



REPUBLIC OF KENYA



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

**Mwangi v Republic (Criminal Appeal E054 of 2023)  
[2024] KEHC 3113 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3113 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E054 OF 2023  
DKN MAGARE, J  
MARCH 15, 2024**

**BETWEEN**

**SAMUEL KABIRU MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of the Honourable  
M. N. Munyendo (Ms.) SRM delivered at Othaya on 27/1/2020  
in Othaya SRM's Court in Criminal Case No. 512 of 2019)*

**JUDGMENT**

1. The Appellant was charged that on 29/7/2019 at night hours broke and entered the dwelling house of Waithaka Ritho with intent to steal, and did steal therein one television make Samsung 32 inch property of Michael Waithaka Ritho being of the value of 40,000/=. The offence was stated to be burglary contrary to Section 279 (b) of the [Penal Code](#).
2. He was charged with an alternative count of handling stolen property. He was released on bond of 50,000/= or cash bail of 30,000/=.
3. On 3/9/2019 the complainant testified that he was at home watching TV when one man came, opened the door and said "vitu ni mbili, pesa ama kifo." It was at 6.30 pm. He escaped. When they came back the TV was stolen. The thief had disappeared. He was told that the thief was caught at Munaini Primary School. He was found with a panga and TV. The TV was his. The wife stated that she did not see the person well. The words were spoken in Kikuyu.
4. She stated that the assailant hit her husband on the left cheek. This fact was not corroborated by the husband PW1. She stated the thief wore a cap and brown jacket. The husband indicated the Appellant did not have a cap. After the two witnesses had testified the prosecutor amended the charge sheet. The Appellant had no objection.



5. The new charge sheet related to robbery with violence. The charge was Amended and the Appellant took plea. The court reviewed the bond terms upwards. The Appellant was not invited to recall witnesses to cross-examine them on the offence of robbery with violence at that stage. Instead PW3 proceeded on 15/10/2019. The Investigating Officer stated that the complainant identified the TV.
6. PW1 and PW2 were recalled later recalled to produce receipts. He stated that the TV had been bought by his son and provided receipts. It was now worth Ksh 30,000/= not 40,000/= as he had maintained all along. The son's name was not given.
7. PW3 testified that he saw a person being chased. At first he said he saw the Appellant throw a TV down. Later stated that he was told that he threw the TV down. He stated that the Appellant wore a long court. At the time of arrest he was without TV.
8. On being put on defence, the Appellant gave unsworn testimony. He stated that a man came running when he alighted at Munaini stage. He did not know what transpired. He was beaten and lost consciousness which he regained at Nyeri PGH.
9. The court found him guilty and sentenced him to 10 years imprisonment on 27/1/2020. The Appellant filed appeal on 5/9/2023 and set forth the following grounds:-
  - i. That the learned trial magistrate erred in law and fact by relying on identification evidence which lacked credence and therefore unable to support a safe conviction, recognition was not proved in the evidence.
  - ii. That the learned trial magistrate erred in law and fact by failing to note that no investigations were carried out by the prosecution and failed in law by not analyzing the whole evidence as adduced thus occasioning to a miscarriage of justice.
  - iii. That the learned trial magistrate erred in law and fact by failing to give reasons as to why the defense of the Appellant was not acceptable.
  - iv. That the learned trial magistrate erred in law and in fact when she relied on contradictory and uncorroborated testimonies to convict the appellant.
10. This file presents one of the most horrific displacements of presumption of similarities that resulted in a grave injustice. The court in its bid to convict the Appellant, and without analysis of evidence stated that the evidence was similar.
11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
12. It is the first appellate court's duty to re-evaluate the evidence and make its own conclusion. In the often cited case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:
  - i. "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.”

13. In the matter as the court evaluates evidence, any doubt must be resolved ultimately in favour of the Appellant/Appellant. The first imbroglio is the identification of a witness. The identification was hearsay. Indeed, a simple question of what he was wearing, or when he assaulted the complainant could not be settled. PW2 stated the man had a black cap while the husband PW1 saw none. The wife PW2 saw the husband being slapped a fact controverted by the man who was reportedly assaulted. PW4 confirmed that when arrested the appellant;
  - a. Was arrested without a TV.
  - b. He was wearing a long coat.
14. This controverted the evidence. The person arrested was not the same person who entered the house. It is even questionable whether the parties had a proper recollection. Why will a person who escapes, want to go and ask someone else to shout.
15. Though unsworn, I believe the defendant's version. It is a consistent version that explains all the discrepancies in the evidence, that is the thief and the Appellant are different people. All the doubt and gaping holes created in the prosecution evidence are resolved in the Appellant's favour. It is only the most stupid of thieves, who will walk into a home of someone, without any attempt to cover himself. Then let the owners escape, give them enough time to drive to some place and come back only to find a TV stolen. The correct charge could have related to burglary. The story of robbery with violence is simply unbelievable.
16. It is high time the prosecution takes chain of custody seriously and disregard attempt to prod dead case. The most comical was the cost of the TV and evidence related to the same. The TV that was lost was valued Kshs. 40,000/= and the one bought was valued Kshs.30,000/=.
17. I cannot trace evidence of the receipt or a record of it. Nothing turns on this given poor identification and grave contradictions. In this case the court will rely on two doctrines:
  - i. Circumstantial evidence.
  - ii. Doctrine of recent possession.
18. The Appellant was not found in possession. A thief was wearing a jacket. He ran away and probably left the TV. A passenger who had just alighted was caught in a cross fire.
19. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, Court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is



capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

20. The doctrine of recent possession places the duty to explain possession is on the party in possession. This arises from the requirements of Section 111 of the *evidence act*. No one other than the accused is in a vantage point to explain where he got the item. Such an item must be shown to have causal link to the crime.

21. In the case of *Eric Otieno Arum v Republic* KSM CA Criminal Appeal No. 85 of 2005 [2006]eKLR, where the court of Appeal stated as follows:

“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 the 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.

13. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see *Malingi v Republic* [1988] KLR 225. In *Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008, the Court of Appeal observed that;

Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.

22. In a nutshell, it is unsafe to maintain the conviction. The identification was poor. Though the court stated that PW2, 3 and 4 were said to have similar evidence, the same cannot be true. The evidence of the 3 witnesses are miles apart.

23. I need not deal with sentence. It was lenient. I find sentence to be proper. However, in view of the setting aside of the conviction, the sentence falls by the wayside and is accordingly set aside.

### **Order**

24. The upshot is that I make the following orders;

- i. The appeal is allowed.
- ii. The conviction and sentence are set aside and the appellant released unless otherwise lawfully held.
- iii. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15<sup>TH</sup> DAY OF MARCH, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**



Appellant, Pro se

Ms Kaniu for the Respondent

Court Assistant – Millicent Thaithi

