

PROPERTY CRIMES

Introduction

Offences against property are covered under Chapter XXVI (S. 267-285) of the Penal Code of Kenya (Chapter 63, Laws of Kenya). This section does not address all property-related offences enumerated under the Penal Code of Kenya. The chapter focuses on major offences against property that are commonly prosecuted in Kenya. The following offences against property are covered in this chapter:

- i. Theft
- ii. Robbery
- iii. Robbery with violence
- iv. Housebreaking
- v. Burglary
- vi. Arson
- vii. Malicious damage to property

THEFT

• Also known as stealing, is defined under S. 268. (1) of the Penal Code:
“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.”

- General punishment for theft: three years imprisonment unless, other punishment is provided.
- Acknowledge the different shades of stealing

The *actus reus* of theft

The *actus reus* of theft will thus involve the following aspects:

- Taking,
- Anything capable of being stolen
- Converting, to the use of any person
- Other than the general or special owner thereof, any property

Taking

- S. 268(5) of the Penal Code, “A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”
- *Victor Mwai Wangeci & another v Republic [2017] eKLR*, “a thing cannot be taken unless the accused person has moved the thing or caused it to move, in other words, there has to be asportation.”
- Kenyan courts have differed on the extent of removal; *Harry Amwayi Etemesi v Republic [1997], eKLR*; *R v. Poynton (1862) 7 L.T 434*; *Victor Mwai Wangeci & another v Republic [2017] eKLR*; *Joseph Kariuki vs Republic (1985) KLR 507*
- Class discussion: compare and contrast the findings in *Harry Amwayi Etemesi* and *Victor Mwai Wangeci*

Things that are capable of being stolen

Section 267 of the Penal Code of Kenya lists the things capable of being stolen. They include:

- a) 'Inanimate things which are movable and which are the property of a person. This excludes immovable or real property, e.g. land and buildings and things attached to them as fixtures.
 - b) But something severed from real property can be the subject of a theft charge, for example removing doors or windows from a house.
 - c) Includes animals: tame animals and wild animals in confinement which are the property of a person. This implies that wild animals in a state or natural liberty are excluded from this category.
 - d) While wild animals in the enjoyment of their natural liberty are not capable of being stolen, their dead bodies are.
 - e) Everything produced by or forming part of the body of an animal capable of being stolen is capable of being stolen.
 - f) Information is capable of being stolen.'
- Can intangible goods, or electricity or a corpse or even body parts can be stolen?
 - ***Elizabeth Wambui Wanjiru & Another v Republic [2020] eKLR***, the appellant was convicted of handling stolen property- trademarks
 - Electricity, though intangible, is a thing capable of being stolen. S. 293 of the Penal Code of Kenya provides that "any person who fraudulently abstracts or diverts to his use or the use of any other person any mechanical, illuminating or electrical power derived from any machine, apparatus or substance, the property of another person, is guilty of a felony and is liable to imprisonment for five years." Fraudulent diversion of electricity would, in this context, fulfil the elements of electricity theft.
 - At common law ***Williams v. Williams 20 Ch. D. 659 (1882)*** "there is no property in a corpse". As such it is not capable of being stolen.

Conversion

- The finding of the complainant's goods and converting them to the defendant's use.
- Conversion is both a civil wrong (a tort) and a crime.
- Discuss the difference between conversion and taking
- The case of ***Sammy Macharia Ruhi & Others v Republic [1985] eKLR*** brings out these distinctions while drawing the difference between "takes" and "converts to".

General and special owner

- The owner of a thing capable of being stolen may be either the general or special owner. General owner is not defined in the Penal Code - may be described as someone with the ultimate right or title to the thing.
- A special owner has been defined in S. 269(2) to include any person with a charge or lien over the thing in question or any right arising from or dependent upon holding the possession of the thing in question, e.g. a bailee.

Mens rea of theft

The *mens rea* aspect of theft is manifested through "fraudulent intent" and "without claim of right."

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Fraudulent intent

- Fraudulent intent is covered under S. 268 (2) of the Penal Code.
- ‘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;’

In the case of *Republic v John William Jones [1966] eKLR*

Without claim of right

- Where an accused person believes that he is lawfully entitled to possess property that is in the possession of another person
- What about a believe by the accused that s/he will acquire the right in future? *Reg. v. Pollard (1962) QWN 13 Gibbs J.*
- Section 8 Penal Code; the defense of claim of right

Offences related to theft

- i. Obtaining by false pretences
 - False pretence is defined under S. 312; and 313 Penal Code
- ii. Handling stolen property
 - Under S. 322 of the Penal Code

- iii. Assault with intent to steal

Assault with intent to steal is covered under S. 298 of the Penal Code.

ROBBERY

- S. 295 of the Penal Code:

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”
- S. 296 (1) Penal Code: Punishment for robbery is a maximum of 14 years imprisonment.

Actus reus of robbery

- A. The *actus reus* of theft or stealing, and

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- B. Use of or threat to use violence (at or immediately before or immediately after time of stealing)
- Prove of violence is key in distinguishing the taking for theft and that of robbery
 - How would you distinguish assault with intent to steal from robbery?

Mens rea of robbery

The *mens rea* requires the prosecution to prove that, i) the defendant intended to steal and ii) the defendant intended to use violence or cause the fear of it.

Attempted robbery

Section 296(1), Penal Code “anyone who assaults another with intent to steal anything or threatens to use actual violence on anyone or on any property in order to obtain the thing intended to be stolen or to prevent resistance to the thing being stolen is criminally responsible.” The maximum punishment is seven years.

ROBBERY WITH VIOLENCE

- S. 296 (2) of the Penal Code:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

The *actus reus* of robbery with violence

Using violence for the purpose of stealing:

- i) while armed with a dangerous weapon, or
 - ii) in the company of one or more persons, or
 - iii) causing harm or injury
- ***Dima Denge Dima & Others vs. Republic Criminal Appeal No. 300 of 2007***, the elements of the offence under S. 296 (2) of the Penal Code are to be read not conjunctively, but disjunctively
 - ***Mohamed Ali vs. Republic*** [2013], the use of the word “or” in the definition under S. 296(2) Penal Code brings about the sufficiency of proving any one of the above ingredients to establish an offence of robbery with violence

The *mens rea* of robbery with violence

- the *mens rea* element of robbery with violence is similar to that of stealing and robbery.