**Nyagami v Republic (Criminal Appeal E010 of 2023)**
**[2024] KEHC 8455 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8455 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CRIMINAL APPEAL E010 OF 2023**

**TA ODERA, J**

**JUNE 27, 2024**

**BETWEEN**

**REBECA KWAMBOKA NYAGAMI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal against the Judgment of Hon. C.A OGWENO (SRM) delivered in Kisii Chief Magistrate's Court Criminal Case E437 of 2021 on 30th March, 2023)***

**JUDGMENT**

## Introduction

1. The Appellant herein was with the decision of the Judgement of the learned trial Magistrate delivered on 30th March, 2023, and thus filed this Appeal vide a Petition dated Appeal on 5th May,2023 which was based on the following grounds;

    a. The learned Magistrate erred in law and in fact, in finding Appellant guilty as charged proving that there was loss of any property and/or the property belonged to the complainant.

    b. The learned Magistrate erred in law and in fact finding in finding Appellant guilty as charged without considering the Appellant's defense and/or the evidence of the complainant was not corroborated.

    c. The learned Magistrate erred in deciding the case against the weight of evidence on record.

    d. That the sentence meted out to the Appellant given the circumstances of this case was harsh and excessive.

2. Based on the above grounds the Appellant the quashing of his conviction and setting aside of his sentence.

**The Factual Background**

**As first appellate court, this court has a duty to re-evaluate the evidence adduced before the Trial Court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses. See Okeno vs. Republic (1972) EA 3.**

3. The Appellant was charged with the offence stealing contrary to section 275 of the penal code. The particulars of the offence were that on the 6th day of March 2021 at Park Hotel in Kitutu Central sub-county within Kisii County the Appellant and his co-accused, Wilson Yegon, and Ombongi Orwenyo jointly with others not before court stole one power bank and an IPAD WI-CI128GB gold in color valued at Kshs. 114,500 the property of Mr. Julius Obare Makori.

4. During the hearing of the prosecution case. The Complainant in his examination in chief testified that on 3rd March, 2021, he checked in at Marsh Park hotel specifically at room 211 at 6 pm. He thereafter proceeded to the restaurant to have dinner. When he went back to the room he found out that his IPAD and power bank were missing and thus proceeded to report the incident to the manager. He asked the manager, the Appellant herein to view the CCTV camera but they were unable to view any footage as none was captured. He had a bill of Kshs. 16,000/=. The manager agreed to reimburse him the value of the missing items less his bill. He thereafter proceeded to report the matter to the police after the management refused to honor its word on the set off. He contended that the IPAD was valued at Kshs. 110,500 and the power bank was valued at Kshs. 4000/=.

5. On cross-examination he admitted that he filled the customer registration forms which required customers not to leave valuable items in the room. He also disclosed that the items which were stolen belonged to the company he worked for and thus he was a special owner. He also stated that room did not appear to have been broken into and CCTV camera appeared not to have been working. He reiterated that the manager advised him not to pay the bill as the same would have been recovered from the sum of money the hotel was going to pay him. He however yielded the agreement for a reimbursement was not reduced into writing. He reiterated too that he did not receive any demand letter requiring him to pay the bill.

6. PW2 is the investigating officer in the matter. She testified that on 7th March, 2021 a case of stealing was reported at the station where she works and was assigned to carry out investigations. On 8th March, 2021 she summoned the complainant to the station who narrated to her that he had taken a hotel room at Marsh Park from 3rd to 6th March, 2021 and was allowed into the room with his laptop and IPAD YC128GB gold in color, a power bank and a mobile phone. On 6th at around 6 pm he secured his room and went to have dinner in the restaurant which was 50 metres away. He returned after 30 minutes and found the power bank and the IPAD and their accessories missing. He made a report to the hotel manager who confirmed that the door had not been broken into; they viewed CCTV camera footage but the camera were not functional. There were no visitors in the other rooms on the floor where the complainant was. The hotel agreed to settle the matter by the complainant not pay the accommodation and agreed to reimburse him for the items lost. However, the restaurant later changed its mind and thus was compelled to report the matter.

7. PW2 went on to that that she together with other officers visited Marsh Park hotel for investigation where they met the Appellant who was the receptionist and she introduced them to the manager who took them to the room which had been occupied by the complainant. They found out that there was no break-in. The manager disclosed to them that the room had two keys wherein one could only be accessed by the manager or the Appellant and the other one was given to the client who in this case

was the complainant. The Manager who was the first accused person the matter confirmed that other workers had left at the time of the incident safe for him, the receptionist (the appellant) and the waiter.

8. PW2 went on to testify that they summoned all the employees who were around during the incident and interrogated them. He testified too that while at the hotel they discovered that the hotel had one entrance and that this was where the reception was.

   On cross examination, PW3 reiterated the testimony of the complaint that the registration form that the complainant signed had indicated that the complainant was not expected to leave his valuable items in the rooms. He also reiterated that the complainant was an employee of Ciplex (K) limited to which the lost items belonged to.

9. During the hearing of the defense case The Manager who was the 1st accused person testified as DWI. He stated that he had worked as the manager of the hotel for a period of 21 years and that his duties were overall of the hotel management. He denied steeling the items. He stated further in the registration form that was given to the complainant to sign, the complainant was required to declare the important valuables. The complainant did not declare any valuables. He also stated that in the room there were several notices directing customers not to leave valuables in the rooms. He also claimed that the complainant was not the buyer of the IPAD. He also denied of there being an agreement to exempt the complaint from paying the bill due to the losses.

10. The Appellant who testified as DW2 denied stealing the lost items and reiterated the testimony of the manager that the complainant did not declare valuables in the registration form. Her testimony was reiterated by DW3.

11. The trial court upon considering the testimonies of the witnesses for both sides, the documentary evidence produced by the parties and their submission delivered its judgement on 30th March, 2023 wherein the learned trial Magistrate found the appellant accused person liable for the offense of stealing and acquitted the Manager. In her Judgment the learned trial Magistrate identified the following as the issues for determination;

    1. Whether there was loss of any property

    2. Whether the lost property belonged to the complaint

    3. Whether it is the accused persons who stole the properties

12. The learned trial Magistrate on the first issue observed that in as much the accused persons had claimed that complainant had failed to declare valuable items in the registration form which had been produced as an exhibit by the complainant at the time of checking in, a second look at the form revealed to her that the said form did not require one to declare valuable items but it instead requested guests not to leave valuables in their rooms as there were safe boxes at the reception. The learned trial magistrate contended that even though the valuables were not declared it did not mean that complainant was not in possession of the same. The learned trial magistrate thus concluded that the prosecution had indeed proved that there was loss of the IPAD and the power bank.

13. Regarding the second issue, the learned trial magistrate observed the evidence that the complainant was in possession of the lost properties which were purchased by his employer Ciplex (K) Limited was not controverted by the defense. She thus concluded that the complainant was the beneficial or special owner of said property since he was at the time in possession and control over them with the authority of the employer

14. Regarding the 3rd issue, the learned trial magistrate observed that given that there were no eye witnesses to the theft, the prosecution case was hinged on circumstantial evidence. Prior to determining whether

the prosecution had proved its case against the accused persons the learned trial magistrate made reference to the case of Sawe vs Republic (2003) eKLR where the court of appeal was observed that in order to justify circumstantial evidence, the inference of guilt, inculpatory facts must be incompatible with the innocence of the accused and the incapable explanation upon any other than of guilt and that there must be no other co-existing circumstances weakening the claim of circumstances relied upon. The Court of Appeal equally stated that the burden of proving fact that justify the drawing of the inferences from the facts to the exclusion any other reasonable hypothesis of innocence lies with the prosecution and does not shift at any time to the accused.

15. Subjecting the holding of the Court of the Appeal in the Sawe Case to the facts of the case, the learned trial magistrate observed that the complainant testified that he stepped out to the restaurant for dinner and left his belongings in his room. The learned trial magistrate observed too that the investigation officer had stated that the police met the two accused person, the Appellant who was the receptionist and the Manager and upon visiting the room that was occupied by the Complainant they found that same had not been broken into. The learned trial magistrate equally observed that manager testified that other workers had left the hotel and that the only persons who were present were the chef, the waiter the receptionist and the manager. Then he observed further that from the evidence the cleaners were only allowed to clean the hotel room from 10 am to 4pm. It was also the observation of the learned trial magistrate that the investigating officer had testified that when she summoned the employees of the hotel she was able to establish that it was only the manager, the Appellant and the waiter who was with the complainant at the restaurant at the time of the incident.

16. The learned magistrate based on the above factual analysis held that the incident having occurred past 7 pm, the house keeper/cleaner was not meant to have access to the room for purposes of cleaning it. She also contended that given that the room was not broken into, the door was accessed with a person who had access to the key to the room or someone who had the knowledge of picking the lock. The learned trial magistrate equally made an observation that it was confirmed that there were no other guests on the floor where the complainant room was located which confirmation meant that there were persons of interest, who were the manager, the waiter and the receptionist. The learned trial magistrate observed that the waiter was said to have been at the restaurant with the complainant when the incident occurred leaving the manager and receptionist as the best persons to explain. The learned trial magistrate observed that the door had only one entrance which was at the reception where the receptionist sat.

17. The learned trial magistrate found that weighing the evidence on record, there were only two persons who actively knew which room the complainant had checked into. The learned trial also held that the Appellant was the only person who had access to the rooms at the time of the incident by being the receptionist and by virtue of having access to the room. The learned trial magistrate was equally of the view that whereas the manager would on account of his position be able to access the guest rooms, he would only have done so if with the knowledge that the complainant had checked in and was occupying a particular room which details were available at the reception. The learned trial magistrate observed that that at no time did the Appellant in her defense state that she had given the information to the manager.

18. The learned trial magistrate stated too that it was not enough for the hotel management to fold their hands and state that they had issued notices informing guests not to leave valuable in their rooms. She contended that the hotel was in the business of making money by providing accommodating clients and thus it was their duty to provide security to their clients together with their belongings whether declared or not. She contended too that it would be impracticable then every time a guests steps out of

his room in the present circumstances to have dinner to run back to the reception to leave valuables at the reception for safe keeping. To her opinion such was an absurdity.

19. It is against the above circumstances that the learned trial magistrate found the Appellant guilty of the offense of stealing contrary to section 268(1) read together with section 275 of the penal code.

20. After considering the mitigation of the Appellant, the Appellant was sentenced to pay a fine of Kshs. 30,000 in default to serve a term of 6 months in prison.

**Written Submissions**

23. This court on 16th October, 2023 directed the parties the Appeal dispose of the Appeal through written submissions. All the Parties have filed their submissions for consideration.

21. The learned counsel for the Appellant submitted that that the complainant who testified as PW1 did not declare having any valuables at the time of checking in. The learned counsel equally submitted that the complainant in his testimony yielded that he filled a form which had a notice that a customer was not to leave valuable items in the room. He contended that the Prosecution failed to provide any evidence to prove that the alleged stolen items belonged to the company that the complainant worked for. The learned counsel submitted that the evidence presented by the prosecution was scanty and did not create nexus between the Appellant and the stolen goods. He argued too that the trial court erred in relying on circumstantial evidence without considering the essential ingredients of the offense.

22. He in conclusion contended that considering the nature of the offense and the kind of evidence adduced, it is fair and reasonable for this court to conclude that the findings of the learned trial magistrate were not based evidence, or were as a result of misapprehension of the evidence and were on the basis of wrong principles.

23. On his part the learned prosecution counsel submitted in as much as the Appellant joined issues with the fact that, the stolen items did not belong to the complainant, it was clearly established during the hearing of the matter at the trial court that the complainant was a special owner of the stolen properties as defined under section 286 (2) of the penal code given that it was proven that the properties which the complainant held before they were stolen belonged to Ciplex (K) Limited to which company the complainant was an employee. He reiterated the fact that the complainant was an employee of Ciplex (k) limited was not challenged

24. On whether the prosecution had beyond reasonable doubt identified the Appellant as the perpetrator, the learned prosecution counsel submitted that the evidence of the PW1 was clear and unchallenged that that the items were stolen when he went for dinner at a restaurant within the hotel and there was no sign of break-in. The learned counsel submitted that it was evidenced that the restaurant was only 50 meters from the room which could only be accessed by the Appellant who had keys to the room given that she was the receptionist of the hotel at the time of the incident. He contended that it was only logical to conclude that that she was the one who stole the items given that she was the only person who could access the room where the items were left. He contended that the only defense that she put forward was to blame the complainant for leaving valuable items at the reception despite the fact that there were notices waring customers not to leave valuable items at the reception.

25. The learned counsel submitted that in the circumstances of this case the Appellant was properly identified as the perpetrator and that the learned court correctly applied the law on circumstantial evidence. He relied in the case of Ibrahim Chacha Mwita vs Republic (2004).

**Determination**

26. Having considered the Appeal herein, the submissions of all the parties the impugned decision of the lower court and the evidence and testimonies of the parties during the hearing of the case at the lower court, I find that the sole issue of determination is whether the trial court erred in finding the Appellant herein guilty of stealing valuable items from the complainant.

27. The offence with which the appellant was charged is stealing contrary to section 268 (1) of the penal code as read with section 278 of the Penal Code.

28. Section 268 (1) of the Penal code provides as follows: -

    268.

    (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.

29. Section 275 provides: -

    275. 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.

30. The question that this court must endeavor to answer in its determination as to whether it should set aside the decision of the lower court is whether the prosecution prove beyond reasonable doubt that the appellant stole goods worth Kshs. 113,000 from the complainant and whether the evidence tendered before the lower court support a conviction.

31. Before making such a determination, this court must determine whether in deed there was proof that complainant was in possession or was the owner of the stolen valuable items. A review of the evidence that was tendered before the trial court reveals the Appellant herein did not satisfactorily challenge the evidence of prosecution that the complainant visited Marsh Park hotel where she worked as a receptionist with valuable items which were stolen in room he had checked into. Even though the learned counsel for the Appellant claims that Complainant did not declare the valuable items in the registration form, I find such a challenge as lame since a clear review of the form reveals that form does not provide for any space where the complainant could declare any valuable items he carried with him. Further I find the learned counsel for the appellant dishonest when he claims Prosecution failed to provide any evidence to prove that the alleged stolen items belonged to the company that the complainant worked for. It is on record that PW3 produced an invoice that that provided proof that the IPAD that got stolen belonged to the complainant's employer. The said invoice was not at any cost challenged during the hearing the case. The testimony that the complainant was an employee of the said company was never put into test by the Appellant.

32. Turning to the main question of establishing whether Appellant was the person who stole the valuable items; as was correctly observed by the learned trial Magistrate given that there were no eye witnesses who witnessed the stealing the prosecution was required to provide circumstantial evidence that would clearly and beyond reasonable doubt draw inferences from the facts of the case that the Appellant was the person who stole the valuable items. To rely on circumstantial evidence, the court should satisfy

itself that there are no co-existing circumstances to weaken such evidence. In the case of Sawe -vs- Republic (2003) KLR 364 the Court of Appeal held that:

> " 1. In order to justify on circumstantial evidence, the inference of the guilt, the exculpatory facts must be incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.
>
> 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
>
> 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the Prosecution. This burden always remains with the Prosecution and never shifts to the Accused."

33. In the case of Rex -vs- Kipkering Arap Koske & 2 others (1949) EACA 135 the court stated that:

> " In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

34. In this instant case the prosecution put forward key strands of circumstantial evidence to prove that the Appellant stole the valuable items from the room that the complainant had checked into; the said strands include;

    a. The Appellant was amongst the three persons who were present in the hotel premises when the items were reported missing,

    b. There was no any evidence of break in into the room.

    c. the complainant did leave room open when she went to the restaurant for dinner.

    d. There were no other guests on the floor where the complainant room was located

    e. There was only one entrance into the hotel which was at the reception.

    f. The Appellant was the receptionist on duty when the complainant checked in;

    g. The Appellant who the receptionist on duty at the time of incident was the sole person who had the knowledge of the room the complainant occupied as and had the extra key to the room at the time of the incident.

    h. There was no evidence by the Appellant in her defense to the effect that she had given the information about the room the complainant occupied to the manager or even handed over the key to him at the time of the incident.

    i. There was no evidence that the waiter who was with the complainant in the restaurant left the restaurant.

35. The Appellant during cross-examination of the prosecution witnesses and during her defense did not controvert all the above strands of circumstantial evidence that drew inference to her guilt. Aside from

just denying that she did not steal the complainant's valuable items, the only defense she put forward was that the complainant did not declare in the registration form the said valuable items which claim as I have observed hereinabove did not have any basis given the said form did not provide any space for such declaration. The Appellant therefore did not tender any co-existing circumstances that would have weakened the inference that were created by the above strands of circumstantial evidence that I have pointed out. To be specific there was no evidence to the effect that the room was left open by the Appellant such that any other person other than the Appellant who had the access key could get into the room; there was uncontroverted evidence that cleaner who equally had access to the room was expected to do his cleaning between 10 am to 4pm and the Appellant did not provide any evidence that cleaner did not hand over the extra access key to the room by 4pm when the cleaning hours were over. Equally as observed by the trial court there was no evidence to show that appellant had given the access key to the manager who according to PW2 had the authority to have the access key to the room.

36. It goes without saying that the learned trial magistrate did not err when she made a finding that the prosecution had beyond reasonable doubt proved through the 4 strands of evidence I have identified hereinabove that indeed that Appellant was guilty of the offense of stealing.

37. In the end I find the Appeal without merit and proceed to dismiss it.

38. It so ordered

**T.A ODERA**

**JUDGE**

**27.6.24**

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:**

Appellant, Koima For Prosecution And Mr Ayienda For Appellant.