



**Mwangi v Republic (Criminal Appeal E065 of 2023)
[2024] KEHC 8231 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E065 OF 2023
DKN MAGARE, J
JUNE 27, 2024**

BETWEEN

STANLAEY NJOROGE MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Conviction and Sentence in Nyeri CMCR 230 & 231 of 2023)

JUDGMENT

1. The Appellant appealed the judgment, conviction and sentence given by the Hon. M. Okuche given on 14/9/2023 for an alternative count of handling stolen property. The Appellant was charged with the offence of stealing by servant contrary to section 281 of the *Penal Code*. He is stated to have stolen goods valued at Kshs. 3,294,900/= being the property of Solio Ranch Ltd.
2. There was an alternative count of handling stolen property contrary to section 322(2) of the *Penal Code*. The alternative charge was that on the 24th day of February 2022 at around 1500hrs at Kiandongoru location in Ndaragwa sub-county within Nyandarua County of the Republic of Kenya, otherwise in the course of stealing dishonestly retained 2 Tool boxes, 1 Honda Engine cylinder, 1 Land Cruiser jack, 1 dust pin, 46 pieces of iron sheets, 4 old water tanks, 5 Aluminum pipes, 2 old water boilers, 11 steel pipes, 2 metal stands, 1 water bowser, 2 fencing posts, 2 metal gates, 4 canvas chairs, 1 winch, 10 aluminum pipe joints, 1 steering pump of John Deere tractor and 2 ceramic white toilet seats knowing or having reasons to be stolen property.
3. The appellant had been arrested on 24/2/2022 and took plea on 22/3/2022 a period of almost a month later. The charge sheet was dated and consolidated on 4/4/2023. The matter proceeded on 5/10/2022 after several false starts - either the court or the prosecutor was away on official duties or the prosecutor was indisposed. After that PW1 testified and was stood down after a short testimony. The court indicated that PW1 was stood down. No reasons are assigned.



4. The next date on 2/11/202 the exhibits were not in court. On 15/2/2023 PW1 was recalled. The witness, David Njoroge Kinyagene stated that between 10/9/2021 and 5/11/2021 he was working at Solio Ranch with the 2 accused persons (the Appellant and David Chege Muigai).
5. The plastic water tank went missing. When he went to the store he found the reserved tank also missing. He stated that he could relieve in charge of stores when on leave. The appellant requested a particular house be deconstructed. He did not know where the materials went. He stated that they found a concrete mixer at home of the Appellant when he was asked to accompany the DCIO and the Appellants. The witness stated that they found 4 hays of wooden tiles.
6. The plastic tank was also recovered at the Appellant's house. They also found 11 metal pipes, 4 irrigation pipes, sheets, 43 burnt iron sheets, 5 aluminum pipes, 2 boilers, water bowers, 10 aluminum joints, fuel pump, body Jack, ceramic seats, dust bin, 4 seats but they had been given to the 2nd appellant, canvas seats. The said goods were taken to the police station. On cross examination he stated that he was employed in 2013. The appellant was an administrative manager. The witness was promoted to an Accountant in 2020, after his predecessor retired.
7. It was the Appellant the Administrative Manager, who was to give him a promotion letter but did not. The appellant took over after Mike Finch died in 2021. The witness did not report loss that occurred in October, 2021. He stated that the store keeper kept an inventory for items but resigned after this incident occurred. He stated that seats were given to managers including the appellant. He produced a letter addressed to accused giving accessories.
8. The witness stated that he was also to share the items given to managers. He stated that pipes were sold to Reuben Kariuki by Finch. He stated that some computers were given. He also did not have a list of items given every year in approbation. They were to the mangers. The list of items given out was with Edward. He stated that they were selling items but the ones in the store were not sold.
9. PW2 James Muriuki a security officers for 9 years stated that he worked at the store, yard, office and vehicle parking. He stated that he used to find items missing. The said loss was sporadic. He was called to identify 4 items. He stated that theft started when the European manger died.
10. PW3 stated that he worked between 10/9/2021 and 5/11/2021 and was assigned work by the Appellant. They deconstructed a house and a vehicle came for materials. He was the only Mason at Solio Ranch. He identified seats, photographs. The said seats had been given by Edward Emmanuel Wafula Wagonyi who was a gardener who deconstructed a house to use it to extend Appellant's house.
11. PW5 PC Hillary Cheruiyot Tanui was attached to DCI Kieni. On 24/2/2022 he was on duty. He was requested by DCIO to accompany him to Solio ranch where they met one Kelvin a General Manger stating that 2 of his colleagues had stolen. They were the accused in court here. He called them and requested him to accompany them to their homesteads. They started with the Appellant. Items that were identified here: -
 1. Mixer machine
 2. Plastic tank
 3. 4 gunny leap containing wooden floor.
 4. 80 fencing posts



12. The posts served the homestead of the co-accused. The inventories were taken. They stated that the goods were gifted. The witness stated that they did not produce evidence of gifts. The report is said to have been made by one Kelvin, a General Manager on 24/2/2022.
13. The appellant was put on his defence. Upon Section 211 of the [CPC](#) being read the appellant gave his sworn evidence. He testified that he used to be an administration manager since 1994 until 2021 when he was terminated.
14. The firm management changed after it was sold. He stated that the manager Edward Puffer left the country and then passed on. He assumed the position. Adam Woodar came then Mike Luise. He passed away. In 2022 another manager came – Kelvin. He stated there were two reports over theft. Kelvin made the report in 2022.
15. He stated that the mixer was given by the general manager. He was to return. The tank was given. The fencing posts were given. He stated that things became hostile after puffers left. He stated that the items belonged to the manager. He stated that there are records of what he was given. The 2nd accused testified.
16. The 2nd accused had 2 different items, some were given to him and some belonged to him and not Solio Ranch. The court found the appellant not guilty of stealing but was found guilty of the alternative count of handling stolen property.
17. The court summarized the evidence quite well. He found some items were given. The court started on a wrong footing by making undue presumptions. He stated that the appellant and the second accused did not deny being employees and they did not deny that items allegedly stolen were found with them.
18. This is a plainly wrong start for a criminal trial. Even when they mean the same thing, the court must allow the prosecution to prove that. It is never the duty of the appellant as an alleged person to say anything. The duty to prove a case is on the state. The burden of proof –

Analysis

19. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”



20. In the 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:

“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.”

21. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) *Woolmington v DPP* [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

22. In the case of *R v Lifchus* {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”



23. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

24. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 stated that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

25. The court made a second fatal error by finding that though charged separately the appellant and 2nd accused faced same charges. They were 4 distinct charges and each has to be proved to the required standards beyond reasonable doubt.

26. The court correctly cited the law. Section 268 (1) of the *Penal Code* provides: -

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.
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. an intent permanently to deprive the general or special owner of the thing of it;
 - b. an intent to use the thing as a pledge or security;
 - 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. 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. 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.
- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.



- (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.
27. The court found that there was no evidence that it is the appellant who moved the goods. A charge of theft by servant was thrown out.
28. On stealing by servant the Appellant was convicted. Section 322 (1) of the [Penal Code](#) provides as follows:-
1. A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
 2. A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.
 3. For the purposes of this section-
 - a. goods shall be deemed to be stolen goods if they have been obtained in any way whatever under circumstances which amount to felony or misdemeanour, and "steal" means so to obtain;
 - b. no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the stealing.
 4. Where a person is charged with an offence under this section-
 - a. it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods;
 - b. at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that the goods were stolen goods."
29. The court then stated that the burden on the prosecution was to prove that an accused dishonestly retained them having a reason to believe they are stolen.
30. The court was wondering why an employer will gift an employee and turn around. The court thus fell into deep error. There were three sets of defences:-
- a. The goods were gifted
 - b. Goods were bought



- c. Goods, in particular the mixer was being used for construction and was to be returned.
31. What was missing is the company record. It is not lost to the court that the Appellant was not some junior staff. It was possible and not farfetched to talk to the immediate supervisors, that is the late general manager.
32. The defence of borrowing means there was no intention to deprive. The mixture was not stolen. The mixture was said to have been given by Edward Puffer. The state had a duty to discount that defence, which, the state failed to do.
33. On whether the employer can give gifts and turn around, it is not a standard of reasonable employer. Some of the materials are useless tiles from a deconstructed house. It is clear that they were of no use to the company. Only change in management questioned the gifts and brought all this issues. I reject a suggestion that a gift must be in writing.
34. I find difficulty with the assertion that the Appellant should have a record of being given a gift. The duty of keeping records is on the giver. The witnesses agree that there are some goods that were gifted. Whether or not the gifts were perfect the same were given out. The prosecution confirmed that they have inventories.
35. They failed to produce those inventories to show charges in items. I have no option other than to make a negative inference. Consequently, there is doubt. When the two versions of event can both be true, the burden should be resolved in favour of the Appellant. In this case the burden placed on them was humongous.
36. The consequence being that the appeal is allowed. Except for the concrete mixer, the exhibits should be restituted to the Appellant.

Order

- a. The appeal is allowed. Conviction and sentence are set aside. In lieu thereof, I make an order that the appellant be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 27TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of:-

Ms. Lubanga for State

Makura for the Appellant

Court Assistant - Jedidah

