cigarettes. He found the club open but there was no cigarette. He was referred to another shop but it was closed. He returned to the club and the shop owner was called. She said that she had left her shop open and everything had been stolen. 7 People arrived and started beating him. They said that they had been informed that he was stealing from the shop. One of them hit him with a metal bar and the other one with a rungu. His brother and the police escorted him to the hospital where he received treatment. He said that he had worn a red sweater and blue denim shorts which he changed at the hospital. He produced them as D ex 2 and 3 respectively and grey briefs as D ex 4.
  9. On cross examination, he said that he changed the clothes and they were handed to the police. That he was arrested in Syatu market Kathonzweni and all those who beat him are known to him. That he was beaten without a reason. He said that he had gone to Mututho bar whose owner is Peter Maruti. That he had kshs 30/= in his pocket for the cigarette. He denied climbing any place and said that he was not at the shop.
  10. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.
  11. The appellant submitted that he is a first offender and urged this court to understand that a first offender is always ignorant of crimes. He wished and hoped that this court will pardon him of the offence which he committed and for which he is very remorseful.
  12. He wondered where the stolen items went since he was arrested at the scene of crime. That the trial magistrate erred by not considering that the total stolen value was stated to be kshs 60,900 but PW1 said it was kshs 9,000/=. That it was not practical for goods to have been missing yet he was arrested inside the shop.
  13. He submitted that the evidence of the I.O was that no exhibit was taken to him to confirm that something was stolen and that the receipts are of different dates thus the goods were purchased from beginning of complainant's business.



14. He submitted that the issue of lost goods was raised by the shop owner later. He wondered why it was done later and not immediately. He also wondered whether there was another thief after him.
15. He submitted that according to the complainant's testimony, very many goods were missing and as such, he had to seek transport or the help of another person. He contended that all the goods recorded as missing were fabrication.
16. He stated that he is a family man with a wife and children and that being the sole bread winner, a non-custodial sentence would favor his family.
17. The State, through Prosecution Counsel Margaret Muraguri, submitted that the appellant gained entry into the shop with the intent of committing a felony. That he had the intention of stealing from the shop but was intercepted by PW2, 3 and other people who had gathered.
18. She submitted that the appellant was well known to PW1, 2 and 3 and that he also confirmed being in the market on that day. She submitted that no evidence was tendered on any grudge between the complainant, the witnesses and the appellant. That the witness called by the appellant was not at the scene and could therefore not testify on what had happened prior to the injuries on the appellant.
19. I have carefully considered the evidence on record and analysed the same as it is my duty and proceed make my own findings and draw its own conclusions keeping in mind the limitation posed by the fact that I can only rely on the written record never having seen nor heard the witnesses.
20. The issue for determination is whether the prosecution proved its case beyond reasonable doubt.
21. The appellant was charged under Section 307 of the [Penal Code](#) which provides : -

“ Any person who 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, with intent to commit a felony therein, is guilty of a felony and is liable to imprisonment for five years..”(Emphasis is mine)
22. The prosecution was required to establish that the appellant broke into the shop of the complainant with the intention of committing theft.
23. The complainant, Jackline Kimanthi, testified as PW1 and her evidence was that she was called to the shop at 6.00am by one Charles. She found a crowd and the accused tied with ropes. She also testified that the goods were valued at Ksh 60,900 and she never recovered any of them. She attempted to produce some receipts and a business permit for the shop which documents had not been supplied to the defence at the requisite time eliciting objections from the defence. The Prosecutor told the court that the documents were brought that morning hence he would only mark them.
24. PW2 was Justus Mwendu Mbithi who testified that he was a neighbor to the appellant and boda operator in Kathonzweni. That on 01/01/2021, he was from home carrying milk when pastor James called and informed him that he had heard sounds on the iron roof at Jacklines shop. That the pastor had also checked and found that the roof had been cut. PW2 called Jackline and a few minutes later, they saw the roof being raised from inside and the accused's head popped out of the broken roof. He proceeded to supply milk and on returning, there was a crown including the area MCA.
25. PW3 was Pastor James Munguti. He said that PW1 was known to him as a business woman and her shop was next to the church. That on 01/01/2021, he had attended morning glory at 4.30am with 5



- members and as they began to fellowship, they heard sounds on a roof. They went out to check and found that the roof had been cut and raised. He heard sounds of someone walking inside the shop and shortly thereafter, he heard sounds of a motor cycle. He realized that the person with a motor cycle was Justus and he alerted him on what he had heard.
26. They made calls and saw someone raising his head. The person jumped out and fell next to a tank in the next shop. He appeared confused and was arrested by the people.
  27. PW4 was No. 112308 PC Jinaro Mburu of Kathonzweni police station. He testified that on 01/01/2021, his boss called and informed him that that there was mob justice at Syathi market. He accompanied the appellant's brother, Titus, to the scene. They found that the suspect had been beaten severely and there was a tyre around his neck. The suspect's clothes reeked of fuel. They took the suspect to the station and the complainant took them to the shop where her roof had been cut. They checked to see if something had been left around but saw nothing. He took photos of the scene for processing by the scenes of crime officer. He produced the photographs as exhibit 3(a)-(f) and certificate as exhibit 4.
  28. Further, he said that the complainant allowed them entry through the door and they did not see anything out of place. The complainant did not avail anything to confirm that some things had been stolen but she availed receipts at the last end of investigations. He testified that the complainant brought him an expired business permit and he sent her to bring one that was in force. The one she brought was expiring on 31st Dec 2021 meaning that in 2021 she did not have a current permit. He testified that the receipts bear different dates to prove that she had been purchasing goods. He produced a bundle of receipts as exhibit 2 and a business permit and receipt as exhibit 1(a) & (b) respectively.
  29. They took the accused to Capital Health Clinic where he was treated and discharged. Nothing was recovered. From the complainant's statement, the value of goods was kshs 9,000. The accused was bleeding all over his face. PW4 could not tell who apprehended the accused.
  30. Though the appellant submitted that he was remorseful and sought this court's pardon in his submissions, it is evident tat that was in the event that the court upheld the conviction. However his position and which he urged this court to find was that the facts were all framed up and untrue.
  31. From the evidence on record, PW2 and 3 were the eyewitnesses and they claimed to have seen the appellant popping his head from the broken roof of the complainant's shop. PW2 stated that he was called by PW3 who told him that he heard sounds on the iron roof of the complainant's shop. They made calls . He called the complainant . People came. Soon thereafter they saw ' ...the roof being raised from inside...the accused's head popping out of the broken roof...I identified him as Mr. Mutunga and asked him what ...he thought he was doing...I then I left to supply milk...and upon my return I found a crowd including the area MCA...'
  32. According to the pastor, PW3, he said ' ...we heard sound on a roof ...we came out to check and found that the roof had been cut and raised . I heard sounds of someone walking inside the shop. I shortly heard a motorcycle when I realized it was Justus who I alerted on what I heard. We made calls we saw someone raising his head. He jumped outa and fell next to a tank in the next shop...
  33. The testimony of these two witnesses is unbelievable. Justs would like us to believe that he saw a thief coming out of a building and just walked away to return later? The pastor says the thief jumped out when he was there with Justus but Justus is saying that upon seeing the head of the person he says was the suspect coming through the roof he left. The pastor says the man jumped out and fell. He says that it was after the fall that he identified him.



34. These two witnesses were not telling the truth. It appears to me it is because of what happened to the appellant, the mob injustice that followed their calls that there was a suspect at the shop. The pastor says the person fell next to another shop, but it appears the appellant was found on that side and that is how they ended up beating him up.
35. On her part, the complainant said that she got the information at 6.00am from a person called Charles. If indeed the complainant was informed about the incident by PW2 at around 4.30am, why did she claim to have learnt about it at 6.00am from a different person? This timeline is important because a lot could have happened between 4.30am and 6.00am.
36. There is nothing to show that there was sufficient light to identify whoever they claim came out through the roof. There is no proof that anyone came out of the said shop from the roof. The pastor cannot say that he had seen the complainant's roof and it was ok. He says the thief came out holding a brick yet no brick was collected from the scene as evidence. As for PW3, the evidence shows that the appellant was not previously known to him yet he claimed that; "The person I saw at the roof is the accused". It was also PW3's evidence that; "The shop did not have electricity". On the other hand, the complainant testified that there was no electricity at the shop but there was solar power. This bit about solar power was not corroborated by any other witness and even assuming that the solar power was available, it is expected that the same was for illuminating the shop interior.
37. The witnesses said that they saw the appellant popping on top of the roof. Was it possible for solar power inside the shop to illuminate someone who was trying to get out from above at 4.00am? Without any evidence on the intensity of that solar power or availability of lighting outside the shop, my answer is in the negative. In my view, it also defies logic that a thief would switch on a lot of light while on a mission to steal. In *Paul Etole & Anor v R* [2001] eKLR, the Court of Appeal stated that;
- "There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of light available which assisted the witnesses in making recognition. What sort of light, its size and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error."
38. The prosecution appear to have been fishing. The appellant was charged with breaking into the shop with intent to commit a felony, yet the testimony presented by the prosecution is that there was theft of property worth over 60K. The appellant was caught at the scene. He was found with nothing- not a single thing not even a sweet or a cigarette. The only motor cycle in the vicinity at that time belonged to Justus PW2. So if anything was ferried away PW2 and PW3 ought to have noticed. Their testimony just goes to support the defence that this case was fabricated- because on scrutiny that is how it turns out.
39. The prosecution witnesses do not place the appellant inside or on top of the complainant's roof. The alleged break in and intention to steal was not established.
40. The investigating officer said that upon gaining entry into the shop, he did not see anything out of place and the complainant did not avail anything to confirm that some things had been stolen. In my view, the receipts availed by the complainant do not speak to anything in terms of theft. She was in the shop business hence it was expected that she would purchase stock. If something appeared on the receipts and was missing on the shelves, it could as well be that she had already sold it.



41. The totality of the evidence therefore is that no theft was established and the impression given by the complainant and her witnesses is that they were untruthful.
42. To buttress the untruthfulness of the complainant, she testified that she did not see any injuries on the accused and she did not see anyone beating him. The IO testified that the appellant was bleeding all over his face as he had been severely beaten by a mob. He also testified that the complainant was at the scene hence there is no chance that she did not see the obvious injuries on the appellant. The medical report produced by the appellant confirmed that he had a deep facial cut wound and his clothing were soiled in blood.
43. The pastor (PW3) tried to suggest that the appellant got his injuries when he hit a tank after jumping from the roof yet the evidence shows that he was at the scene until the shop owner arrived. The evidence suggests that he witnessed the mob lynching and was just feigning ignorance. Also, the Clinical Officer was categorical that the injuries were not inflicted by a fall. In *Ndungu Kimanyi v R* [1979] KLR 282, the court held that;

“the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, trustworthiness or do (or/say) something of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence”

44. From the foregoing it comes out that PW1, 2 and 3 were untruthful witnesses and it was unsafe to found a conviction based on their evidence. Photographs were produced showing the roof of a shop that had been interfered with and while that may be so, the evidence and lighting conditions are insufficient to pin the appellant down as the culprit. Being present at the market on the material date does not automatically mean that he is culpable. The prosecution had a duty to prove their case beyond reasonable doubt.
45. Looking at the judgment, it is clear that the learned trial court did not address its mind to the lighting condition, to the evidence of the witnesses and the fact that identification of the suspect was not without a shadow of doubt. The case for the prosecution held against the defence and an analysis of the circumstances surrounding the alleged offence raised sufficient doubts which ought to have been resolved in favor of the appellant.
46. I find that the appeal has merit, the conviction is quashed. The sentence is set aside. The appellant be set at liberty forthwith unless otherwise legally held.
47. Considering the period that the appellant has been in custody and that this appeal culminates into an acquittal the Judgment will be published on the e file for actioning at the next working day.
48. Orders Accordingly

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

**DATE: 2024-03-23 15:41:12**

**The Judiciary of Kenya**

