



REPUBLIC OF KENYA



KENYA LAW
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**Muhinze v Republic (Criminal Revision 007 of 2023)
[2023] KEHC 25896 (KLR) (27 November 2023) (Revision)**

Neutral citation: [2023] KEHC 25896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION 007 OF 2023
DR KAVEDZA, J
NOVEMBER 27, 2023**

BETWEEN

CLINTON AMAMU MUHINZE APPLICANT

AND

REPUBLIC RESPONDENT

REVISION

1. The applicant was charged and convicted for the offence of breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code* in Kibera CM Criminal Case No. E1672 of 2022. He was subsequently sentenced to a fine of Kshs. 100,000 in default to serve three (3) years imprisonment.
2. The applicant has now filed a Notice of Motion application dated 16th October 2023, seeking a revision of his sentence. He avers that he has reformed from his past mistakes and prays for a non-custodial sentence for the remaining part of his sentence.
3. The application is supported by an affidavit sworn by the applicant, Clinton Amamu Muhinze, in which he reiterates the same grounds.
4. The application invokes the revisionary jurisdiction of this court which is donated by section 362 of the *Criminal Procedure Code* which reads as follows:

“...The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
5. It is trite law that sentencing is discretionary. An appellate court cannot automatically interfere with the exercise of discretion by the trial court. An intervention on discretion is only justified when it is



wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous. (See *Wanjema v Republic* [1971] EA 493 and *Diego v Republic* [1985] KLR 621.)

6. Section 307 of the *Penal Code* provides:

“Breaking into building with intent to commit felony

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..”

7. The applicant herein was sentenced to a fine of Kshs. 100,000/= and in default to serve 3 years imprisonment. The limits of default sentences are set out in section 28(2) of the *Penal Code* as follows –

“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale –

Amount	Maximum Period
Exceeding Sh 50,00	12 months

8. In the present case therefore, the maximum term of imprisonment that the trial court could have imposed upon the Appellant in default of payment of the fine was 12 months. The term of three (3) years imprisonment it imposed was thus unlawful.

9. For that reason, I hereby set aside the sentence of a fine of Kshs. 100,000/= in default to serve three (3) years imprisonment, and substitute it with a sentence of three (3) years from the date of conviction being 7/9/2023.

10. It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF NOVEMBER 2023.

D.KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the State.

Applicant present (VTC).

Joy/ Naomi C/A.

